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Title 3—

The President

Proclamation 8258 of May 20, 2008

A Day of Solidarity With the Cuban People, 2008

By the President of the United States of America

A Proclamation

Freedom of speech, freedom of assembly, and freedom of worship are among the liberties that Americans cherish. Our Nation fully supports the brave people who work to secure these liberties in the countries where they are denied. And on this Day of Solidarity with the Cuban People, we focus our attention on the men and women working to secure freedom, democracy, and human rights for the citizens of Cuba.

For half a century, the Cuban people have suffered under oppressive dictatorship. Under the rule of Fidel and Raul Castro, Cubans have seen their political freedoms denied, their economy reduced to shambles, and their families torn apart. The Cuban people deserve better—and the American people stand with them as they work to achieve it.

The United States is rallying the free world to the cause of Cuban liberty. We continue to shine a bright light on the Castro regime's abuses—and America calls on the Government of Cuba to immediately and unconditionally release all prisoners of conscience.

We keep these prisoners, their families, and all Cubans in our prayers. Especially on this Day of Solidarity, we ask the Almighty to comfort and strengthen those who suffer under the Castro dictatorship—and to hasten the day when Cuba's suffering comes to an end.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim May 21, 2008, as A Day of Solidarity with the Cuban People to recognize those who are suffering in Cuba, especially Cuba's prisoners of conscience. I call upon the citizens of the United States to mark this observance with appropriate ceremonies and activities that demonstrate America's resolute support for those living under the Castro regime.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of May, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-second.

[FR Doc. 08–1296
Filed 5–22–08; 8:45 am]
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Rules and Regulations

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 680

[Docket No. 070718364–8478–03]

RIN 0648–AV19

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

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

ACTION: Final rule.

SUMMARY: NMFS issues final regulations implementing Amendment 25 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP) and a provision of the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act) to amend the Crab Rationalization Program. Amendment 25 to the FMP satisfies the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 requirement for the Secretary of Commerce to amend the FMP to authorize conversion of catcher vessel owner quota shares and processor quota shares to newly created converted catcher processor owner quota shares. The Secretary approved Amendment 25 on April 12, 2007. The Coast Guard Act mandates that the Secretary issue processing quota shares to Blue Dutch, LLC, under specific conditions. This action is necessary to implement Amendment 25 and the Coast Guard Act. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the Coast Guard Act, the FMP, and other applicable law.

DATES: Effective June 23, 2008.

ADDRESSES: Copies of Amendment 25 and the Regulatory Impact Review (RIR) for this action may be obtained from the NMFS Alaska Region, P. O. Box 21668, Juneau, AK 99802 or from the Alaska Region website at *http://www.fakr.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS at the above address and by e-mail to *David__Rostker@omb.eop.gov*, or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Glenn Merrill, 907–586–7228, or Gretchen Harrington, 907–586–7228.

SUPPLEMENTARY INFORMATION: The king and Tanner crab fisheries in the exclusive economic zone of the Bering Sea/Aleutian Islands (BSAI) are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Crab Rationalization Program (Program)

The Consolidated Appropriations Act of 2004 (Pub. L. 108–199, section 801) amended the Magnuson-Stevens Act to mandate that the Secretary of Commerce implement the Program as recommended by the Council. On March 2, 2005, NMFS published a final rule to implement the Program (70 FR 10174).

To implement the Program, NMFS initially issued processing quota shares (PQS), catcher vessel owner quota shares (CVO QS), and catcher processor owner quota shares (CPO QS) to eligible applicants. NMFS issued PQS and QS for nine crab fisheries in the BSAI. In 2006, NMFS initially issued Bristol Bay red king crab (*Paralithodes camtschaticus*) and snow crab (*Chionoecetes opilio*) PQS to the Blue Dutch, LLC, under the requirements of section 417 of the Coast Guard Act.

CVO QS represents an exclusive but revocable privilege that authorizes the holder to receive an annual allocation to harvest a specific percentage of the total allowable catch (TAC) from a fishery. The annual allocations of TACs, in pounds, are referred to as individual fishing quotas (IFQs).

PQS represents an exclusive but revocable privilege to receive deliveries of a specific portion of the annual TAC from a fishery. An annual allocation of PQS is referred to as individual processing quotas (IPQs) and is expressed in pounds of crab. Harvesters holding CVO IFQ must deliver a portion of their IFQ to processors with the same amount of IPQ available.

For most crab fisheries, CVO QS and PQS are designated for specific geographic regions. Crab harvested with regionally designated CVO QS is required to be delivered to a processor in the designated region. Likewise, a processor with regionally designated PQS is required to accept delivery of and process crab in the designated region. Two regional designations were created for the snow crab and Bristol Bay red king crab fisheries. The North Region consists of all areas in the Bering Sea north of 56°20′ N. latitude. The South Region is all other areas. The regional designation of CVO QS and PQS preserves the historic geographic distribution of landings in the fisheries.

CPO QS represents an exclusive but revocable privilege to harvest a percentage of the TAC and process that crab onboard. Under the Program, CPO QS does not have regional designations and is not required to be delivered to a processor holding available IPQ.

Coast Guard Act

Section 417 of the Coast Guard Act (Pub. L. 109–241) contains a provision mandating the Secretary of Commerce to issue PQS for the Bristol Bay red king crab and the Bering Sea snow crab fisheries to Blue Dutch, LLC, under two specific conditions.

First, NMFS must issue Blue Dutch PQS equal to 0.75 percent of the total number of PQS units. NMFS issued an initial administrative determination on July 31, 2006, to issue Blue Dutch 3,015,229 units of Bristol Bay red king crab PQS and 7,516,253 units of snow crab PQS. NMFS assigned a regional designation to the PQS units issued to Blue Dutch according to the procedures established in the regulations at 50 CFR 680.40(b)(2)(iv).

Second, NMFS must issue IPQ for that PQS whenever the TAC for that fishery is more than 2 percent higher than the most recent TAC in effect for that

fishery prior to September 15, 2005. Accordingly, NMFS determined that it will issue Bristol Bay red king crab IPQ to Blue Dutch when the TAC for that fishery is greater than 15,732,480 lb (7,136.1 mt). NMFS will issue snow crab IPQ to Blue Dutch when the TAC for that fishery is greater than 21,350,640 lb (9,684.5 mt).

This final rule specifies in regulations the statutory thresholds for annually issuing IPQ to Blue Dutch and prohibits the transfer of the PQS units issued under the provisions of the Coast Guard Act.

Amendment 25

Section 122(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA, Pub. L. 109–479) requires the Secretary of Commerce, not later than 90 days after the date of enactment of that act, to amend the FMP to modify the Program to authorize conversion of North CVO QS and North PQS to newly created converted CPO QS.

Amendment 25 to the FMP complies with MSRA by amending the FMP to include the statutory language from section 122(a) that authorizes an eligible entity and its affiliates to combine North PQS and North CVO QS and exchange these shares for newly created converted CPO QS.

NMFS published the notice of availability for Amendment 25 on February 5, 2007 (72 FR 5255), with a public comment period that closed on April 6, 2007. NMFS received one public comment on Amendment 25. The Secretary of Commerce approved Amendment 25 on April 12, 2007. NMFS published the proposed rule for this action on February 15, 2008 (73 FR 8838), with a public comment period that closed on March 17, 2008. NMFS received no public comments on the proposed rule.

To implement Amendment 25, this final rule authorizes two types of quota share conversions and defines the entities eligible to make those conversions.

First, an eligible entity holding PQS, along with its affiliates, can combine its North CVO QS for Bristol Bay red king crab or snow crab with its North PQS for that fishery and exchange these shares for converted CPO QS on an annual basis. Entities can do this under the following two conditions: (1) If NMFS initially issued the entity both CPO QS and PQS under the Program, and that PQS, in combination with the PQS of its affiliates, is less than 7 percent of the total PQS pool for that year; or (2) if NMFS initially issued the entity CPO QS under the Program and PQS under the Coast Guard Act. An eligible entity would be limited to converting only the PQS that it, along with its affiliates, was initially issued by NMFS.

Second, an eligible entity holding CVO QS, along with its affiliates, can combine its North PQS for Bristol Bay red king crab or snow crab with its North CVO QS for that fishery and exchange these shares for converted CPO QS on an annual basis. The only entity that can do this would be an entity to which NMFS initially issued CPO QS and PQS under the Program, and that PQS, in combination with the PQS of its affiliates, is more than 7 percent of the total PQS pool for that year. This eligible entity is limited to converting only the CVO QS that it, along with its affiliates, was initially issued by NMFS.

According to the NMFS Official Record, three individual entities are eligible for these new provisions. Yardarm Knot, Inc., and Blue Dutch, LLC, would be eligible for the first type of conversion. Trident Seafoods, Inc., would be eligible for the second type of conversion. These entities may elect on an annual basis whether to receive converted CPO QS and the amount of North CVO QS and North PQS they wish to convert by completing the annual application for converted CPO QS/IFQ permit and submitting that application along with the annual application for crab IFQ/IPQ permit. NMFS must receive the applications by August 1 for that crab fishing year.

Entities applying for a converted CPO QS permit and resulting CPO IFQ will be required to provide information on any person who is affiliated, as the term ''affiliation'' is defined at § 680.2, to that entity and indicate the amount of PQS and CVO QS in either the Bristol Bay red king crab or snow crab QS fishery with a North Region designation for issuance as converted CPO QS. The MSRA does not specifically define which fisheries are subject to this provision. However, under this final rule, converted CPO QS will be created for only the snow crab and Bristol Bay red king crab fisheries because these were the only fisheries for which the eligible entities were initially issued North PQS and North CVO QS.

The final rule specifies a number of provisions for converted CPO QS/IFQ to conform with section 122(a) of the MSRA and the Program's implementing regulations. Converted CPO QS and the resulting CPO IFQ would not be transferable. This restriction on transfers is consistent with the MSRA eligibility standards for which entities are eligible to receive converted CPO QS. However, the final rule provides that CPO IFQ derived from converted CPO QS may be issued to a cooperative.

The final rule specifies that (1) eligible entities would receive one unit of North CPO QS in exchange for one unit of North CVO QS and 0.9 units of North PQS and (2) the amount of IFQ derived from the converted CPO QS issued to each entity could not exceed one million pounds per fishery during any calendar year.

Additionally, the final rule would implement the area of validity described in section 122(a)(4) of the MSRA by requiring that any crab harvested under a CPO IFQ permit derived from converted CPO QS must be offloaded in the North Region.

Converting PQS and CVO QS to converted CPO QS will allow entities to harvest and process crab onboard a catcher processor. Conversion may reduce each eligible entity's operating costs associated with purchasing crab, processing crab on land or at a stationary floating crab processor, and complying with the Program's arbitration system. NMFS can not predict the amount of converted CPO QS that would be annually issued because the participants annually elect to exercise this provision and need not request conversion of all CVO QS and PQS held.

Sections 122(b) and (c) of the MSRA include additional requirements for fees and off-loading for converted CPO QS; however, the statute does not require the Secretary of Commerce to implement these requirements and therefore they are not part of Amendment 25 and will not be implemented by Federal rulemaking. Section 122(b) of the MSRA requires the holder of converted CPO QS to pay a fee of five percent of the ex-vessel value of the crab harvested with those shares to any local governmental entities in the North Region, if the PQS used to produce the converted CPO QS was originally derived from the processing activities that occurred in a community under the jurisdiction of those local governmental entities. Section 122(c) of the MSRA allows the State of Alaska to collect from the holder of the converted CPO QS a fee of one percent of the ex-vessel value of the crab harvested with those shares. Additionally, section 122(c) of the MSRA specifies that crab harvested with converted CPO QS shall be off-loaded in those communities receiving the local governmental entity's fee revenue.

Section 122(d) of the MSRA also provides that, as part of its periodic review of the Program, the North Pacific Fishery Management Council may review the effects on communities in

the North Region of allowing the conversion to CPO QS. Under this section, if the Council determines that Amendment 25 adversely affects the communities, the Council may recommend to the Secretary of Commerce, and the Secretary may approve, changes to the Program necessary to mitigate those adverse effects. The MSRA does not require the Secretary of Commerce to implement this requirement and therefore it is not part of Amendment 25 and will not be implemented by Federal rulemaking.

Section 122(e) of the MSRA requires an additional FMP amendment and rulemaking to modify the use caps for processing North Region snow crab. Under this section, custom processing arrangements do not count against any use cap for the processing of snow crab in the North Region by a shore-based crab processor. NMFS issued an enforcement policy on January 19, 2007, that provides guidance to the industry on NMFS' enforcement and interpretation of this section, which is effective until superseded by future rulemaking. At its December meeting, the Council adopted Amendment 27 to the FMP that would implement this MSRA provision. NMFS intends to publish a proposed rule for Amendment 27 in the spring of 2008.

Changes from the Proposed Rule

NMFS made a few changes to the proposed regulatory text in this final rule to clarify regulatory language or correct minor mistakes in the proposed rule.

NMFS modified the regulations describing the information that is required to be submitted in the annual application for a converted CPO QS/IFQ permit. These changes provide additional clarity to the public and do not substantively modify the information that is required to be submitted. First, NMFS modified regulations in § 680.4(n)(2)(iii)(B) to clarify the phrase ''that person'' referred to in this paragraph refers to ''the affiliate'' of either Entity A or B. This change provides clarity to the affiliate of Entity A of B in the application. Second, NMFS modified regulations in § 680.4(n)(2)(iv)(C) to clarify that in the annual application for converted CPO QS/IFQ permit the amount of CVO QS that may be designated for conversion to CPO QS must have been initially issued to the affiliate of Entity C. This change is consistent with regulations in § 680.40(c)(5)(vi)(C) and section 122(a) of the MSRA that clearly limit the amount of CVO QS that may be assigned for conversion to CPO QS to the amount of CVO QS initially issued to Entity C and any affiliates of Entity C. This change provides clarity to the affiliate of Entity C in the application. Third, NMFS modified regulations in § 680.4(n)(2)(iv)(C) to clarify the phrase ''that person'' referred to in this paragraph refers to ''the affiliate'' of Entity C. This change provides clarity to the affiliate of Entity C in the application. Other minor editorial changes were made throughout the rule that NMFS determine have no substantive effect.

Classification

The Acting Administrator, Alaska Region, NMFS, determined that the FMP Amendment 25 is necessary for the conservation and management of the BSAI crab fisheries and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

An Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/Social Impact Assessment was prepared for the Program that describes the management background, the purpose and need for the Program, the management alternatives, and the environmental, social, and economic impacts (see **ADDRESSES**). With this final rule, NMFS is continuing to implement the Program.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

A Regulatory Impact Review was prepared to assess all costs and benefits of available regulatory alternatives. The Regulatory Impact Review describes the potential size, distribution, and magnitude of the economic impacts that this action may be expected to have. Copies of the RIR prepared for this rule are available from NMFS (see **ADDRESSES**).

Small Entity Compliance Guide

NMFS has posted a small entity compliance guide on the Internet at *http://www.fakr.noaa.gov/sustainablefisheries/crab/crfaq.htm* to satisfy the Small Business Regulatory Enforcement Fairness Act of 1996, which requires a plain language guide to assist small entities in complying with this rule. Contact NMFS to request a hard copy of the guide (see **ADDRESSES**).

Collection-of-Information

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under Control Number 0648–0576. Public reporting burden for annual application for converted CPO QS and CPO IFQ permit is estimated to average 30 minutes or 0.5 hours per individual response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David__Rostker@omb.eop.gov*, or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects

15 CFR Part 902

Recordkeeping and reporting requirements.

50 CFR Part 680

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: May 16 2008.

Samuel D. Rauch III

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

■ For the reasons set out in the preamble, NMFS amends 15 CFR part 902 and 50 CFR part 680 as follows:

TITLE 15—[AMENDED]

CHAPTER IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under the entry ''50 CFR'':

■ a. Remove the entry for ''680.4''; and
■ b. Add new entries for ''680.4(a), (b)(2), and (c) through (m)'', ''680.4(b)(1)'', and ''680.4(b)(3) and (n)'' in alphanumeric order to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
* * * * * * *	
50 CFR	
* * * * * * *	
680.4(a), (b)(2), and (c) through (m)	-0514
680.4(b)(1)	-0514, -0576
680.4(b)(3) and (n)	-0576
* * * * * * *	

TITLE 50—[AMENDED]

CHAPTER VI

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 3. The authority citation for 50 CFR part 680 is revised to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

■ 4. In § 680.2, add the definition of ''Converted CPO QS'' in alphabetical order to read as follows:

§ 680.2 Definitions.

* * * * *

Converted CPO QS means CPO QS for the BBR and BSS crab QS fisheries that is issued to the entities defined in § 680.40(c)(5)(ii), (c)(5)(iii), or (c)(5)(iv) based on the procedures established in § 680.40(c)(5).

* * * * *

■ 5. In § 680.4, revise paragraph (b)(1) and add paragraphs (b)(3) and (n) to read as follows:

§ 680.4 Permits.

* * * * *

(b) * * *

(1) Crab QS is issued by the Regional Administrator to persons who qualify for an initial allocation under § 680.40 or receive QS by transfer under § 680.41. Once issued, a crab QS permit is valid until modified under paragraph (b)(2) or (b)(3) of this section, or by transfer under § 680.41; or until the permit is revoked, suspended, or modified pursuant to § 679.43 of this chapter or under 15 CFR part 904. To qualify for a crab QS permit, the applicant must be a U.S. citizen.

* * * * *

(3) A converted CPO QS permit is valid until the end of the crab fishing year for which the permit is issued.

* * * * *

(n) *Contents of annual application for converted CPO QS/IFQ permit.* (1)(i) A complete application must be received by NMFS no later than August 1 of the crab fishing year for which a person or crab harvesting cooperative is applying to receive converted CPO QS and the IFQ derived from that converted CPO QS. If a complete application is not received by NMFS by this date, that person or crab harvesting cooperative will not receive converted CPO QS and the IFQ derived from that converted CPO QS for that crab fishing year.

(ii) To receive converted CPO QS/IFQ this application must be accompanied by a timely and complete application for crab IFQ/IPQ described at paragraph (f) of this section or a timely and complete application for a crab harvesting cooperative IFQ permit described at paragraph (m) of this section.

(2) For the application to be considered complete, all fees required by NMFS must be paid, and any EDR required under § 680.6 must be submitted to the DCA. In addition, the applicant must include the following information (see paragraphs (n)(2)(i) through (v) of this section):

(i) *Entity identification.* Indicate the entity (Entity A, B, or C) described in § 680.40(c)(5)(ii) through (c)(5)(iv) for which you are applying to receive converted CPO QS.

(ii) *Applicant information.* Enter applicant's name and NMFS Person ID; applicant's permanent business mailing address and any temporary mailing address the applicant wishes to use; and applicant's business telephone number, facsimile number, and e-mail address.

(A) For Entity A or B:

(*1*) Identify the amount of CVO QS in either the BBR or BSS crab QS fishery with a North Region designation for issuance as converted CPO QS; and

(*2*) Identify the amount of PQS in either the BBR or BSS crab QS fishery initially issued to you by NMFS with a North Region designation for issuance as converted CPO QS.

(B) For Entity C:

(*1*) Identify the amount of CVO QS in either the BBR or BSS crab QS fishery initially issued to you by NMFS with a North Region designation for issuance as converted CPO QS; and

(*2*) Identify the amount of PQS in either the BBR or BSS crab QS fishery with a North Region designation for issuance as converted CPO QS.

(iii) *Affiliate information for Entities A and B.* (A) For Entities A and B described in § 680.40(c)(5)(ii) and (c)(5)(iii), indicate the permanent business mailing address and any temporary mailing address, business telephone number, facsimile number, and e-mail address of any person who is affiliated with you based on information provided in an annual application for IFQ/IPQ that is approved by the Regional Administrator for that crab fishing year

(B) Indicate the amount of PQS in either the BBR or BSS crab QS fishery initially issued to that person with a North Region designation for issuance as converted CPO QS.

(C) Indicate the amount of CVO QS in either the BBR or BSS crab QS fishery with a North Region designation held by the affiliate for issuance as converted CPO QS.

(iv) *Affiliate information for Entity C.* (A) For Entity C described in § 680.40(c)(5)(iv), indicate the permanent business mailing address and any temporary mailing address, business telephone number, facsimile number, and e-mail address of any person who is affiliated with you based on information provided in an annual application for IFQ/IPQ that is approved by the Regional Administrator for that crab fishing year.

(B) Indicate the amount of PQS in either the BBR or BSS crab QS fishery with a North Region designation for issuance as converted CPO QS.

(C) Indicate the amount of CVO QS in either the BBR or BSS crab QS fishery initially issued to the affiliate with a North Region designation for issuance as converted CPO QS.

(v) *Certification of applicant and affiliates.* The applicant and any persons who are affiliated with the applicant and named on the application must sign and date the application certifying that all information is true, correct, and complete to the best of his/her knowledge and belief. If the application is completed by an authorized representative, proof of authorization must accompany the application.

■ 6. In § 680.7, add paragraph (c)(6) to read as follows:

§ 680.7 Prohibitions.

* * * * *

(c) * * *

(6) For any person who is not an entity defined in § 680.40(c)(5)(ii), (c)(5)(iii), or (c)(5)(iv) to:

(i) Hold converted CPO QS.

(ii) Use the CPO IFQ derived from that converted CPO QS outside of a crab harvesting cooperative.

* * * * *

■ 7. In § 680.40, add paragraphs (c)(5), (c)(6), (e)(3), and (j)(4) to read as follows:

§ 680.40 Quota Share (QS), Processor QS (PQS), Individual Fishing Quota (IFQ), and Individual Processor Quota (IPQ) issuance.

* * * * *

(c) * * *

(5) *Issuance of converted CPO QS.* (i) For each crab fishing year, the Regional Administrator may issue converted CPO QS for the BBR or BSS crab QS fishery with a North Region designation to an entity described in paragraph (c)(5)(ii), (c)(5)(iii), or (c)(5)(iv) of this section if NMFS has approved an application for converted CPO QS/IFQ for that crab fishing year.

(ii) Entity A is comprised only of Yardarm Knot, Inc. (NMFS ID # 675).

(iii) Entity B is comprised only of Blue Dutch, LLC (NMFS ID # 3163).

(iv) Entity C is comprised only of Trident Seafoods, Inc. (NMFS ID # 8184).

(v) NMFS will issue Entity A, B, or C, described in paragraphs (c)(5)(ii) through (c)(5)(iv) of this section, one unit of converted CPO for each unit of CVO QS and 0.9 units of PQS indicated in an approved application for converted CPO QS/IFQ.

(vi) For each crab fishing year, the Regional Administrator will not issue CPO QS for the BBR or BSS crab QS fishery:

(A) To Entity A described in paragraph (c)(5)(ii) of this section that is greater than the amount of converted CPO QS that may be derived from the amount of PQS units with a North Region designation initially issued by NMFS to Yardarm Knot, Inc. (NMFS ID # 675), and any affiliates of Yardarm Knot, Inc., as listed on an annual application for converted CPO QS/IFQ for that crab fishing year;

(B) To Entity B described in paragraph (c)(5)(iii) of this section that is greater than the amount of converted CPO QS that may be derived from the amount of PQS units with a North Region designation initially issued by NMFS to Blue Dutch, LLC, (NMFS ID # 3163) under paragraph (e)(3) of this section and any affiliates of Blue Dutch, LLC, as listed on an annual application for annual application for converted CPO QS/IFQ for that crab fishing year; and

(C) To Entity C described in paragraph (c)(5)(iv) of this section that is greater than the amount of converted CPO QS that may be derived from the amount of CVO QS units with a North Region designation initially issued by NMFS to Trident Seafoods, Inc. (NMFS ID # 8184), and any affiliates of Trident Seafoods, Inc., as listed on an annual application for converted CPO QS/IFQ for that crab fishing year;

(vii) CPO IFQ derived from converted CPO QS may be issued to a crab harvesting cooperative only if the entity described in paragraph (c)(5)(ii), (c)(5)(iii), or (c)(5)(iv) of this section holding the converted CPO QS is a member of that crab harvesting cooperative.

(6) *Offloading requirements for CPO IFQ derived from converted CPO QS.* Any crab harvested under a CPO IFQ permit derived from converted CPO QS must be offloaded in the Bering Sea subarea north of 56°20′ N. lat.

* * * * *

(e) * * *

(3) *PQS issued to Blue Dutch, LLC.* (i) Pursuant to Public Law 109–241, NMFS issued 3,015,229 units of PQS for the BBR crab QS fishery and 7,516,253 units of PQS for the BSS crab QS fishery.

(ii) PQS units issued to Blue Dutch, LLC, under paragraph (e)(3)(i) of this section were assigned a regional designation according to the procedures established in paragraph (b)(2)(iv) of this section.

(iii) PQS units issued to Blue Dutch, LLC, under paragraph (e)(3)(i) of this section may not be transferred to any other person.

* * * * *

(j) * * *

(4) *IPQ issued to Blue Dutch, LLC*—(i) *BBR IPQ.* For each crab fishing year that the total allowable catch for BBR CR crab is greater than 15,732,480 lb (7,136.2 mt), NMFS will issue IPQ for the 3,015,229 units of PQS issued to Blue Dutch, LLC, pursuant to Public Law 109–241.

(ii) *BSS IPQ.* For each crab fishing year that the total allowable catch for BSS CR crab is greater than 21,350,640 lb (9,684.6 mt), NMFS will issue IPQ for the 7,516,253 units of PQS issued to Blue Dutch, LLC, pursuant to Public Law 109–241.

* * * * *

■ 8. In § 680.41:

■ a. Paragraphs (c)(1)(iv) through (c)(1)(vi) are redesignated as paragraphs (c)(1)(vi) through (c)(1)(viii), respectively.

■ b. New paragraphs (c)(1)(iv) and (c)(1)(v) are added.

■ c. Paragraph (c)(1)(i) is revised.

The additions and revision read as follows:

§ 680.41 Transfer of QS, PQS, IFQ, and IPQ.

* * * * *

(c) * * *

(1) * * *

Quota type	Eligible person	Eligibility requirements
(i) PQS not issued under § 680.40(e)(3)(i)	Any person	None.
* * * * * * *		
(iv) Converted CPO QS	N/A	Converted CPO QS may not be transferred.
(v) CPO IFQ derived from Converted CPO QS	N/A	CPO IFQ derived from Converted CPO may not be transferred.
* * * * * * *		

* * * * *

■ 9. In § 680.42, paragraph (a)(5) is revised, and paragraph (a)(7) is added to read as follows:

§ 680.42 Limitations on use of QS, PQS, IFQ, and IPQ.

(a) * * *

(5) IFQ that is used by a crab harvesting cooperative is not subject to the use caps in this paragraph (a) except as provided for in paragraph (a)(7) of this section.

* * * * *

(7) In a calendar year, an entity as described in § 680.40(c)(5)(ii), (c)(5)(iii), or (c)(5)(iv), may not use more than 1,000,000 lb (453.6 mt) of IFQ derived from converted CPO QS in the BBR or BSS crab QS fisheries.

* * * * *

[FR Doc. E8–11539 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 891

[Docket No. FR–5097–F–02]

RIN 2502–AI48

Project Design and Cost Standards for the Section 202 and Section 811 Programs

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises HUD's regulations that govern the project

design and cost standards for HUD's section 202 supportive housing for the Elderly and section 811 Persons with Disabilities programs. This rule allows project sponsors to use HUD funds for dishwashers in individual supportive housing units for the elderly and in independent living projects for persons with disabilities. The current regulation excludes dishwashers from the list of permitted project amenities. By providing access to dishwashers, a standard amenity in today's housing market, HUD endeavors to maintain the quality of life for elderly and disabled residents, and, further, the use of dishwashers will help promote healthy living conditions, and assist independent living. This rule will also clarify the applicability of the project design and cost standards to section 811 group homes. This final rule follows publication of an August 15, 2007, proposed rule on which HUD received one comment, which was fully supportive of the rule. HUD is adopting the August 15, 2007, proposed rule without change.

DATES: *Effective date: June 23, 2008.*

FOR FURTHER INFORMATION CONTACT: Yvonne Jefferson, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6154, Washington, DC 20410–8000, telephone number (202) 708–3000 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On August 15, 2007, at 72 FR 45868, HUD published a proposed rule for public comment to amend the Department's regulations governing project design and cost standards for HUD's section 202 Supportive Housing for the Elderly and section 811 Persons with Disabilities programs. Section 202 of the Housing Act of 1959, as amended by section 801 of the Cranston-Gonzalez National Affordable Housing Act (12 U.S.C. 1701q), and section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013), authorize HUD to establish programs to provide assistance to expand the supply of housing with supportive services for the elderly and persons with disabilities. HUD's regulations that establish the section 202 Supportive Housing for the Elderly program (section 202 program) and HUD's section 811 Supportive Housing for persons with disabilities program (section 811 program) are codified in 24 CFR Part 891.

Section 891.120 establishes the project design and cost standards for section 202 and section 811 projects. Projects must be modest in design and certain amenities are not eligible for HUD capital advance or project rental assistance contract (PRAC) funds. Dishwashers and washers and dryers are among the amenities for which HUD funding is restricted under the regulation; section 202 and section 811 project sponsors may include these amenities, but are not permitted to use HUD funds for their purchase or the continued operating costs associated with any ineligible amenity. HUD acknowledges that many items once considered excess amenities, including dishwashers, are now considered standard in today's housing market and that, in addition, their presence in housing units for the elderly and persons with disabilities would increase the quality of life, promote healthy living conditions, and assist independent living.

The current regulation does not address section 811 group homes specifically, therefore an ambiguity exists regarding what amenities are allowed in section 811 housing pursuant to § 891.120(c). HUD recognizes that the installation of washers and dryers in group homes intended for persons with disabilities would increase the supportive nature of that housing, and that HUD funding would likely encourage the availability of these appliances to benefit and enhance section 811 programs.

II. This Final Rule

This final rule follows the publication of an August 15, 2007, proposed rule. The public comment period on the proposed rule closed on October 15, 2007. HUD received one public comment on the proposed rule. This commenter supported the intent of the final rule, stating that because the people assisted by these programs are either elderly or have some type of disability, ''* * * it is very favorable to have amenities such as a dishwasher in their homes because it will help them * * * further, it will assist independent living for these people.'' HUD is issuing this final rule without change from the proposed rule.

III. Findings and Certifications

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The regulatory change does not revise or establish new binding requirements on project sponsors or owners. Rather, this final rule updates HUD's regulations to authorize the use of section 202 and section 811 funds for an amenity now standard in today's housing market. the change will assist the elderly and persons with disabilities to live independently. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This rule does not impose any federal mandate on state, local, or tribal government, or the private sector within the meaning of UMRA.

Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments, and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance (CFDA)

The CFDA number for the Section 202 program is 14.157 and the CFDA

number for the section 811 program is 14.181.

List of Subjects in 24 CFR Part 891

Aged, Grant programs-housing and community development, Individuals with disabilities, Loan programs-housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, HUD amends 24 CFR Part 891 to read as follows:

PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 1. The authority citation for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

■ 2. Revise § 891.120(c) to read as follows:

§ 891.120 Project design and cost standards.

* * * * *

(c) *Restrictions on amenities.* Projects must be modest in design. In individual units in supportive housing for the elderly and in independent living facilities for persons with disabilities, amenities not eligible for HUD funding include individual unit balconies and decks, atriums, bowling alleys, swimming pools, saunas, Jacuzzis, trash compactors, washers and dryers. However, HUD funding is eligible to pay for washers and dryers in group homes for persons with disabilities. Sponsors may include certain excess amenities, but must pay for them from sources other than the section 202 or 811 capital advance. They must also pay for the continuing operating costs associated with any excess amenities from sources other than the section 202 or 811 project rental assistance contract.

* * * * *

Dated: May 15, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E8–11619 Filed 5–22–08; 8:45 am]

BILLING CODE 4210–67–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4002

Bylaws of the Pension Benefit Guaranty Corporation

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This is a final rule to amend the bylaws of Pension Benefit Guaranty Corporation.

DATES: Effective June 23, 2008.

FOR FURTHER INFORMATION CONTACT: Judith R. Starr, General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4400. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4400.)

SUPPLEMENTARY INFORMATION: Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Section 4002(b)(3) of ERISA gives PBGC power ''to adopt, amend, and repeal, by the board of directors, bylaws * * *.'' Section 4002(f) of ERISA provides that ''[T]he board of directors may alter, supplement, or repeal any existing bylaw * * * and may adopt additional bylaws * * * from time to time as may be necessary.'' PBGC's bylaws are set forth in 29 CFR Part 4002.

PBGC's Board of Directors has amended the bylaws. This rule replaces the old bylaws with the new bylaws.

Compliance With Rulemaking Guidelines

As a rule of agency organization, procedure, or practice, this rule is exempt from notice and public comment requirements. Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply to this rule. See 5 U.S.C. 601(2), 603, 604. PBGC has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, as amended.

List of Subjects in Part 4002

Authority delegations (Government agencies), Organization and functions (Government agencies).

■ Accordingly, 29 CFR part 4002 is revised to read as follows:

PART 4002—BYLAWS OF THE PENSION BENEFIT GUARANTY CORPORATION

Sec.

4002.1 Name.
4002.2 Offices.
4002.3 Board of Directors, Chair, and Representatives of Board Members.
4002.4 Quorum.
4002.5 Meetings.
4002.6 Place of meetings; use of conference call communications equipment.
4002.7 Voting without a meeting.
4002.8 Conflicts of interest.
4002.9 Director of the Corporation and Senior Officers.
4002.10 Emergency Procedures.
4002.11 Seal.
4002.12 Amendments.

Authority: 29 U.S.C. 1302(b)(3), 1302(f).

§ 4002.1 Name.

The name of the Corporation is the Pension Benefit Guaranty Corporation.

§ 4002.2 Offices.

The principal office of the Corporation is in the Metropolitan area of the City of Washington, District of Columbia. The Corporation may have additional offices at such other places as the Board of Directors may deem necessary or desirable to the conduct of its business.

§ 4002.3 Board of Directors, Chair, and Representatives of Board Members.

(a)(1) The Corporation is governed by a Board of Directors which is composed of the Secretary of Labor, the Secretary of the Treasury, and the Secretary of Commerce. Members of the Board shall serve without compensation, but shall be reimbursed by the Corporation for travel, subsistence, and other necessary expenses incurred in the performance of their duties as Members of the Board. A person at the time of a meeting of the Board of Directors who is serving in an acting capacity as Secretary of Labor, Secretary of the Treasury, or Secretary of Commerce shall serve as a Member of the Board of Directors with the same authority and effect as the designated Secretary.

(2) The Secretary of Labor shall be the Chair of the Board of Directors and shall call and preside over all Board meetings, and shall, on behalf of the Board, review and approve the Corporation's budget. The Inspector General of the Corporation shall report to the Board through the Chair.

(3) The Board of Directors is responsible for establishing and overseeing the policies of the Corporation. The Board may delegate powers to the Director of the Corporation except that the following powers of the Board may not be delegated to the Director of the Corporation:

(i) Voting on an amendment to these bylaws;

(ii) Approval of the Annual Management Report (AMR), which includes the annual financial statements, management's discussion and analysis, annual performance report, and reports of the independent auditor;

(iii) Approval of the Annual Report, which includes the AMR, the

Chairman's message, and certain statutory reporting requirements;

(iv) Approval of the Corporation's Investment Policy Statement;

(v) Approval of the issuance of any notes or debt instruments to the Secretary of the Treasury under Section 4005(c) of ERISA;

(vi) Approval of all final nonprocedural regulations prior to publication in the **Federal Register**, except for amendments that establish new interest rates and factors under Parts 4044 (Appendices C and D) and 4281 of this chapter, which may be approved by the Director of the Corporation;

(vii) Approval of all reports or recommendations to the Congress required by Title IV of ERISA;

(viii) Approval of any policy matter that would have a significant impact on the pension insurance program or its stakeholders; and

(ix) Review of reports from the Corporation's Inspector General that the Inspector General deems appropriate to deliver to the Board.

(4) The Board shall review the Corporation's Investment Policy Statement at least every two years and approve the Investment Policy Statement at least every four years.

(b)(1) Each Board Member shall designate in writing an official, not below the level of Assistant Secretary, to serve as the Board Member's Representative. Such designation shall be effective until revoked or until a date or event specified therein. A Board Representative may act for all purposes under these bylaws, except that an action of a Board Representative on a Board Member's behalf with respect to the powers described in paragraph (a)(3)(i) through (v) of this section, shall be valid only upon ratification in writing by the Board Member. Any Board Representative may refer for Board action any matter under consideration by the Board Representatives.

(2) A Board Member may designate in writing an official, not below the level of Assistant Secretary, to serve as the Board Member's Alternate Representative at a meeting. An Alternate Representative may act for all purposes at that meeting, except that the Alternate Representative's actions shall be valid only upon ratification in writing by either the Board Member or the Board Representative. Any action of the Alternate Representative involving the powers described in paragraph (a)(3)(i) through (v) of this section or any matter that has been referred to the Board under paragraph (b)(1) of this section must be ratified in writing by the Board Member.

(3) For purposes of this section, ratification shall include approval of the minutes of the meeting of the Board of Directors.

(c) Final procedural regulations and all proposed regulations shall be approved by the Director of the Corporation prior to publication in the **Federal Register**; however, all final procedural regulations and all proposed regulations shall first be reviewed for comment by each Board Representative, except for amendments that establish new interest rates and factors under Parts 4044 (Appendices C and D) and 4281 of this chapter. A Board Representative may, within 21 days of receiving a final procedural regulation or proposed regulation for review, request that it be referred to the Board Representatives for approval.

§ 4002.4 Quorum.

A majority of the Board Members shall constitute a quorum for the transaction of business. Any act of a majority of the Members present at any meeting at which there is a quorum shall be the act of the Board.

§ 4002.5 Meetings.

Regular meetings of the Board of Directors shall be held as often as required to provide appropriate oversight and guidance to the Corporation and at such times as the Chair shall select. Special meetings of the Board of Directors shall be called by the Chair on the request of any other Board Member. Reasonable notice of any meetings shall be given to each Board Member. The General Counsel of the Corporation shall serve as Secretary to the Board of Directors and keep its minutes. As soon as practicable after each meeting, a draft of the minutes of such meeting shall be distributed to each Member of the Board for approval.

§ 4002.6 Place of meetings; use of conference call communications equipment.

Meetings of the Board of Directors shall be held at the principal office of the Corporation unless otherwise determined by the Board of Directors or the Chair. Any Member may participate in a meeting of the Board of Directors through the use of conference call telephone or similar communications equipment, by means of which all persons participating in the meeting can speak to and hear each other. Any Board Member so participating in a meeting shall be deemed present for all purposes. Actions taken by the Board of Directors at meetings conducted through the use of such equipment, including the votes of each Member, shall be recorded in the usual manner in the minutes of the meetings of the Board of Directors.

§ 4002.7 Voting without a meeting.

A resolution of the Board of Directors signed by each of the Board Members or each of the Board Representatives shall have the same effect as if agreed to at a meeting and shall be kept in the Corporate Minutes Book. A resolution for an action taken on any matter for which a Board Member has been disqualified under § 4002.8 may be signed by the Board Representative of the disqualified Board Member.

§ 4002.8 Conflict of interest.

Any Board Member may disqualify himself or herself from participation in a Board action on any matter if the Board Member may have or may appear to have a conflict of interest. The Board Member shall notify the other Board Members of a disqualification. The disqualified Member's Board Representative, acting independently of that Member, may vote on the matter in the Member's place. The disqualified Board Member need not and may not ratify any action taken on the matter giving rise to his or her disqualification.

§ 4002.9 Director of the Corporation and Senior Officers.

(a) *Director of the Corporation.* The Corporation shall be administered by a Director appointed by the President with the advice and consent of the Senate. Subject to policies established by the Board, the Director shall have responsibility for the Corporation's management, including its personnel, organization and budget practices, and shall carry out the Corporation's functions under Title IV of ERISA. The Director shall submit the Corporation's budget to the Chair of the Board for review and approval.

(b) There shall be the following senior officers of the Corporation, reporting directly to the Director:

(1) Deputy Directors for Policy and Operations, who shall be first and second assistant, respectively;

(2) General Counsel, who shall serve as Secretary to the Board;

(3) Chief Financial Officer;

(4) Chief Information Officer;

(5) Chief Management Officer;

(6) Chief Operating Officer; and

(7) Chief Insurance Program Officer.

(c) Subject to prior approval of the Board, the Director may establish such additional or other senior officers as necessary. Before making an appointment to a senior officer position,

the Director shall consult with the Board.

§ 4002.10 Emergency procedures.

(a) An emergency exists if a quorum of the Corporation's Board cannot readily be assembled or act through written contact because of the declaration of a government-wide emergency. These emergency procedures shall remain in effect during the emergency and upon the termination of the emergency shall cease to be operative unless and until another emergency occurs. The emergency procedures shall operate in conjunction with the PBGC Continuity of Operations Plan (''COOP Plan'') of the current year, and any government-wide COOP protocols in effect.

(b) During an emergency, the business of the PBGC shall continue to be managed in accordance with its COOP Plan. The functions of the Board of Directors will be carried out by those Members of the Board of Directors in office at the time the emergency arises, or by persons designated by the agencies' COOP plans to act in place of the Board Members, who are available to act during the emergency. If no such persons are available, then the authority of the Board shall be transferred to the Board Representatives who are available. If no Board Representatives are available, then the Director of the Corporation shall perform essential Board functions.

(c) During an emergency, meetings of the Board may be called by any available Member of the Board. The notice thereof shall specify the time and place of the meeting. To the extent possible, notice shall be given in accordance with these bylaws. Notice shall be given to those Board Members whom it is feasible to reach at the time of the emergency, and notice may be given at a time less than 24 hours before the meeting if deemed necessary by the person giving notice.

§ 4002.11 Seal.

The seal of the Corporation shall be in such form as may be approved from time to time by the Board.

§ 4002.12 Amendments.

These bylaws may be amended or new bylaws adopted by unanimous vote of the Board.

Issued in Washington, DC, this 20th day of May, 2008.

Charles E.F. Millard,

Director, Pension Benefit Guaranty Corporation.

Issued on the date set forth above pursuant to Resolution 2008–09 of the Board of Directors authorizing adoption of the revised Bylaws contained in this final rule.

Judith R. Starr,

Secretary, Board of Directors, Pension Benefit Guaranty Corporation.

[FR Doc. E8–11667 Filed 5–22–08; 8:45 am]

BILLING CODE 7709–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG–2008–0375]

Portland Rose Festival Fireworks Display

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the ''Portland Rose Festival Fireworks Display safety zone on the Willamette River''; from 8:30 p.m. through 11:30 p.m. on May 30, 2008. This action is necessary to provide a safe display for the public and to keep them clear of the fall out area of the fireworks. During the enforcement period, no person or vessel may enter the safety zone without permission of the Captain of the Port.

DATES: The regulations in 33 CFR 165.1315(a)(2) will be enforced from 8:30 p.m. through 11:30 p.m. on May 30, 2008.

FOR FURTHER INFORMATION CONTACT: BM2 Joshua Lehner, Sector Portland Waterways Management at (503) 247–4015.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone for the Portland Rose Festival fireworks display in 33 CFR 165.1315(a)(2) on May 30, 2008 from 8:30 p.m. to 11:30 p.m.

Under the provisions of 33 CFR 165.1315, a vessel may not enter the regulated area, unless it receives permission from the COTP. The Coast Guard may be assisted by other Federal, state, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.1315(a)(2) and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners and a marine information broadcast. If the COTP determines that the regulated area need not be enforced for the full duration stated in this notice, he may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: May 7, 2008.

F.G. Myer,

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

[FR Doc. E8–11549 Filed 5–22–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R08–RCRA–2006–0127; FRL–8569–9]

Utah: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA), allows the Environmental Protection Agency (EPA) to authorize states to operate their hazardous waste management programs in lieu of the federal program. Utah has applied to EPA for final authorization of the changes to its hazardous waste program under RCRA. EPA has determined that these changes satisfy all requirements needed to qualify for final authorization and is authorizing Utah's changes through this final action.

DATES: This final authorization will become effective on May 23, 2008.

FOR FURTHER INFORMATION CONTACT: Carl Daly, Solid and Hazardous Waste Program, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202, (303) 312–6416, *daly.carl@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States that have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the federal program. As the federal program changes, states must change their programs and ask EPA to authorize the changes. Changes to state programs may be necessary when federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) Parts 124, 260 through 266, 268, 270, 273 and 279.

Utah initially received Final Authorization on October 10, 1984, effective October 24, 1984 (49 FR 39683) to implement its base hazardous waste management program. Utah received authorization for revisions to its program on February 21, 1989 (54 FR 7417), effective March 7, 1989; May 23, 1991 (56 FR 23648) and August 6, 1991 (56 FR 37291), both effective July 22, 1991; May 15, 1992 (57 FR 20770), effective July 14, 1992; February 12, 1993 (58 FR 8232) and May 5, 1993 (58 FR 26689), both effective April 13, 1993; October 14, 1994 (59 FR 52084), effective December 13, 1994; May 20, 1997 (62 FR 27501), effective July 21, 1997; January 13, 1999 (64 FR 02144), effective March 15, 1999; October 16, 2000 (65 FR 61109), effective January 16, 2001; May 7, 2002 (67 FR 30599), effective July 7, 2002; and June 11, 2003 (68 FR 34829), effective June 11, 2003.

On September 30, 2003, Utah submitted a complete program revision application, seeking authorization of additional changes to its program in accordance with 40 CFR 271.21. On March 7, 2008, EPA published both an immediate final rule (73 FR 12277) granting Utah final authorization for these revisions to its federally authorized hazardous waste program, along with a companion proposed rule announcing EPA's proposal to grant such a final authorization (73 FR 12340). EPA announced in both notices that the immediate final rule and the proposed rule were subject to a thirty-day public comment period. The public comment period ended on April 7, 2008. Further, EPA stated in both notices that if it received adverse comments on its intent to authorize Utah's program revisions that it would (1) withdraw the immediate final rule; (2) proceed with the proposed rule as the basis for the receipt and evaluation of such comments, and (3) subsequently publish a final determination responding to such comments and announce its final decision as to whether or not to authorize Utah's program revisions. EPA did receive two adverse comments during the public comment period, and on April 23, 2008, EPA published a notice withdrawing the immediate final rule (73 FR 21843).

Today's action responds to the comments EPA received and publishes EPA's final determination granting Utah final authorization of its program revisions. Further background on EPA's immediate final rule and its tentative determination to grant authorization to Utah for its program revisions appears in the aforementioned **Federal Register** notices. The issues raised by the commenters are summarized and responded to in section B below.

B. What Were the Comments and Responses to EPA's Proposal?

During the public comment period relevant and adverse comments were received from two sources. The comments did not address specific concerns with EPA's approval of the 14 additional RCRA regulatory provisions in Utah's authorized hazardous waste program; rather the comments were general in nature: Opposition to Utah accepting additional hazardous wastes and an allegation that Utah's DSHW provides misleading information to the public. In response to the first commenter who stated that he does ''not want Utah to take more hazardous waste than it already has,'' EPA notes that authorization of the additional RCRA regulatory provisions specified in the immediate final rule should not impact the amount or type of hazardous waste imported into Utah. The state has already adopted these regulatory provisions into the Utah Hazardous Waste Management Rules at R–315. In addition, the types and quantity of hazardous waste accepted at Treatment, Storage, and Disposal Facilities (TSDFs) in Utah are controlled by their respective RCRA permits issued by the State of Utah, and this authorization will not directly impact the conditions and restrictions in these RCRA permits.

The commenter also states that bringing ''low-level radioactive waste into the United States for disposal or storage'' sets a bad precedent and that ''radioactive waste from Italy * * * should not be accepted in any form or degree.'' EPA notes that, in general, this authorization of additional RCRA regulatory provisions does not address radioactive waste. The one regulatory provision approved in this authorization that is related to radioactive waste is the Treatment Variance for Radioactively Contaminated Batteries. This provision, promulgated as a federal regulation on October 7, 2002, requires radioactively contaminated batteries determined to also be hazardous waste because of the heavy metal content of cadmium, mercury, or silver, to be treated with macro-encapsulation and then disposed of in a permitted disposal facility. Prior to this provision, radioactively contaminated batteries were required to be thermally treated or manually segregated to recover the heavy metals. EPA determined that these treatment standards were technically inappropriate for radioactively contaminated cadmium, mercury, and silver batteries. Our review has determined that Utah has adopted an equivalent rule to the federal hazardous waste regulation, specified in 40 CFR 268.40. Therefore, we have determined that there is no basis to deny authorization approval based on these comments.

In response to the second commenter, who expressed concerns regarding the integrity of Utah's DSHW and raised allegations that the DSHW provides misleading information to the public, EPA has no documentation that indicates the Utah DSHW has provided misleading information to the public related to the hazardous waste authorization process. The DSHW has followed the process specified in 40 CFR 271.20 to provide public notice prior to submitting an application for authorization to EPA. In addition, EPA conducts annual reviews of the DSHW's hazardous waste program. The last review was completed at the end of 2007. These reviews evaluate the DSHW's hazardous waste program using 19 program criteria organized under four key program areas: Program management, pollution prevention and hazardous waste minimization, safe waste management, and corrective action. EPA's program management review of the DSHW includes the following criteria: Adoption and authorization of federal rules, resources and skill mix, training program, data timeliness, accuracy and completeness, and records management. EPA notes that, for 2007, Utah met or exceeded the standards for all 19 program criteria. Therefore, we have determined that there is no basis to deny authorization approval based on these comments.

C. What Decisions Have We Made in This Rule?

Based on EPA's response to public comments, the Agency has determined that approval of Utah's RCRA program revisions should proceed. EPA has made a final determination that Utah's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Utah final authorization to operate its hazardous waste program with the changes described in the authorization application. Utah has responsibility for permitting TSDFs within its borders, except in Indian country as that term is defined at 18 U.S.C. 1151, and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New federal requirements and prohibitions imposed by federal regulations that EPA promulgates under

the authority of HSWA take effect in authorized states before they are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Utah, including issuing permits, until Utah is authorized to do so. For further background on the scope and effect of today's action to approve Utah's RCRA program revisions, please refer to the preambles of EPA's March 7, 2008 proposed and immediate final rules at 73 FR 12340 and 73 FR 12277, respectively.

D. Statutory and Executive Order Reviews

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), and, therefore, this action is not subject to review by OMB. This action authorizes state requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by state law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments'' (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, ''Federalism'' (64 FR 43255, August 10, 1999), because it merely authorizes state requirements as part of the state RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective May 23, 2008.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Incorporation-by-reference, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: May 12, 2008.

Carol Rushin,

Acting Regional Administrator, Region 8.

[FR Doc. E8–11648 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 060525140–6221–02]

RIN 0648–XI05

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Resources of the South Atlantic; Trip Limit Reduction

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

ACTION: Temporary rule; trip limit reduction.

SUMMARY: NMFS reduces the commercial trip limit for golden tilefish in the South Atlantic to 300 lb (136 kg) per trip in or from the exclusive economic zone (EEZ). This trip limit reduction is necessary to protect the South Atlantic golden tilefish resource.

DATES: This rule is effective 12:01 a.m., local time, May 27, 2008, through December 31, 2008, unless changed by further notification in the **Federal Register**.

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

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the Fishery Management Plan for the Snapper-Grouper Resources of the South Atlantic (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Under 50 CFR 622.44(c)(2), NMFS is required to reduce the trip limit in the commercial fishery for golden tilefish from 4,000 lb (1,814 kg) to 300 lb (136 kg) per trip when 75 percent of the fishing year quota is met, by filing a notification to that effect in the **Federal Register**. Based on current statistics, NMFS has determined that 75 percent of the available commercial quota of 295,000 lb (133,810 kg), gutted weight, for golden tilefish will be reached on or before May 20, 2008. Accordingly, NMFS is reducing the commercial golden tilefish trip limit to 300 lb (136 kg) in the South Atlantic EEZ from 12:01 a.m., local time, on May 20, 2008, until the quota is reached and the fishery closes or 12:01 a.m., local time, on January 1, 2009, whichever occurs first.

Classification

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

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

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

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

Dated: May 19, 2008.

Emily H. Menashes,

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

[FR Doc. E8–11538 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 070717341–8549–02]

RIN 0648–AV41

Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Fishing Year 2008

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement recreational management measures for the 2008 summer flounder and scup fisheries and to notify the public that the recreational management measures for the black sea bass fisheries remain the same as in 2007. The actions of this final rule are necessary to comply with regulations implementing the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) as well as to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The intent of these measures is to prevent overfishing of the summer flounder, scup, and black sea bass resources.

DATES: Effective June 23, 2008, except for the amendment to § 648.107(a) introductory text, which is effective May 23, 2008.

ADDRESSES: Copies of supporting documents used by the Summer Flounder, Scup, and Black Sea Bass Monitoring Committees and of the Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901–6790. The EA/RIR/IRFA is also accessible via the Internet at *http://www.nero.noaa.gov*. The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses contained in this final rule, and the summary of impacts and alternatives contained in this final rule. Copies of the small entity compliance guide and supplemental economic analysis document are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298.

FOR FURTHER INFORMATION CONTACT: Michael Ruccio, Fishery Policy Analyst, (978) 281–9104.

SUPPLEMENTARY INFORMATION:

Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Atlantic States Marine Fisheries Commission (Commission) and the Mid-Atlantic Fishery Management Council (Council), in consultation with the New England and South Atlantic Fishery Management Councils. The Summer Flounder, Scup, and Black Sea Bass FMP and its implementing regulations, which are found at 50 CFR part 648, subparts A (general provisions), G (summer flounder), H (scup), and I (black sea bass), describe the process for specifying annual recreational management measures that apply in the Exclusive Economic Zone (EEZ). The states manage these fisheries within 3 nautical miles of their coasts, under the Commission's plan for summer flounder, scup, and black sea bass. The Federal regulations govern vessels fishing in the EEZ, as well as vessels possessing a Federal fisheries permit, regardless of where they fish.

The 2008 coastwide recreational harvest limits, after deduction of research set-aside (RSA), are 6,215,800 lb (2,819 mt) for summer flounder, 1,830,920 lb (830 mt) for scup, and 2,108,447 lb (956 mt) for black sea bass. The 2008 quota specifications, inclusive of the recreational harvest limits, were previously determined to be consistent with the 2008 target fishing mortality rate (F) for summer flounder and the target exploitation rates for scup and black sea bass.

The proposed rule to implement annual Federal recreational measures for the 2008 summer flounder, scup, and black sea bass fisheries was published on March 21, 2008 (73 FR 15111), and contained management measures (minimum fish sizes, possession limits, and fishing seasons) intended to keep annual recreational landings from exceeding the specified harvest limits.

2008 Recreational Management Measures

Additional discussion on the development of the recreational management measures appeared in the preamble of the proposed rule and is not repeated here. All minimum fish sizes discussed below are total length measurements of the fish, i.e., the

straight-line distance from the tip of the snout to the end of the tail while the fish is lying on its side. For black sea bass, total length measurement does not include the caudal fin tendril. All possession limits discussed below are per person.

Summer Flounder Management Measures

Based on the recommendation of the Commission, the Regional Administrator finds that the recreational summer flounder fishing measures proposed to be implemented by the states of Massachusetts through North Carolina for 2008 are the conservation equivalent of the season, minimum size, and possession limit prescribed in §§ 648.102, 648.103, and 648.105(a), respectively. According to the regulation at § 648.107(a)(1), vessels subject to the recreational fishing measures of this part and landing summer flounder in a state with an approved conservation equivalency program shall not be subject to the more restrictive Federal measures, and shall instead be subject to the recreational fishing measures implemented by the state in which they land. Section 648.107(a) has been amended accordingly. The management measures will vary according to the state of landing, as specified in the following table.

TABLE 1 - 2008 STATE RECREATIONAL MANAGEMENT MEASURES FOR SUMMER FLOUNDER.

State	Minimum Fish Size		Possession Limit (number of fish)	Fishing Season
	inches	cm		
MA	17.5	44.45	5	June 10 through August 15
RI	20.0	50.80	7	January 1 through December 31
CT	19.5	49.53	5	May 24 through September 1
NY	20.5	52.07	4	May 15 through September 1
NJ	18.0	45.72	8	May 24 through September 7
DE	19.5	49.45	4	January 1 through December 31
MD[1]	17.5	44.45	3	January 1 through December 31
VA	19.0	48.26	5	January 1 through July 20, and July 31 through December 31
NC[2]	15.5	39.37	8	January 1 through December 31

[1] *Chesapeake Bay, MD*- a 16.5-in (41.91-cm) minimum fish size, a 1-fish possession limit, and a fishing season of January 1 through December 31 applies.

[2] *Pamlico Sound* , NC No person may possess flounder less than 14 in (35.56 cm) total length taken from internal waters for recreational purposes west of a line beginning at a point on Point of Marsh in Carteret County at 35° 04.6166'N lat. 76° 27.8000'W long., then running northeasterly to a point at Bluff Point in Hyde County at 35° 19.7000'N lat. 76° 09.8500'W long. In Core and Clubfoot creeks, the Highway 101 Bridge constitutes the boundary north of which flounder must be at least 14 in total length.

Albemarle Sound, NC No person may possess flounder less than 14 in (35.56 cm) total length taken from internal waters for recreational purposes west of a line beginning at a point 35° 57.3950'N lat. 76° 00.8166'W long. on Long Shoal Point; running easterly to a point 35° 56.7316'N lat. 75° 59.3000' W long. near Marker ″5″ in Alligator River; running northeasterly along the Intracoastal Waterway to a point 36° 09.3033'N lat. 75° 53.4916'W long. near Marker ″171″ at the mouth of North River; running northwesterly to a point 36° 09.9093'N lat. 75° 54.6601'W long. on Camden Point.

Browns Inlet South, NC No person may possess flounder less than 14 in (35.56 cm) total length in internal and Atlantic Ocean fishing waters for recreational purposes west and south of a line beginning at a point 34° 37.0000'N lat. 77° 15.000'W long.; running southeasterly to a point 34° 32.0000'N lat. 77° 10.0000'W long.

Scup Management Measures

This rule implements the scup measures contained in the March 21, 2008, proposed rule. Table 2 contains the coastwide Federal measures for scup for 2008.

TABLE 2- 2008 SCUP RECREATIONAL MANAGEMENT MEASURES

Fishery	Minimum Fish Size		Possession Limit	Fishing Season
	inches	cm		
Scup	10.5	26.67	15 fish	January 1 through February 28, and October 1 through October 31

As has occurred in the past 6 years, the scup fishery in state waters will be managed under a regional conservation equivalency system developed through the Commission. Because the Federal FMP does not contain provisions for conservation equivalency, and states may adopt their own unique measures, the Federal and state recreational scup management measures will differ for 2008.

Black Sea Bass Management Measures

Table 3 contains the coastwide Federal measures black sea bass in effect for 2007 and codified. The 2008 measures are unchanged from those at

50 CFR part 648 subpart I, and are presented in Table 3.

TABLE 3- 2008 BLACK SEA BASS RECREATIONAL MANAGEMENT MEASURES

Fishery	Minimum Fish Size		Possession Limit	Fishing Season
	inches	cm		
Black Sea Bass	12	30.5	25 fish	January 1 through December 31

Comments and Responses

Eleven comments were received regarding the proposed recreational management measures (73 FR 15111, March 21, 2008). One individual submitted several comments regarding several species such as mackerel, red hake, and marlin which are not addressed by this rulemaking. In addition, several minor comments, whose relevance to the recreational management measures could not be ascertained, were submitted. A number of issues raised by commenters pertained to past actions already promulgated by NMFS, such as the establishment of the 2008 summer flounder Total Allowable Landings (TAL) and scup rebuilding plan. These are not responded to in this section. When possible, the concepts relayed in the comments have been consolidated and responded to in turn.

Comment 1: Some of the comments received allege that state-by-state conservation equivalency violates National Standard 2 of the Magnuson-Stevens Act, which requires that conservation and management actions to be based upon the best available scientific information. The argument presented by the commenters is that the Marine Recreational Fishery Statistical Survey (MRFSS) used to develop state-by-state conservation equivalency measures has inadequate resolution for state-level monitoring and management. These commenters cite the 2006 NOAA-commissioned National Academy of Sciences independent review of MRFSS that stated monitoring fisheries at a state level is a finer stratification than intended originally for the data collected and that the existing sampling strata may be too coarse a resolution to generate estimates that are adequate for management requirements. Further, these commenters cite a quotation from the National Academy of Science review committee chair wherein it was stated that MRFSS is better suited to monitor and manage on larger spatial scales rather than on smaller spatial scales.

Response: NMFS disagrees that managing the summer flounder recreational fishery using state-by-state conservation equivalency is a violation of National Standard 2. NMFS has been aware of limitations in the MRFSS design and data for some time. It is, in fact, why the National Academy of Science peer-review was commissioned by NOAA. While the review did, as expected, point out numerous areas for improvement of the MRFSS sampling design, nowhere did the National Academy of Science reviewers indicate that use of the MRFSS data at smaller spatial scales (i.e., state-by-state) was an inappropriate use of the data. Moreover, the National Academy of Science review indicated that the level of precision available from MRFSS may require the modification of management objectives or management tools. This reason, along with poor performance of conservation equivalency in recent years, led NMFS to send letters early in the 2008 recreational management measures development process strongly encouraging both the Commission and the Council to improve their analysis of how potential recreational management measures are evaluated. In addition, NMFS encouraged states to take a more precautionary approach to both improve conservation equivalency's performance and to offset uncertainty in the assessment of potential measures effectiveness. In response, the Commission's Technical Committee evaluated a number of additional factors that may influence the effectiveness of state-by-state conservation equivalency before recommending the performance-based adjustment factor intended to improve conservation equivalency in 2008. NMFS contends that the information provided by MRFSS, along with additional information provided by individual states and fishery independent surveys, is sufficient and appropriate to manage the recreational summer flounder fishery on a state-by-state basis.

NMFS is continuing to move forward with implementing the recommendations of the National Academy of Science regarding MRFSS as well as developing and implementing a national saltwater angler registry, as required by the Magnuson-Stevens Reauthorization Act of 2006. NMFS does not disagree that the use of current MRFSS methodology and data has moved well beyond their originally intended purpose. The changes under development, when fully implemented, are expected to incorporate many of the National Academy of Science's recommendations and substantially improve the precision and utility of the recreational fishery information available for fisheries management. In the interim, while new measures are developed and implemented, the MRFSS supplied data remain the only available information for recreational fisheries management at any spatial scale.

The use of MRFSS data was challenged, along with other aspects of the agency's actions, in 2006 in the case *United Boatmen, et al.,* v. *Gutierrez*[1], the Secretary of Commerce (Secretary), wherein the defendants alleged that MRFSS was a gravely flawed tool and unsuitable for use in setting the summer flounder TAL. On behalf of NMFS, the United States attorneys stated in the defendants' memorandum of law in opposition to the motion for summary judgment that, ''MRFSS, while admittedly having limitations, has been upheld under National Standard 2 as the best available scientific information.'' The defendants' brief cited three separate cases wherein MRFSS had been upheld as the best available scientific information relative to National Standard 2. In this case, the judge found in favor of the Secretary, adding further support to the adequacy of MRFSS data for use in fisheries management as the best available science.

Comment 2: One commenter alleges that state-by-state conservation equivalency violates National Standard 3 of the Magnuson-Stevens Act, which requires individual fish stocks to be managed as a unit throughout its range, to the extent practicable.

Response: NMFS disagrees with the commenter. The summer flounder stock is managed as a single unit, consistent with National Standard 3. Management is cooperative among the Commission, which represents individual states in

[1] *United Boatmen, et al.,* v. *Gutierrez Civil NO. 06–CV–400 (JBW)*

the management unit, the Council, and NMFS. The stock assessment conducted in support of annual TAL setting is for the entire Northeast Region management unit for summer flounder, from Maine to North Carolina. Catch limits for the recreational and commercial fisheries are established for the entire coast. The overarching commercial TAL is managed on a state-by-state basis, parsed by historic landings percentage by each state: Conversely, the recreational fishery may employ coastwide measures, or regional or state-by-state conservation equivalency to achieve the coastwide recreational harvest level. When state-by-state conservation equivalency is utilized for management, the individual state management measures are structured to achieve equivalency with the overarching coastwide (i.e., single management unit) recreational harvest limit. Furthermore, NMFS guidance on National Standard 3 (50 CFR 600.320) clearly states that management measures need not be identical for each geographic area within the management unit.

Comment 3: Some of the comments received allege that state-by-state conservation equivalency violates National Standard 4 of the Magnuson-Stevens Act which, states that conservation and management actions implemented by NMFS shall not discriminate between residents of different states. These commenters raised concerns about disparities that arise between adjacent states' management measures under the state-by-state conservation equivalency management system, specifically citing the differences between 2008 New York and New Jersey measures. Many of these commenters assert that such differences are highly inequitable and unfair. Some of these commenters point out that under the 2008 conservation equivalency system, New York will be required to implement measures with the greatest required reduction and, as a result, New York will have more restrictive fishing measures than any other state. Many of these commenters also stated that the state harvest allocations assigned by the Commission are inequitable and violate both National Standard 4 and National Standard 2 because they are based on a single year of landings data.

Response: NMFS disagrees with these comments that state-by-state conservation equivalency violates National Standards 2 and 4 of the Magnuson-Stevens Act. The conservation equivalency system was implemented in 2001 by Framework Adjustment 2 to the Federal FMP (66 FR 36208, July 11, 2001) and the Commission's companion action Addendum III to the Commission's Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan. Under this process, states are allowed to design management measures to achieve their specified recreational management targets which, in turn, ensures that the coastwide recreational harvest limit will be achieved. NMFS has implemented conservation equivalency, as recommended by the Council and Commission, in each year since 2001.

The overarching process of conservation equivalency establishes a set of guidance for states to tailor management measures that meet the conservation objectives of the FMP rather than being subject to a one-size-fits-all coastwide approach. The conservation equivalency framework is uniform and applied consistently for all states, without differentiating among U.S. citizens, nationals, resident aliens, or corporations on the basis of their state of residence. Individual states must provide a combination of minimum fish size, possession limit, and fishing season to ensure that, when paired with the remaining Atlantic coastal states, the coastwide recreational harvest limit will not be exceeded. Each state's circumstance with respect to landings and overage is unique to that state and argues against the application of the same measures for each state. The Commission's Technical Committee evaluates the proposed state measures and, if sufficient, a recommendation to adopt, as functionally equivalent, the reviewed and approved measures is forwarded by the Commission to NMFS for implementation. This ensures that the conservation objectives of the FMP and the summer flounder rebuilding program are met.

To achieve conservation equivalency, the Commission, not NMFS, establishes a base recreational allocation that each state receives from the coastwide recreational harvest limit and specifies the percent reduction or liberalization in landings each state's measures must meet for each year. The conservation equivalency system does not result in a direct distribution of fishing privileges to individual states by NMFS. This allocation is not earmarked solely for the residents of an individual state; rather, any landing made in the state in question is counted against that state's recreational allocation. Fishery participants are free to participate in multiple states, land in adjacent states, etc., and are not discriminated against based on their state of residence.

The basis for the state recreational harvest allocations is the percentage of 1998 coastwide recreational landings by state. However, the Commission is at liberty to revise or amend these allocation percentages independently of the Council and/or NMFS as specific state recreational fishery percent allocations are not specified in the Federal regulations that implement the conservation equivalency program. The use of 1998 by the Commission was not arbitrary; the intent of 1998 as the base allocation year was to perpetuate the existing fishing practices in place prior to the onset of regulations which substantially modified the recreational fishery.

The percent reduction, or liberalization in landings, required by the Commission is relative to the previous year's landings level to ensure that the state-supplied measures will result in the same harvest level as would coastwide measures. A state may be required to reduce landings if the coastwide recreational harvest limit is reduced from year to year, if the state in question has exceeded the previous year's recreational landing limit, or if both have occurred. For 2008, in response to NMFS indicating that conservation equivalency measures needed to be more robust, the Commission included an additional percent reduction for some states called a performance-based adjustment. This adjustment is a further reduction imposed by the Commission to ensure that conservation equivalency will function as designed, and is the average overage for individual states from the period of 2001–2007.

New York has exceeded its Commission specified allocation of the recreational harvest limit in 5 of the 7 years where conservation equivalency has been utilized, including a 55–percent overage in 2007. The state's overages have ranged from 20 to 112 percent. Therefore, the percent reduction required by the Commission for New York under conservation equivalency for 2008 is greater than adjacent states. Had New York's measures achieved the required targets in previous years, New York would not be required to produce as large a reduction under the Commission's plan in 2008 to ensure that conservation equivalency could be achieved on a coastwide basis.

For these reasons, NMFS finds that implementing conservation equivalency, as recommended by the Council and Commission for 2008, does not violate National Standard 4 or National Standard 2 of the Magnuson-Stevens Act.

Comment 4: Some commenters allege that state-by-state conservation

equivalency violates National Standard 6 of the Magnuson-Stevens Act, which states that conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. The basis for the commenters assertion is that conservation equivalency does not address a northward shift in summer flounder stock distribution.

Response: NMFS disagrees with the commenters. Furthermore, NMFS asserts that the commenters have misinterpreted the intent of National Standard 6. The intent of National Standard 6 is to ensure that an FMP management regime includes some protection against uncertainties that may arise. National Standard 6 directs FMPs to have a suitable buffer, in favor of conservation, to deal with uncertainty, which may also be stated as a precautionary approach. Examples provided in NMFS guidance on National Standard 6 (50 CFR 600.336) include reductions in Optimum Yield, establishment of reserves, and adjustable management techniques to compensate for changes that occur during a fishing year as suitable buffers to mitigate uncertainty.

In regards to conservation equivalency, a summer flounder stock assessment is conducted annually and fully accounts for, among other things, stock distribution, changes in stock size, and fishery removals. The stock assessment does fully account for changes in stock dynamics and distribution in providing the basis for setting the annual coastwide TAL, which is then divided among the recreational and commercial fisheries.

The resultant commercial quota and recreational harvest limit generated from the annual stock assessment do account for uncertainty in the assessment by implementing a lower overall TAL than required by the FMP. For 2008, analysis conducted by the Northeast Fisheries Science Center (NEFSC) indicates that the 15.77–million-lb (7,153–mt) TAL has a 99–percent probability of not exceeding the overfishing level (FMAX=0.28). The FMP requires that the annual TAL have, at minimum, a 50–percent probability of constraining fishing mortality at or below the overfishing level.

Further, both the states and NMFS are able to monitor recreational harvests during the fishing season, and both can take corrective or closure actions to ensure that mortality objectives or harvest targets are not exceeded. For these reasons, NMFS finds that the use of state-by-state conservation equivalency complies with National Standard 6 of the Magnuson-Stevens Act.

Comment 5: One commenter stated that NMFS did not conduct the required review of scientific and other relevant information before establishing the 2008 recreational management measures.

Response: NMFS disagrees with the commenter as extensive analysis of scientific and other relevant information has occurred as part of the 2008 recreational management measures specification process. A full analysis of the fishery dependent and independent data was conducted, as has occurred annually for each year since the inception of the FMP. The Council's Monitoring Committee and Commission's Technical Committee met jointly in November 2007 to review the most up to date stock and fishery related information available for establishing the 2008 recreational management measures. This review is required under the summer flounder regulations at § 648.100(a). These groups relayed their findings in December 2007 to the Council and Commission who, in turn, forwarded recommendations to NMFS based on the information provided by the two committees. Following the joint Council and Commission meeting, Council staff prepared and provided to NMFS an EA/RIR/IRFA outlining, in detail, the options considered by the Council including the environmental, regulatory, and economic impacts of each. NMFS certified that the EA/RIR/IRFA, and this subsequent final rule to implement the 2008 recreational management measures, is fully compliant with the FMP, its implementing regulations, the Magnuson-Stevenson Act, and other applicable guidance and laws.

Comment 6: One commenter stated that the only equitable way to manage the 2008 recreational summer flounder fishery would be to have a coastwide minimum fish size and possession limit, and allow states to set individual season lengths.

Response: This approach was not contemplated by the Council, Commission, or individual states for 2008. The summer flounder regulations found at § 648.100 are not currently structured to require or easily accommodate the commenter's proposed management system. Under coastwide management measures, minimum fish size, possession limit, and fishing season must be uniform for the entire coast. Under conservation equivalency, states may form voluntary regions; however, the states within those regions must have an identical minimum fish size, possession limit, and fishing season. If state by state-by-state conservation equivalency is utilized, states are permitted to adopt unique measures provided the suite of measures are equivalent to the level established by the coastwide measures. It is conceivable that under state-by-state conservation equivalency, each state could voluntarily agree to hold minimum fish size and possession limits the same across states, while implementing independent state fishing seasons.

NMFS is implementing, through this final rule, state-by-state conservation equivalency as recommended by both the Council and Commission for the reasons previously outlined in the preamble to this rule. Under conservation equivalency, each state has implemented a unique minimum fish size, possession limit, and fishing season tailored to ensure that these measures result in recreational landings equivalent to the coastwide recreational harvest level.

Comment 7: One commenter stated that no economic analysis had been conducted for the 2008 recreational management measures.

Response: NMFS disagrees. A full economic impact analysis on regulated small businesses (i.e., federally permitted party/charter vessels) relative to the 2008 recreational management measures can be found in the EA/RIR/IRFA prepared by Council staff, the EA supplement prepared by NMFS staff, the proposed rule (73 FR 15111, March 21, 2008) IRFA summary, and in the FRFA contained in this final rule. As such, the economic analysis is not repeated here.

NMFS acknowledges that there are economic impacts associated with reductions in the TAL, and subsequent reductions in the recreational harvest limit from 2007 to 2008, and that continual reductions have a cumulative effect on fishery participants and associated businesses. A discussion of the steps taken to minimize, to the extent practicable, the economic impacts on small entities is outlined in the FRFA contained in the Classification section of this final rule.

Although this final rule does not directly regulate fishing support industries, NMFS acknowledges that potential reductions in fishing effort and associated expenditures may have indirect impacts on hotels, restaurants, fishing gear and bait shops, marinas, and other associated businesses. Rising fuel costs paired with the fishery reductions may exacerbate those impacts. The RFA imposes an obligation on NMFS only to analyze the economic impacts on businesses that it regulates directly. Associated and support businesses to the fishing industry

mentioned above are not directly regulated by NMFS. Thus, they were not included in the regulatory flexibility analysis.

Comment 8: Several commenters raised the issue that NMFS had spoken in support of coastwide management measures in both written correspondence and on the record at public meetings during the 2008 summer flounder recreational management measures development. These commenters indicated that NMFS is now ignoring its own advice, and should exercise it's authority to replace the Council and Commission's recommendation for state-by-state conservation equivalency with coastwide management measures.

Response: NMFS acknowledges that previous statements were made by agency personnel in support of coastwide management measures during the early stages of development of recreational management measures for the 2008 recreational summer flounder fishery. In addition to these statements, NMFS personnel also urged the Council and Commission to consider factors that affect the effectiveness of both coastwide and conservation equivalency approaches to recreational management to substantially improve the likelihood of achieving the 2008 mortality objectives (i.e., not exceeding the recreational harvest limit). NMFS asked that the Council and Commission, through their Monitoring and Technical Committees, evaluate factors that influence the effectiveness of recreational management measures, including state performance relative to their respective conservation equivalency targets in previous years, changes in fish weight, angler participation, stock size, noncompliance rates, and standard error around MRFSS generated harvest estimates used in the evaluation of potential management measures. The Commission's Technical Committee reviewed these topics and found the use of the predicted 2008 average weight and the performance of individual states as compelling factors for application in 2008. The Technical Committee recommended using the predicted average weight for 2008 and a performance-based adjustment factor, that is derived by taking the average of yearly harvest-to-target performance by state from 2001–2007, and applying the resultant number as an additional reduction to 2008 states targets that have a net overage for the time frame.

NMFS is not constrained or committed to a particular course of action for any rulemaking until a final rule is published in the **Federal Register**. Introduction of new or previously not considered information, or response to issues raised by the public during open comment periods, are examples of instances wherein NMFS may deviate from the course of action initially discussed or even published in a proposed rule. NMFS finds the Commission's required performance-based approach to be a meaningful demonstration by the Commission's member states to ensure that conservation equivalency performs as originally contemplated for 2008. As such, it is a more precautionary approach than applied in previous years, and presents a higher likelihood that the 2008 recreational harvest limit will not be exceeded on either a state-by-state basis or coastwide, and that the subsequent mortality objectives will be met for the 2008 fishing year.

For NMFS to disapprove the Council's recommendation and substitute alternative measures, in this case, coastwide management measures, NMFS must reasonably demonstrate that the recommended measures are either inconsistent with applicable law or otherwise demonstrate that the conservation objectives of the FMP will not be achieved by implementing the recommendation in question. NMFS does not find the Council and Commission's recommendation are legally suspect or incapable of achieving the FMP's conservation objectives in light of the additional performance based factor mandated by he Commission for use in 2008.

However, NMFS remains concerned that there is little margin for error in the remaining 4 years of the summer flounder rebuilding plan (2009–2012). Therefore, as NMFS also frequently indicated during recreational management measures development, recreational landings will be monitored in season and, if necessary to ensure the mortality objectives are not compromised for 2008, an inseason closure of the EEZ may occur. Any such closure action would be announced through multiple media outlets, including publication of a notice in the **Federal Register**.

Comment 9: One commenter stated that the summer flounder stock is sufficiently rebuilt and that the current rebuilding target should be re-evaluated.

Response: The updated 2006 stock assessment information used in establishing the 2008 summer flounder TAL indicates that the Spawning Stock Biomass (SSB) in 2006, the most recent year for which complete information is available, was 93.3 million lb (42,316 mt). This is below the most recently peer-reviewed[2] biomass rebuilding target of 197.1 million lb (89,411 mt), and slightly below one-half the biomass rebuilding target level of 98.6 million lb (44,706 mt). As such, the stock continues to be defined as overfished, and has not yet been rebuilt as required by the Magnuson-Stevens Act. The summer flounder stock must achieve the biomass rebuilding target (i.e., be rebuilt) by no later than January 1, 2013.

A comprehensive benchmark stock assessment involving scientist from the Northeast Fisheries Science Center, Mid-Atlantic state fishery agencies, academia, and industry is currently occurring. The benchmark assessment will re-evaluate the status of the summer flounder stock and the biological reference points, including the rebuilding target. Results of the benchmark assessment, including updated stock status and any modifications to the biological reference points and rebuilding target, are expected to be available to the Council during their August 2008 meeting, wherein initial discussions for the 2009 summer flounder TAL will occur.

Comment 10: Some commenters specifically requested that NMFS exercise its authority to replace the Council and Commission recommended state-by-state conservation equivalency management approach with the Council and Commission non-preferred alternative for coastwide measures. These commenters stated, in support of coastwide measures, that state-by-state conservation equivalency is based on flawed science, is grossly inequitable, and has consistently failed in constraining the recreational fishery to the respective annual targets.

Response: NMFS is implementing, through this rule, the Council and Commission recommended management system for the 2008 summer flounder recreational fishery--state-by-state conservation equivalency. See response to comment 8 for additional details. NMFS may disapprove and implement substitute measures when the Council recommends measures that are inconsistent with the goals and objectives of the FMP, the Magnuson-Stevens Act rebuilding requirements for summer flounder, or other applicable law. NMFS has determined that state-by-state conservation equivalency, paired with the Commission's performance-based adjustment factor, satisfies the 2008 regulatory and statutory requirements for summer flounder. As such, NMFS has no compelling reason to disapprove state-by-state conservation equivalency and

[2] Summer Flounder Assessment and Biological Reference Point Update for 2006

substitute coastwide measures for the 2008 recreational fishery.

NMFS acknowledges that state-by-state conservation equivalency has performed poorly, since the summer flounder recreational harvest limit has been exceeded in 5 of the 7 years where it has been utilized. It was for this reason that NMFS cautioned both the Council and Commission that several factors influencing the effectiveness of conservation equivalency be examined, and a new approach or approaches applied for the 2008 fishery. In response, the Commission's Technical Committee examined several areas not previously considered in conservation equivalency analysis. This examination led to the Technical Committee's recommended performance-based adjustment factor designed to reduce the risk of exceeding the 2008 recreational harvest limit.

Comment 11: Some commenters stated that state-by-state conservation equivalency has failed too often and will not prevent overfishing in 2008. One of these commenters stated that the 2008 conservation equivalency differs by only the Technical Committee's performance-based adjustment from the system that performed very poorly in 2007, and is not likely to be successful in preventing overfishing. These commenters advocated for implementation of regional or coastwide measures.

Response: NMFS has been vocal in raising its concerns about the performance of state-by-state conservation equivalency in recent years. However, as previously indicated in responses 8 and 10, NMFS has determined that the performance-based adjustment required by the Commission's Technical Committee, use of the predicted 2008 average weight, and inseason monitoring of the recreational fishery provides a sufficient basis to responsibly manage the 2008 recreational summer flounder fishery so that the recreational harvest limit is not exceeded, and the mortality objectives of the rebuilding program are met.

Comment 12: The State of Maine wrote in support of state-by-state conservation equivalency and clarified that Maine was in the process of revising its current recreational harvest limit of 4 summer flounder per day to 2 summer flounder per day with a minimum fish size of 20 inches (50.80 cm). This clarification was sent in response to the proposed rule that stated Maine had no recreational harvest limit and was not required to submit management measures to the Commission.

Response: NMFS supports Maine's decision to implement a minimum fish size and possession limit for 2008 that is consistent with the size and possession limits of the precautionary default level. However, Maine does not have a recreational harvest allocation under the Commission conservation equivalency program and is not, as was stated in the proposed rule, required to submit measures to the Commission for conservation equivalency to be approved by NMFS. Occurrences of summer flounder north of Massachusetts are rare, and it is unlikely that many, if any, fish would be landed by recreational anglers in Maine. MRFSS data from 1998–2007 indicate that no summer flounder were landed by recreational fishermen in Maine for that 10–year period.

Classification

The Administrator, Northeast Region, NMFS, determined that this final rule implementing the 2008 summer flounder, scup, and black sea bass recreational management measures is necessary for the conservation and management of the summer flounder, scup, and black sea bass fisheries, and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30–day delay in effective date for the summer flounder recreational management measures contained in this rule (§ 648.107(a)). The linchpin of NMFS's decision whether to proceed with the coastwide measures or to give effect to the conservation equivalent measures is advice from the Commission as to the results of its review of the plans of the individual states. This advice has only recently been received, via a letter dated April 23, 2008. The recreational summer flounder fishery will be open in eight of nine states by May 24, 2008. The remaining state will open June 10, 2008. Based on historic effort and landings information, and the importance of summer flounder as a recreational fishery target species, participation and landings are expected to be high from the onset of the fishery. The party and charter vessels from the various states are by far the largest component of the recreational fishery that fish in the EEZ. The Federal coastwide regulatory measures for the three species that were codified last year remain in effect until the 2008 recreational management measures become effective. The Federal coastwide measures for the summer flounder fishery do not achieve the necessary reduction in recreational landings to constrain the fishery to the 2008 recreational harvest limit. It is, therefore, imperative that NMFS implement measures, as quickly as possible, for the 2008 recreational summer flounder fishery to ensure that the mortality objectives of the 2008 recreational harvest limit are not compromised. The conservation equivalent measures approved by the Commission and implemented by this final rule are such measures. Failure of NMFS to implement the 2008 conservation equivalent measures as soon as possible would result in fishery participants operating under the more liberal 2007 measures. The effect of this would be to substantially increase the early fishing season mortality on summer flounder beyond the levels used in estimating the appropriate 2008 measures. This substantially increases the likelihood that the 2008 mortality objectives will be compromised, as the early-season effort is historically high in southern and Mid-Atlantic Bight states, and those fish landed under last year's more liberal measures will contribute to higher recreational fishery mortality than previously accounted for in analyses. The state-by-state conservation equivalent measures will, upon their implementation, restrict the recreational summer flounder coastwide landings within the 2008 recreational harvest limit. The recreational scup fishery does not open until October 1, and the 2008 black sea bass measures remain status quo; therefore, there is no need to waive the delay in effectiveness for these species' measures.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Included in this final rule is the FRFA prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the economic impacts described in the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support the action. Copies of the EA/RIR/IRFA and supplement are available from the Council and NMFS (see **ADDRESSES**).

Final Regulatory Flexibility Analysis

Statement of Objective and Need

A description of the reasons why this action is being taken, and the objectives of and legal basis for this final rule are explained in the preambles to the proposed rule and this final rule, and are not repeated here.

A Summary of the Significant Issues Raised by the 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 in the Proposed Rule as a Result of Such Comments

A summary of the comments received and NMFS' responses thereto is contained in the preamble of this rule. None of those comments addressed specific information contained in the IRFA economic analysis and thus, are not repeated here. No changes have been made from the proposed rule as a result of the comments received by NMFS.

Description and Estimate of Number of Small Entities to Which This Rule Will Apply

The Council estimated that the proposed measures could affect any of the 919 vessels possessing a Federal charter/party permit for summer flounder, scup, and/or black sea bass in 2006, the most recent year for which complete permit data are available. However, only 369 of these vessels reported active participation in the recreational summer flounder, scup, and/or black sea bass fisheries in 2006.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule.

Description of the Steps Taken to Minimize Economic Impact on Small Entities

No-action alternatives. The economic analysis conducted in support of this action assessed the impacts of the various management alternatives. In the EA, the no action alternative for each species is defined as the continuation of the management measures as codified for the 2007 fishing season. The no-action measures were analyzed in Summer Flounder Alternative 2, Scup Alternative 3, and Black Sea Bass Alternative 1 in the Council's EA/RIR/IRFA.

For summer flounder, state-specific implications of the no-action (coastwide) alternative of a 18.5–inch (46.99–cm) minimum fish size, a 4–fish possession limit, and no closed season would not achieve the mortality objectives required, and, therefore, cannot be continued for the 2008 fishing season. Similarly the no-action alternative for scup (a 10–in (25.4–cm) minimum fish size, a 50–fish possession limit, and a fishing season of January 1 through the last day of February and from September 18 through November 30) would result in fishing mortality that exceeds the level established for 2008 and, therefore, cannot be continued for the 2008 fishing season. The implications of the no-action alternative are not substantial for black sea bass. Recreational landings of black sea bass in 2007 were less than the target, and the status quo measures are expected to constrain landings to the 2008 target.

Summer flounder alternatives. In seeking to minimize the impact of recreational management measures (minimum fish size, possession limit, and fishing season) on small entities (i.e., Federal party/charter permit holders), NMFS is constrained to implementing measures that meet the conservation objectives of the FMP and Magnuson-Stevens Act rebuilding program requirements. As previously indicated, the no-action alternative for summer flounder was considered but rejected by the Council, and subsequently NMFS, on the grounds that it would not ensure that the 2008 mortality objectives would be met.

The remaining alternatives examined by the Council and forwarded for consideration by NMFS consisted of the preferred alternative of state-by-state conservation equivalency with a precautionary default backstop, and the non-preferred alternative of coastwide measures. These were alternatives 1 and 2, respectively, in the Council's EA/RIR/IRFA. These two alternatives were determined by the Council analyses to satisfy the 2008 conservation objectives for the recreational fishery, i.e., analysis indicated that implementation of either would constrain recreational landings within the 2008 recreational harvest limit. Therefore, either alternative recreational management system could be considered for implementation by NMFS, as the critical metric of satisfying the regulatory and statutory requirements would be met by either.

Next, NMFS considered the recommendation of both the Council and Commission. Both groups recommended implementation of state-by-state conservation equivalency with a precautionary default backstop. In response to NMFS request for more stringent analyses and changes in how conservation equivalency measures are calculated, the Commission further recommended the used of a performance-based adjustment to further increase the reduction required for the states of Rhode Island, Connecticut, New York, New Jersey, and Virginia for 2008. The conservation equivalency approach allows states some degree of flexibility in the specification of management measures, unlike the application of one set of uniform coastwide measures. The degree of flexibility available to states under conservation equivalency is constrained to a combined suite of minimum fish size, possession limit, and fishing season that will achieve the required percent reduction required for 2008 (i.e., achieve the conservation objectives). This provides the opportunity for states to construct measures that achieve the conservation objectives while providing a state-specific set of measures in lieu of the one-size-fits-all coastwide measure. States that fail to provide measures, or whose measures do not achieve the required reduction, are assigned the more restrictive precautionary default measures.

At this time, it is not possible to determine the precise economic impact on small entities under conservation equivalency. The specific measures adopted for each state were only made available to NMFS from the Commission on April 23, 2008, and were unavailable for analysis during this rulemaking. Because the recreational fisheries in many states will have begun by the time this rule is effective, NMFS has elected to forgo quantitative analysis of the specific conservation equivalency measures as implemented by the individual states as the need to have measures in place in a timely fashion outweighs the benefits of delaying publication of this rule to complete further analysis. However, economic impact is likely to be proportional to the level of landings reductions required for each individual state. As such, the greater percent reduction required for states that have both the initially required reduction as specified by the Council and the performance-based reduction required by the Commission (Table 4), have the potential for higher economic impacts on small entities in comparison to coastwide measures dependent on the configuration of management measures ultimately selected.

TABLE 4. 2008 CONSERVATION EQUIVALENCY STATE SPECIFIC INITIAL PERCENT REDUCTIONS, COMMISSION REQUIRED PERFORMANCE BASED ADJUSTMENTS, AND FINAL PERCENT REDUCTIONS.

State	Initial Percent Reduction Required under Framework Adjustment 2 to the FMP	Commission Performance-Based Reduction Factor	Final Percent Reduction Required by Commission
MA	0	0	0
RI	47.5	7.8	51.6
CT	28.7	1.9	30.1
NY	45.9	33.6	64.0
NJ	39.2	4.3	41.8
DE	41.8	0.0	41.8
MD	56.7	0.0	56.7
VA	13.9	8.9	21.5
NC	34.3	0.0	34.2

For NMFS to disapprove the Council's recommendation for conservation equivalency and substitute coastwide management measures, NMFS must reasonably demonstrate that the recommended measures are either inconsistent with applicable law or otherwise demonstrate that the conservation objectives of the FMP will not be achieved by implementing conservation equivalency. NMFS does not find the Council and Commission's recommendation to be inconsistent with the implementing regulations of the FMP found at § 648.100 or the Magnuson-Stevens Act. Furthermore, NMFS finds that the performance-based adjustment factor paired with the use of the predicted average fish weight for 2008 required by the Commission are meaningful demonstrations to improve the performance of conservation equivalency. These improvements, paired with the potential for inseason closure of the EEZ by NMFS, present a much higher likelihood that conservation equivalency will function in 2008 as designed and will ensure that the recreational harvest level will not be exceeded.

The use of coastwide management measures was considered by NMFS. In fact, as a number of commenters stated in response to the proposed rule, NMFS advocated for a coastwide approach in the early stages of the 2008 recreational fishery management measures development. The economic impacts on small entities under the coastwide measures management system would vary in comparison to the conservation equivalency system dependent on the specific state wherein the small entities operate. In the Council's provided analysis, closed seasons typically result in a higher economic impact to small entities than do increases in minimum fish sizes or reduction in possession limits. The reason for this is that angler success begins to decline at higher minimum fish size and higher possession limits, yielding lower return on the effectiveness of implementing such measures. Closed seasons, however, are unmistakable in their effectiveness as they permit no harvest irrespective of fish size or possession limit, provided there are no compliance issues. Closed seasons also are typically more easily enforceable. The interplay between the three management measures and the inability to quantitatively assess the impacts of the state's implemented conservation equivalency measures make definitive statements regarding impacts difficult to provide. Both fishery independent and dependent data suggests that larger summer flounder are less common in the southern portion of the management range; therefore, implementation of coastwide measures may have a more profound economic impact on small entities operating in the southern portion of the management area if the minimum fish size is set larger than fish that are typically available in southern states. Conservation equivalency is generally expected to mitigate the economic impact in states with lower required percent reductions for 2008 compared to the coastwide reduction of 36.3 percent. In those states, management measures can be tailored that suit the expressed needs of both small entities and other recreational fishery participants while achieving the required conservation equivalency percent reduction. Conversely, coastwide measures may yield lower economic impacts for states with the percent reductions greater than the total coastwide level of reduction required for 2008 by permitting smaller minimum fish sizes paired with slightly lower possession limits, and comparable fishing seasons than would be required for implemented under conservation equivalency.

However, NMFS is implementing the Council and Commission's recommended state-by-state conservation equivalency measures for the reasons previously stated: (1) The state-by-state conservation equivalency management system has been modified, by the Commission, from the previously utilized methodology that had yielded a poor performance record; and, (2) NMFS finds no compelling reason to disapprove the Council and Commission's recommended 2008 management system as the analysis provided by the Commission's Technical Committee demonstrates that the improved conservation equivalency system will provide a high likelihood that the 2008 recreational harvest limit will not be exceeded. To further ensure that the 2008 recreational harvest limit is not exceeded, NMFS is prepared to close the EEZ during the fishing season if harvest projections indicate that the 2008 recreational harvest limit may be exceeded before the end of the calendar year.

Scup alternatives. Similar to summer flounder, the options available for scup recreational management measures are constrained to selecting a suite of minimum fish size, possession limit, and fishing season measures that achieves the annual conservation objectives. In this case, the conservation objective is a level of recreational scup

landings that is at or below the 2008 scup recreational harvest level. Therefore, the measures available to mitigate the economic impact on small entities is constrained to selection of management measures that will permit the maximum amount of recreational landings while achieving the specified conservation objectives for the fishing season.

For 2008, a coastwide reduction in scup landings of 51.8 percent is necessary to achieve the conservation objective. The Council's EA/RIR/IRFA evaluated alternatives 1 and 2 for scup which would achieve this objective. The Council recommended, and NMFS has implemented, alternative 1 consisting of a 10.5–inch (26.67–cm) minimum fish size, a 15–fish possession limit, and a fishing season of January 1–February 29 and October 1–October 31 because it is projected to achieve a 53.2–percent reduction in scup recreational landings in 2008. Alternative 2, consisting of a 10.5–inch (26.67–cm) minimum fish size, a 15–fish possession limit, and a fishing season of January 1–February 29 and October 1–October 15, is projected to reduce landings by 60.5 percent from 2007 levels. The measures of this alternative are more restrictive than necessary to achieve the conservation objectives for 2008.

The four states where the majority (approximately 97 percent) of scup recreational landings occur--New York, Connecticut, Rhode Island, and Massachusetts--entered into a regional conservation equivalency program in state-waters through the Commission process. In addition, the majority of scup recreational landings come from state waters (93 percent). Thus, the economic impacts on the recreational scup fishery are likely to be further mitigated from the level analyzed by the Council in the EA/RIR/IRFA. It is not possible, nor required, to quantify the extent of the potential reduction in economic impact that occurs from the Commission's regional scup conservation equivalency management system as the system and its measures exist wholly outside the Federal system and occur exclusively in state waters.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as the small entity compliance guide was prepared and will be sent to all holders of Federal party/charter permits issued for the summer flounder, scup, and black sea bass fisheries. In addition, copies of this final rule and the small entity compliance guide are available from NMFS (see **ADDRESSES**) and at the following website: *http://www.nero.noaa.gov*.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 16, 2008.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.102, the first sentence is revised to read as follows:

§ 648.102 Time restrictions.

Unless otherwise specified pursuant to § 648.107, vessels that are not eligible for a moratorium permit under § 648.4(a)(3) and fishermen subject to the possession limit may fish for summer flounder from May 23 through September 1. ***

■ 3. In § 648.103, paragraph (b) is revised to read as follows:

§ 648.103 Minimum fish sizes.

* * * * *

(b) Unless otherwise specified pursuant to § 648.107, the minimum size for summer flounder is 19–inch (48.26–cm) TL for all vessels that do not qualify for a moratorium permit, and charter boats holding a moratorium permit if fishing with more than three crew members, or party boats holding a moratorium permit if fishing with passengers for hire or carrying more than five crew members.

* * * * *

■ 4. In § 648.105, the first sentence of paragraph (a) is revised to read as follows:

§ 648.105 Possession restrictions.

* * * * *

(a) Unless otherwise specified pursuant to § 648.107, no person shall possess more than two summer flounder in, or harvested from, the EEZ, unless that person is the owner or operator of a fishing vessel issued a summer flounder moratorium permit, or is issued a summer flounder dealer permit. * * *

* * * * *

■ 5. In § 648.107, paragraph (a) introductory text and paragraph (b) are revised to read as follows:

§ 648.107 Conservation equivalent measures for the summer flounder fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by Massachusetts through North Carolina for 2008 are the conservation equivalent of the season, minimum fish size, and possession limit prescribed in §§ 648.102, 648.103, and 648.105(a), respectively. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

* * * * *

(b) Federally permitted vessels subject to the recreational fishing measures of this part, and other recreational fishing vessels subject to the recreational fishing measures of this part and registered in states whose fishery management measures are not determined by the Regional Administrator to be the conservation equivalent of the season, minimum size, and possession limit prescribed in §§ 648.102, 648.103(b) and 648.105(a), respectively, due to the lack of, or the reversal of, a conservation equivalent recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission, shall be subject to the following precautionary default measures: Season - July 4 through September 1; minimum size - 20.0 inches (50.80 cm); and possession limit - two fish.

■ 6. In § 648.122, paragraph (g) is revised to read as follows:

§ 648.122 Season and area restrictions.

* * * * *

(g) *Time restrictions.* Vessels that are not eligible for a moratorium permit under § 648.4(a)(6), and fishermen subject to the possession limit, may not possess scup, except from January 1 through the last day of February, and from October 1 through October 31. This time period may be adjusted pursuant to the procedures in § 648.120.

■ 7. In § 648.124, paragraph (b) is revised to read as follows:

§ 648.124 Minimum fish sizes.

* * * * *

(b) The minimum size for scup is 10.5 inches (26.67 cm) TL for all vessels that do not have a moratorium permit, or for party and charter vessels that are issued a moratorium permit but are fishing with passengers for hire, or carrying more than three crew members if a charter boat, or more than five crew members if a party boat.

* * * * *

■ 8. In § 648.125, the first sentence in paragraph (a) is revised to read as follows:

§ 648.125 Possession limit.

(a) No person shall possess more than 15 scup in, or harvested from, the EEZ unless that person is the owner or operator of a fishing vessel issued a scup moratorium permit, or is issued a scup dealer permit. * * *

* * * * *

[FR Doc. E8–11601 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XI07

Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole by Vessels Participating in the Amendment 80 Limited Access Fishery in Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the first seasonal allowance of the 2008 halibut bycatch allowance specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), May 19, 2008, through 1200 hrs, A.l.t., July 1, 2008.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The first seasonal allowance of the 2008 halibut bycatch allowance specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery for the yellowfin sole fishery category in the BSAI is 214 metric tons as established by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008). See § 679.21(e)(3)(vi)(A) and § 679.91(d)(1) and (3).

In accordance with § 679.21(e)(3)(vi)(B) and § 679.21(e)(7)(v), the Administrator, Alaska Region, NMFS, has determined that the first seasonal allowance of the 2008 halibut bycatch allowance specified for the trawl yellowfin sole fishery category by vessels participating in the Amendment 80 limited access fishery in the BSAI will be caught. Consequently, NMFS is closing directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in the BSAI.

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

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for yellowfin sole by vessels participating in the Amendment 80 limited access fishery in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of May 16, 2008.

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

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

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

Dated: May 19, 2008.

Emily H. Menashes,

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

[FR Doc. 08–1287 Filed 5–19–08; 2:58 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 101
Friday, May 23, 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

Agricultural Marketing Service

7 CFR Part 1230

[No. AMS–LS–08–0038; LS–02–15]

Pork Promotion, Research, and Consumer Information Program: Submission of Information; Withdrawal of Proposed Rule

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Withdrawal of a proposed rule.

SUMMARY: This action withdraws a proposed rule published in the March 13, 2003 [68 FR 11996], issue of the **Federal Register**, which intended to add a section to the regulations implementing the Pork Promotion, Research, and Consumer Information Order (Order) that would require remitters of pork checkoff assessments, upon request by the Department of Agriculture (USDA), to submit to the Agricultural Marketing Service (AMS) the names, addresses, and any other information deemed necessary to identify persons from whom they collected assessments.

This information would have been used to establish the total number of pork producers and importers in the United States, from which AMS would determine the number of respondents necessary to meet a threshold requirement of 15 percent to conduct a referendum, as contained in the Pork Promotion, Research, and Consumer Information Act. Based upon further review and consideration, AMS has determined that the most accurate representation of total number of pork producers and importers would result from utilizing the most recent data published by USDA's National Agricultural Statistic Service (NASS) in its February 2008 ''Farms, Land in Farms, and Livestock Operations'' report to determine the total number of farm operations with hogs and pigs and the U.S. Customs and Border Protection (Customs) to determine the total number of importers who imported hogs, pigs, pork, or pork products.

DATES: This proposed rule is withdrawn as of May 23, 2008.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief, Marketing Programs Branch, Livestock and Seed Program, Agricultural Marketing Service, USDA, Room 2628–S, STOP–0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251; telephone (202) 720–1115; facsimile (202) 720–1125; or e-mail at *kenneth.payne@usda.gov*. This document can be viewed at *www.regulations.gov*.

SUPPLEMENTARY INFORMATION: The proposed rule would have added a section to the regulations implementing the Order to require remitters of pork checkoff assessments, upon request by the Department of Agriculture (USDA), to submit to the Agricultural Marketing Service (AMS) the names, addresses, and any other information deemed necessary to identify persons from whom assessments were collected. This action was deemed necessary in order to obtain the information to conduct a request for referendum for eligible producers and importers to determine if they favor a referendum on the Pork Checkoff Program. The information that would have been collected through this action was going to be used to establish the total number of pork producers and importers who had paid an assessment during a representative period established by USDA and would have been utilized in determining whether the 15 percent threshold requirement contained in the Act for conducting a referendum had been met. Further, that information could have been used in subsequent referenda to determine the number of eligible producers. The Request for Referendum is being conducted as a result of a settlement of a lawsuit entered into February 28, 2001, with USDA and the Michigan Pork Producers Association, Inc., et al. (Plaintiffs). Under the settlement agreement, USDA will conduct a Request for Referendum among eligible pork producers and importers to determine whether 15 percent of eligible producers and importers favor holding a referendum on the Pork Checkoff Program.

AMS requested comments on the proposed rule in the March 13, 2003 [68 FR 11996], issue of the **Federal Register**. The proposed rule would have required, upon request by USDA, remitters of pork checkoff assessments to submit to AMS the names, addresses, and any other information deemed necessary to identify persons from whom they collected assessments. Accordingly, a new section would have been added to the regulations that would have required this action in order to assist AMS in its administration and oversight of the Pork Checkoff Program. Ten comments were received on or before May 12, 2003. A full range of comments were received from a cross-section of the industry, with a number of comments suggesting a variety of ways to better identify the number of producers.

Upon further review, AMS determined that the most accurate information collection would result from utilizing the most recent data published by NASS in its February 2008 ''Farms, Land in Farms, and Livestock Operations'' report to determine the total number of farm operations with hogs and pigs and Customs to determine the total number of importers who imported hogs, pigs, pork, or pork products. Therefore, AMS is withdrawing the proposed rule and will instead publish a Notice of Request for Referendum. In addition, the public will be invited to submit comments on the new information collection.

Accordingly, the proposed rule published in the March 13, 2003 [68 FR 11996], issue of the **Federal Register** is hereby withdrawn.

Authority: 7 U.S.C. 4801–4819.

Dated: May 16, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–11555 Filed 5–22–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. APHIS–2007–0124]

Availability of a Risk Analysis Evaluating the Foot-and-Mouth Disease Status of Surrey County, England

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that a risk analysis has been prepared by the Animal and Plant Health Inspection Service concerning the foot-and-mouth disease status of Surrey County, England, and the related disease risks associated with importing ruminants and swine and the fresh meat and other animal products of ruminants and swine from Surrey County, England. This evaluation will be used as a basis for determining whether to relieve certain restrictions on the importation of those articles into the United States from Surrey County, England. We are making this evaluation available to the public for review and comment.

DATES: We will consider all comments that we receive on or before July 22, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0124* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2007–0124, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2007–0124.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Chip Wells, Senior Staff Veterinarian, Regionalization Evaluation Services Import Staff, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of certain animals and animal products into the United States in order to prevent the introduction of various animal diseases, including rinderpest and foot-and-mouth disease (FMD). Section 94.1 of the regulations lists regions of the world that are considered free of rinderpest and FMD. Section 94.11 lists regions of the world considered free of rinderpest and FMD but from which the importation of meat and other animal products into the United States is subject to additional restrictions because of those regions' proximity to or trading relationships with FMD-affected regions.

In an interim rule [1] effective and published in the **Federal Register** on January 30, 2008 (73 FR 5424–5426, Docket No. 2007–0124), we amended the regulations in § 94.1 to remove Surrey County, England, from the list of regions that are considered free of rinderpest and FMD. We also amended the regulations in § 94.11 to remove Surrey County, England, from the list of regions considered free of rinderpest and FMD but from which the importation of meat and other animal products of ruminants and swine into the United States is subject to additional restrictions. That action was necessary because, by September 30, 2007, a total of eight outbreaks of FMD in Surrey County, England, had been reported to the World Organization for Animal Health (OIE).

Epidemiological investigations and risk assessments conducted by the United Kingdom linked the source of the outbreaks in Surrey County with a probably accidental release of the FMD virus from a laboratory and vaccine production facility in Pirbright. Intensive surveillance demonstrated that the virus never spread outside of Surrey County. The United Kingdom and the European Commission removed all restrictions in Great Britain on December 31, 2007.

Although we removed Surrey County, England, from the list of regions of the world considered free of rinderpest and FMD, and the list of regions considered free of rinderpest and FMD but from which the importation of meat and other animal products into the United States is subject to additional restrictions, we recognized that the United Kingdom immediately responded to the detection of the disease by imposing restrictions on the movement of ruminants and swine and the fresh meat and other animal products of ruminants and swine within and from England and initiating measures to eradicate the disease. We stated that, because of the United Kingdom's efforts to ensure that FMD does not spread beyond its borders, we intended to reassess the situation in accordance with the standards of the OIE at a future date, and that as part of the reassessment process, we would consider all comments received during the comment period on the interim rule.

In this notice, we are announcing the availability for review and comment of a document titled ''APHIS Risk Analysis on Importation of Foot and Mouth Disease (FMD) Virus from Surrey County, England, in the United Kingdom.'' This evaluation examines the events that occurred during and after the outbreaks and assesses the risk associated with the resumption of importation of ruminants and swine and the fresh meat and other animal products of ruminants and swine from Surrey County, England. This risk analysis will serve as a basis for our determination whether to continue to prohibit the importation of ruminants and swine and the fresh meat and other animal products of ruminants and swine from Surrey County, England. We are making the risk analysis available for public comment for 60 days.

The risk analysis may be viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the risk analysis by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the analysis when requesting copies.

Authority: 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

[1] To view the interim rule and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0124.*

Done in Washington, DC, this 19th day of May 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–11659 Filed 5–22–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0590; Directorate Identifier 2008–NM–057–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes. This proposed AD would require repetitive inspections for cracks or fractures of the forward end attachment and the forward lower flange of the flap tracks of the trailing edge flaps, and corrective actions if necessary. For certain airplanes, this proposed AD would also require modifying the fail-safe links of the main carriage. This proposed AD results from a detailed structural analysis of the flap attach structural and fail-safe components, accomplished as a result of a dynamic stability and control analysis, which could not demonstrate continued safe flight and landing of the airplane after the loss of a trailing edge flap. We are proposing this AD to detect and correct cracks or fractures of the primary structural and fail-safe load paths of the inboard and outboard trailing edge flaps, which could result in the loss of a flap during takeoff or landing, reducing flightcrew ability to maintain the safe flight and landing of the airplane.

DATES: We must receive comments on this proposed AD by July 7, 2008.

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Gary Oltman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6443; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0590; Directorate Identifier 2008–NM–057–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

A detailed structural analysis of the flap attach structural and fail-safe components, accomplished as a result of a dynamic stability and control analysis, could not demonstrate continued safe flight and landing of the airplane after the loss of a trailing edge flap. This structural analysis showed that additional inspections and modifications should be accomplished to prevent the loss of a flap. For components where there is a fail-safe load path, the inspections were based on finding a fractured component within the fatigue life of the fail-safe component of the load path. For the main carriage fail-safe link load path, the analysis showed the components were not adequate to retain the flap in the case of a fracture of the carriage. These conditions, if not corrected, could result in the loss of a flap during takeoff or landing, reducing flightcrew ability to maintain the safe flight and landing of the airplane.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 747–57A2323, dated February 21, 2008. For all airplanes, the service bulletin describes procedures for repetitive general visual inspections for cracks or fractures of the forward end attachment of the flap tracks, fuse pin, and support fitting; repetitive detailed inspections for cracks or fractures of the forward lower flange of the flap tracks; and corrective actions if necessary. The corrective actions include replacing the flap track and the fail-safe strap if any crack or fracture is found in a flap track; replacing the fuse pin and fail-safe strap if any crack or fracture is found in a fuse pin; and replacing the support fitting if any crack or fracture is found in a support fitting. If no cracks are found, the general visual inspection is repeated during inspection of the flap track forward attachment, and after each replacement is done. For Groups 1 through 3 airplanes, the service bulletin describes procedures for modifying the fail-safe links of the main carriage by replacing the links, pins, and attachment hardware. The service bulletin also recommends contacting Boeing for repair data if a fractured support fitting is found.

The compliance time for the general visual inspection is within 6,000 total flight cycles on the flap track since new, or within 750 flight cycles, whichever occurs later. If no crack or fracture is found, the inspection is repeated at intervals not to exceed 750 flight cycles.

The compliance time for the detailed inspection is within 20,000 total flight cycles on the flap track since new, or within 1,500 flight cycles, whichever occurs later. If no crack or fracture is found, the inspection is repeated at

intervals not to exceed 1,500 flight cycles.

The compliance time for modifying the fail-safe links of the main carriage for Groups 1 through 3 airplanes is within 24 months after the date on the service bulletin.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Difference Between the Proposed AD and Service Information.''

Difference Between the Proposed AD and Service Information

The alert service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD would affect 190 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Part 1: Inspections	4	$80	$0	$320, per inspection cycle.	190	$60,800, per inspection cycle.
Part 3: Inspections	4	80	$0	$320, per inspection cycle.	190	$60,800, per inspection cycle.
Part 2: Modification for Groups 1–3 airplanes.	Between 3 and 7.	80	Between $212 and $7,934.	Between $452 and $8,494.	182	Between $82,264 and $1,545,908.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2008–0590; Directorate Identifier 2008–NM–057–AD.

Comments Due Date

(a) We must receive comments by July 7, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from a detailed structural analysis of the flap attach structural and fail-safe components accomplished as a result of a dynamic stability and control analysis, which could not demonstrate continued safe flight and landing of the airplane after the loss of a trailing edge flap. We are issuing this AD to detect and correct cracks or fractures of the primary structural and fail-safe load paths of the inboard and outboard trailing edge flaps, which could result in the loss of a flap during takeoff or landing, reducing flightcrew ability to maintain the safe flight and landing of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Repetitive Inspections/Corrective Actions

(f) For all airplanes: Except as provided by paragraph (h) of this AD; at the applicable times specified in paragraph 1.E. of Boeing Alert Service Bulletin 747–57A2323, dated February 21, 2008, inspect for cracks or fractures of the forward end attachment and

the forward lower flange of the flap tracks of the trailing edge flaps by doing all the actions specified in Parts 1 and 3 of the Accomplishment Instructions of the service bulletin; except as provided by paragraph (i) of this AD. Do all applicable corrective actions before further flight. Repeat the applicable inspection at the applicable time specified in paragraph 1.E. of the service bulletin.

Modification of Fail Safe Links of Main Carriage

(g) For Groups 1, 2, and 3 airplanes: Within 24 months after the effective date of this AD, replace the fail-safe links, pins, and attachment hardware in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2323, dated February 21, 2008.

Exception to Compliance Times

(h) Where Boeing Alert Service Bulletin 747–57A2323, dated February 21, 2008, specifies counting the compliance time from ''* * * the date on this service bulletin,'' this AD requires counting the compliance time from the effective date of this AD.

Exception to Corrective Actions

(i) If any fractured support fitting is found during any inspection required by this AD, and Boeing Alert Service Bulletin 747–57A2323, dated February 21, 2008, specifies to contact Boeing for appropriate action: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Gary Oltman, Aerospace Engineer, Airframe Branch, ANM–120S, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6443; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on May 16, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–11565 Filed 5–22–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0586; Directorate Identifier 2008–NM–043–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–400, –401 and –402 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

There was one reported failure of the elevator centering torsion spring. Investigation revealed that the tangs on the torsion spring had been bent due to difficulty encountered during installation of the elevator centering torsion spring on the horizontal stabilizer torque tube. The bending of the tangs on the torsion spring would degrade its durability and could lead to premature failure of the elevator centering torsion spring. A control rod disconnect between the elevator aft quadrant and the elevator Power Control Unit input torque tube, in combination with the loss or reduction in elevator centering capability, could result in a significant reduction in aircraft pitch control.

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

DATES: We must receive comments on this proposed AD by June 23, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Fabio Buttitta, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7303; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0586; Directorate Identifier 2008–NM–043–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2008–05R1, dated February 27, 2008. (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

There was one reported failure of the elevator centering torsion spring. Investigation revealed that the tangs on the

torsion spring had been bent due to difficulty encountered during installation of the elevator centering torsion spring on the horizontal stabilizer torque tube. The bending of the tangs on the torsion spring would degrade its durability and could lead to premature failure of the elevator centering torsion spring. A control rod disconnect between the elevator aft quadrant and the elevator Power Control Unit input torque tube, in combination with the loss or reduction in elevator centering capability, could result in a significant reduction in aircraft pitch control.

Corrective actions include replacing all elevator centering torsion springs with new elevator centering torsion springs. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Service Bulletin 84–27–31, dated April 27, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

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

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 42 products of U.S. registry. We also estimate that it would take about 7 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $1,746 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $96,852, or $2,306 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc. (Formerly de Havilland, Inc.): Docket No. FAA–2008–0586; Directorate Identifier 2008–NM–043–AD.

Comments Due Date

(a) We must receive comments by June 23, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model DHC–8–400, –401 and –402 airplanes, certificated in any category, having serial numbers 4001, 4003, 4004, and 4006 through 4081.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight Controls.

Reason

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

There was one reported failure of the elevator centering torsion spring. Investigation revealed that the tangs on the torsion spring had been bent due to difficulty encountered during installation of the elevator centering torsion spring on the horizontal stabilizer torque tube. The bending of the tangs on the torsion spring would degrade its durability and could lead to premature failure of the elevator centering torsion spring. A control rod disconnect between the elevator aft quadrant and the elevator Power Control Unit input torque tube, in combination with the loss or reduction in elevator centering capability, could result in a significant reduction in aircraft pitch control.

Corrective actions include replacing all elevator centering torsion springs with new elevator centering torsion springs.

Actions and Compliance

(f) Prior to the accumulation of 22,000 total flight hours, or within 5,000 flight hours after the effective date of this AD, whichever comes later, unless already done: Replace all

elevator centering torsion springs with new elevator centering torsion springs by incorporating Modsum 4–113482, in accordance with Bombardier Service Bulletin 84–27–31, dated April 27, 2007.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Fabio Buttitta, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7303; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2008–05R1, dated February 27, 2008, and Bombardier Service Bulletin 84–27–31, dated April 27, 2007, for related information.

Issued in Renton, Washington, on May 8, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–11566 Filed 5–22–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0585; Directorate Identifier 2008–NM–027–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747SP Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Boeing Model 747SP series airplanes. This proposed AD would require repetitive lubrication of the rudder tab hinges and repetitive replacement of the rudder tab control rods. This proposed AD results from reports of freeplay-induced vibration of the control surfaces on Boeing Model 727, 737, 757, and 767 airplanes. We are proposing this AD to prevent damage to the control surface structure during flight, which could result in loss of control of the airplane.

DATES: We must receive comments on this proposed AD by July 7, 2008.

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6426; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0585; Directorate Identifier 2008–NM–027–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received reports of freeplay-induced vibration of control surfaces on Boeing Model 727, 737, 757, and 767 airplanes. Excessive wear of components or interfaces allows excessive freeplay of the control surfaces and can cause unacceptable airframe vibration during flight. The potential for vibration of the control surface should be avoided because the point of transition from vibration to divergent flutter is unknown. Divergent flutter can cause damage to the control surface structure during flight. This condition, if not corrected, could result in loss of control of the airplane.

Although there have been no reports of freeplay-induced vibration of the rudder tabs for Model 747SP airplanes, the affected control surfaces on Boeing Model 727, 737, 757, and 767 airplanes and Boeing Model 747SP airplanes are similar in design. Therefore, all of these models might be subject to the identified unsafe condition.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 747–27–2447, dated January 17, 2008. The service bulletin describes procedures for repetitive lubrication of the rudder tab

hinges, and repetitive replacement of the rudder tab control rods. For airplanes on which BMS 3–33 grease is used to lubricate the rudder tab hinges, the compliance time for the first lubrication is within 9 months after the date on the service bulletin, and the repetitive interval is not to exceed 18 months thereafter. For airplanes on which BMS 3–33 grease is not used to lubricate the rudder tab hinges, the compliance time for the first lubrication is 9 months after the date on the service bulletin, and the repetitive interval is not to exceed 9 months thereafter. The compliance time for all airplanes for the first replacement of the rudder tab control rods is within 6,000 flight hours after the date on the service bulletin, and the repetitive interval is not to exceed 8,000 flight hours thereafter.

Other Relevant Rulemaking

The following ADs resulted from reports of freeplay-induced vibration of control surfaces on Boeing Model 727, 737, 757, and 767 airplanes.

On March 30, 2006, we issued AD 2006–07–23 (amendment 39–14550, 71 FR 18194, April 11, 2006) for all Boeing Model 757 airplanes. That AD requires repetitive measurements of the freeplay of each of the three power control units that move the rudder; repetitive lubrication of rudder components; and corrective actions if necessary. That AD resulted from a report of freeplay-induced vibration of the rudder. That AD explained that the potential for vibration of the control surface should be avoided because the point of transition from vibration to divergent flutter is unknown. We issued that AD to prevent excessive vibration of the airframe during flight, which could result in divergent flutter and loss of control of the airplane.

On June 15, 2006, we issued AD 2006–13–16 (amendment 39–14669, 71 FR 36481, June 27, 2006) for certain Boeing Model 727 airplanes. That AD requires repetitive measurements of the freeplay of the left and right outboard aileron balance tabs and of the upper and lower rudder tabs, and related investigative/corrective actions if necessary. That AD also requires repetitive lubrication of the hinge bearings and rod end bearings of the outboard aileron balance tabs. That AD resulted from reports of freeplay-induced vibration of the outboard aileron balance tabs and rudder tabs. We issued that AD to prevent excessive vibration of the airframe during flight, which could result in divergent flutter and loss of control of the airplane.

On September 28, 2006, we issued AD 2006–21–01 (amendment 39–14784, 71 FR 59368, October 10, 2006) for all Boeing Model 737 airplanes. That AD requires repetitive measurement of the freeplay of both aileron balance tabs; repetitive lubrication of the aileron balance tab hinge bearings and rod end bearings; and related investigative and corrective actions if necessary. That AD resulted from reports of freeplay-induced vibration of the aileron balance tab. That AD also explained that the potential for vibration of the control surface should be avoided because the point of transition from vibration to divergent flutter is unknown. We issued that AD to prevent excessive vibration of the airframe during flight, which could result in loss of control of the airplane.

On November 16, 2007, we issued AD 2007–24–08 (amendment 39–15274, 72 FR 67236, November 28, 2007), for all Boeing Model 767 airplanes. That AD requires repetitive measurements of the rudder freeplay and the elevator freeplay for each of the power control actuators that move the rudder and elevator, corrective and related investigative actions if necessary, and repetitive lubrications of the rudder and elevator components. For some airplanes, that AD also requires related concurrent actions. That AD also explained that the potential for vibration of the control surface should be avoided because the point of transition from vibration to divergent flutter is unknown. We issued that AD to prevent excessive vibration of the airframe during flight, which could result in loss of control of the airplane.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the(se) same type design(s). This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 7 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD. The average labor rate is $80 per work hour.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per product	Fleet cost
Lubrication	2	None	$160, per cycle	$1,120, per cycle.
Replacement	16	$39,511	$40,791, per cycle	$285,537, per cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

3. Will not have a significant economic impact, positive or negative,

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2008–0585; Directorate Identifier 2008–NM–027–AD.

Comments Due Date

(a) We must receive comments by July 7, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 747SP series airplanes.

Unsafe Condition

(d) This AD results from reports of freeplay-induced vibration of the control surfaces on Boeing Model 727, 737, 757, and 767 airplanes. We are issuing this AD to prevent damage to the control surface structure during flight, which could result in loss of control of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Repetitive Lubrication and Replacement

(f) At the applicable compliance time listed in Paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–27–2447, dated January 17, 2008, lubricate the rudder tab hinges and replace the rudder tab control rods with new control rods. Repeat the lubrication and replacement thereafter at the applicable repeat interval listed in paragraph 1.E., ''Compliance,'' of the service bulletin. Do all actions in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–27–2447, dated January 17, 2008. Where Boeing Special Attention Service Bulletin 747–27–2447, dated January 17, 2008, specifies a compliance time after the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Kathleen Arrigotti, Aerospace Engineer, Airframe Branch, ANM–120S, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6426; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on May 8, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–11567 Filed 5–22–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–25390; Directorate Identifier 2005–NM–224–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767 Airplanes

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

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: The FAA is revising an earlier proposed airworthiness directive (AD) for certain Boeing Model 767 airplanes. The original NPRM would have required repetitive inspections for cracking of the wing skin, and related investigative/corrective actions if necessary. The original NPRM resulted from reports of cracks found in the lower wing skin originating at the forward tension bolt holes of the aft pitch load fitting. This action revises the original NPRM by revising certain compliance times. We are proposing this supplemental NPRM to detect and correct cracking in the lower wing skin for the forward tension bolt holes at the aft pitch load fitting, which could result in a fuel leak and reduced structural integrity of the airplane.

DATES: We must receive comments on this supplemental NPRM by June 17, 2008.

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tamara Anderson, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6421; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this supplemental NPRM. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2006–25390; Directorate Identifier 2005–NM–224–AD'' at the beginning of your comments. We specifically invite

comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

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

Discussion

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an AD (the ''original NPRM'') for certain Boeing Model 767 airplanes. The original NPRM was published in the **Federal Register** on July 19, 2006 (71 FR 40948). The original NPRM proposed to require repetitive inspections for cracking of the wing skin, and related investigative/corrective actions if necessary.

Actions Since Original NPRM Was Issued

Since we issued the original NPRM, Boeing has issued Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007. The procedures in Revision 1 are essentially the same as those in Boeing Alert Service Bulletin 767–57A0097, dated September 29, 2005, which we referred to as the appropriate source of service information for accomplishing the actions proposed in the original NPRM. However, Revision 1 clarifies the compliance times to add a flight-hour component. The flight-hour times were inadvertently omitted from the original release of the service bulletin. Flight-hour compliance times take into account those airplanes that have long flights. We have revised this supplemental NPRM to include the clarified compliance times.

We have also added paragraph (n) to the supplemental NPRM to give credit for actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 767–57A0097, dated September 29, 2005.

Comments

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

Requests To Clarify Thresholds for Internal Inspections of the Wing Skin in Paragraph (g) of the Original NPRM

UPS and Japan Airlines (JAL) request that we clarify the thresholds for the internal inspections of the wing skin in paragraph (g) of the original NPRM. UPS asks that the statement ''prior to [as of] the effective date of this AD'' be removed from paragraphs (g)(1) and (g)(2) of the original NPRM. UPS states that the current phrases, ''prior to the effective date of this AD,'' and ''as of the effective date of this AD'' would require operators of airplanes on which one of the strut improvement program (SIP) service bulletins (Boeing Service Bulletins 767–54–0080, Revision 1, dated May 9, 2002; 767–54–0081, dated July 29, 1999, Revision 1, dated February 7, 2002; and 767–54–0082, dated October 28, 1999, Revision 1, dated November 4, 2004, or Revision 3, dated September 20, 2007) is accomplished after the effective date of the proposed AD to be inspected at 20,000 total aircraft cycles rather than 16,500 cycles from the accomplishment of the SIP service bulletin. UPS concludes that this is not the intent of Boeing Alert Service Bulletin 767–57A0097. Furthermore, UPS does not see any relevant reason for use of this statement in paragraph (g)(1) or (g)(2) of the original NPRM. JAL states that doing the SIP service bulletins is equivalent to performing the bolt open hole inspection in Part 2 of Boeing Alert Service Bulletin 767–57A0097.

We agree with the commenters that the wording in the original NPRM does not give credit for work done in accordance with the SIP service bulletins after the effective date of the proposed AD. We have revised paragraphs (g)(1) and (g)(2) of this supplemental NPRM to clarify this point.

Request To Change Inspection Threshold in Paragraph (h) of the Original NPRM

UPS requests that we change the inspection threshold in paragraph (h) of the original NPRM so that it is based on the preceding open-hole high frequency eddy current (HFEC) inspection method used. In that case, the threshold for the paragraph (h) inspections would be 16,500 flight cycles, rather than 3,000 flight cycles, from the last accomplishment of paragraph (g) of the NPRM. UPS agrees with the repetitive interval of 3,000 flight cycles as currently stated in paragraph (h) of the original NPRM.

We do not agree with the commenter that the threshold should be based on the preceding open-hole HFEC inspection method. The external inspection specified in Part 1 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, will miss cracks that are hidden by the fitting until the crack grows beyond the fitting. In particular, the Part 1 inspection will not detect large cracks growing aft that are hidden by the fitting. Also, there is a preload in the skin due to ''clamp-up stress'' from the bolts. These clamp-up stresses add to uncertainty in the analysis. The 3,000-flight-cycle threshold will allow for additional opportunities to detect possible cracks once they grow beyond the fitting. In addition, this rationale is the intent of the manufacturer, and this intent has been clarified in Revision 1 of the service bulletin. We have not changed this supplemental NPRM in this regard.

Request To Clarify the Airplane Effectivity in Paragraph (h) of the Original NPRM

UPS requests that we revise the following statement from paragraph (h) of the original NPRM: ''For all airplanes, regardless of whether Boeing Service Bulletins 767–54–0080, Revision 1, dated May 9, 2002; 767–54–0081, dated July 29, 1999; or 767–54–0082, dated October 28, 1999, have been accomplished * * *''. UPS says that this statement is both confusing and unnecessary and recommends that we introduce the paragraph by simply saying, ''For all airplanes: * * *''.

We agree that the cited text, beginning with the word ''regardless,'' is unnecessary, and that revising the paragraph effectivity to state, ''For all airplanes: * * *'' is more clear. We have revised paragraph (h) of this supplemental NPRM accordingly.

Requests To Clarify Intent of Repair Specified in Paragraph (i) of the Original NPRM

Boeing and JAL request that we change paragraph (i) of the original NPRM to make it more clear that:

- A freeze plug repair is not feasible to meet the requirements of paragraph (i) of the original NPRM. Boeing explains that although cracks found during the inspections required by paragraph (g) of the original NPRM can be repaired using a freeze plug as specified in paragraph (i) of the original NPRM, cracks found during the inspections required by paragraphs (f) and (h) of the original NPRM are too large to be repaired using freeze plugs.
- A freeze plug is not eventually required. Boeing explains, however, that the wording in paragraph (i) of the original NPRM implies it in the phrase, ''* * * until the freeze plug repair specified in paragraph (i) of this AD has been accomplished on both wings.''
- Only cracking that cannot be repaired by over-sizing the fastener hole to the limit provided in the service

bulletin must be repaired using the freeze plug method. JAL requests that we add specific wording to paragraph (i) of the original NPRM to make this clear.

We agree with the commenters' requests. Freeze plug repairs might not be necessary on both wings. It might be possible to remove small crack indications in accordance with Part 2 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007. We have revised paragraph (i) of this supplemental NPRM and added a new paragraph (j) to this supplemental NPRM to clarify the specified points, and we have re-identified the subsequent paragraphs.

Request to Revise ''Differences * * *'' Section

Boeing requests that we revise the fourth paragraph of the ''Differences between the Proposed AD and the ASB'' (alert service bulletin) section. Boeing specifically requests that we revise the sentence ''This proposed AD would require that any cracking found outside the limits of Part 1 of the ASB'' to instead refer to cracking outside the limits of Part 2 of the ASB. Boeing states that the NPRM incorrectly refers to Part 1.

We agree with Boeing that the reference is incorrect. However Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, clarifies the repair actions that should be taken. In addition, we have not retained in the supplemental NPRM the fourth paragraph in the section titled ''Differences between the Proposed AD and the ASB'' from the original NPRM, and therefore, we have not revised this supplemental NPRM in this regard.

Requests Regarding Service Information

The Modification and Replacement Parts Association (MARPA) requests that the service documents deemed essential to accomplishing the proposed action be: (1) Incorporated by reference into the regulatory instrument (the **Federal Register**), and (2) published in the docket management system (DMS). MARPA justifies the first request by stating that it is concerned that failure to incorporate essential service information could result in a court decision invalidating the AD. MARPA justifies the second request by stating that publishing the service information in the DMS would make those documents available to a new class of individuals that has emerged since the majority of aircraft maintenance is now performed by specialty shops instead of aircraft owners and operators. Owners and operators are provided with service information by the manufacturer, but specialty shops are not. MARPA adds that publishing electronically makes archaic the reason for incorporating by reference—to keep from expanding the **Federal Register** needlessly by publishing documents already in the hands of the affected individuals.

In regard to the commenter's request that service documents be made available to the public by publication in the **Federal Register**, we agree that incorporation by reference was authorized to reduce the volume of material published in the **Federal Register** and the *Code of Federal Regulations.* However, as specified in the Federal Register *Document Drafting Handbook,* the Director of the Office of the Federal Register (OFR) decides when an agency may incorporate material by reference. As the commenter is aware, the OFR files documents for public inspection on the workday before the date of publication of the rule at its office in Washington, D.C. As stated in the Federal Register *Document Drafting Handbook,* when documents are filed for public inspection, anyone may inspect filed documents during the OFR's hours of business. Further questions regarding publication of documents in the **Federal Register** or incorporation by reference should be directed to the OFR.

In regard to the commenter's request to post service bulletins on the Department of Transportation's (DOT's) DMS, effective September 30, 2007, DOT's DMS was replaced by the Federal Docket Management System (FDMS). We are currently in the process of reviewing issues surrounding the posting of service bulletins on the FDMS as part of an AD docket. Once we have thoroughly examined all aspects of this issue and have made a final determination, we will consider whether our current practice needs to be revised.

No change to this supplemental NPRM is necessary in response to this comment.

Explanation of Change to Paragraph (h) of the Original NPRM

Paragraph (h) of the original NPRM was one sentence. We have retained the same information, but divided it into paragraph (h), paragraph (h)(1), and paragraph (h)(2) to make the information more clear.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

The change discussed above, in the section titled ''Actions Since Original NPRM was Issued,'' expands the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

Differences Between This Supplemental NPRM and Boeing Service Bulletin 767–57A0097, Revision 1

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization whom we have authorized to make those findings.

Operators should also note that, although the Accomplishment Instructions of the service bulletin describe procedures for submitting a report of damage found, this proposed AD would not require that action.

Costs of Compliance

There are about 918 airplanes of the affected design in the worldwide fleet, and about 387 airplanes on the U.S. Registry. The following table provides the estimated costs, at an average labor rate of $80 per hour, for U.S. operators to comply with this supplemental NPRM.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Fleet cost
Repetitive inspections, per inspection cycle (Part 1).	8	None	$640, per inspection cycle	$247,680.
Inspection, rework, and bolt installation (Part 2).	8	Between $303 and $12,716	Between $943 and $13,356	Between $364,941, and $5,168,772.
Repetitive inspections for certain airplanes (Part 4).	4	None	$320, per inspection cycle	$123,840, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2006–25390; Directorate Identifier 2005–NM–224–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by June 17, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category; as identified in Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007.

Unsafe Condition

(d) This AD results from reports of cracks found in the lower wing skin originating at the forward tension bolt holes of the aft pitch load fitting. We are issuing this AD to detect and correct cracking in the lower wing skin for the forward tension bolt holes at the aft pitch load fitting, which could result in a fuel leak and reduced structural integrity of the airplane.

Compliance

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

External Inspections of the Wing Skin

(f) For airplanes specified as Group 1, Configuration 1, 2, 3, or 6; Group 2, Configuration 1, 2, 3, or 6; and Group 3, Configuration 1 or 3, as specified in Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007: At the later of the times specified in paragraph (f)(1) or (f)(2) of this AD, perform the detailed inspection and the external high frequency eddy current (HFEC) or dye penetrant inspections for cracking as specified in Part 1 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007. Repeat at intervals not to exceed 3,000 flight cycles or 12,000 flight hours, whichever occurs first, until the actions required by paragraph (g) or (j) of this AD are accomplished.

(1) Prior to the accumulation of 10,000 total flight cycles or 30,000 total flight hours, whichever occurs first.

(2) Within 3,000 flight cycles or 12,000 flight hours after the effective date of this AD, whichever occurs first.

Internal Inspections of the Wing Skin

(g) For airplanes specified in paragraphs (g)(1) and (g)(2) of this AD: Perform the bolt open-hole inspections for cracking in accordance with Part 2 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, at the times specified in paragraphs (g)(1) or (g)(2) of this AD, as applicable, until the requirement of paragraphs (h) or (j)(1) of this AD are accomplished. Doing the actions in this paragraph terminates the requirements of paragraph (f) of this AD.

(1) For airplanes on which the modifications of the nacelle strut and wing structure specified in any service bulletin listed in Table 1 of this AD have been done: Do the inspection at the later time specified in paragraph (g)(1)(i) and (g)(1)(ii) of this AD. Repeat the inspections at intervals not to exceed 16,500 flight cycles or 65,000 flight hours, whichever occurs first.

(i) Within 16,500 flight cycles or 65,000 flight hours, whichever occurs earlier, after accomplishment of a service bulletin identified in Table 1 of this AD.

(ii) Within 3,000 flight cycles or 12,000 flight hours after the effective date of this AD, whichever occurs first.

TABLE 1.—THRESHOLD SERVICE BULLETINS

Boeing Service Bulletin	Revision	Dated
767–54–0080	Original	October 7, 1999.
767–54–0080	1	May 9, 2002.
767–54–0081	Original	July 29, 1999.
767–54–0081	1	February 7, 2002.
767–54–0082	Original	October 28, 1999.
767–54–0082	1	November 4, 2004.
767–54–0082	3	September 20, 2007.

(2) For airplanes on which the modifications of the nacelle strut and wing structure specified in any service bulletin listed in Table 1 of this AD have not been done: Do the inspection at the later of the times specified in paragraph (g)(2)(i) and (g)(2)(ii) of this AD. Repeat the inspections at intervals not to exceed 16,500 flight cycles or 65,000 flight hours, whichever occurs first.

(i) Before the accumulation of 20,000 total flight cycles or 60,000 total flight hours, whichever occurs earlier.

(ii) Within 72 months after the effective date of this AD.

Acceptable Method of Compliance With Paragraph (g) of this AD

(h) For all airplanes: Doing the actions in both paragraphs (h)(1) and (h)(2) of this AD is an acceptable method of compliance for the repetitive inspection requirements of paragraph (g) of this AD after the initial paragraph (g) inspection is accomplished.

(1) Accomplishing the inspections specified in Part 1 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, within 3,000 flight cycles or 12,000 flight hours, whichever occurs first, after the accomplishment of the most recent inspection done in accordance with paragraph (g) of this AD (Part 2 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007).

(2) Repeating the inspections specified in Part 1 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, at intervals not to exceed 3,000 flight cycles or 12,000 flight hours, whichever occurs first.

Repair of Cracking

(i) If cracking is found during any inspection required by paragraph (f) or (h) of this AD: Before further flight, repair in accordance with the procedures specified in paragraph (o) of this AD.

(j) If cracking is found during any inspection required by paragraph (g) of this AD: Before further flight, oversize the fastener hole in accordance with Part 2, of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, except as provided by paragraphs (j)(1) and (j)(2) of this AD.

(1) If any cracking cannot be removed by oversizing the fastener hole in accordance with Part 2 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, before further flight, accomplish the freeze plug repair in accordance with Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, except as provided by paragraph (j)(2) of this AD. Accomplishing the freeze plug repair ends the repetitive inspections required by paragraphs (f) and (g) of this AD for the repaired wing only.

(2) If any cracking is outside the limits specified for the freeze plug repair in Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, before further flight, repair in accordance with the procedures specified in paragraph (o) of this AD.

Repetitive Inspections Required After Freeze Plug Repair

(k) For airplanes on which of the requirements of paragraph (j)(1) of this AD have been accomplished, perform the repetitive inspections specified in paragraphs (k)(1) and (k)(2) of this AD at the times specified.

(1) At the later time in paragraph (k)(1)(i) or (k)(1)(ii) of this AD: Accomplish the external inspections specified in Part 1 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007. If any cracking is found during any inspection required by this paragraph, before further flight, repair in accordance with the procedures specified in paragraph (o) of this AD. Repeat the external inspections at intervals not to exceed 3,000 flight cycles or 12,000 flight hours, whichever occurs earlier.

(i) Prior to the accumulation of 37,500 total flight cycles or 90,000 total flight hours, whichever occurs earlier.

(ii) Within 18 months after accomplishment of the freeze plug repair specified in Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007.

(2) At the later of the times specified in paragraph (k)(2)(i) or (k)(2)(ii) of this AD: Perform an internal HFEC for cracking, in accordance with Part 4 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007. If any cracking is found during any inspection required by this paragraph, before further flight, repair in accordance with the procedures specified in paragraph (o) of this AD. Repeat the inspections at intervals not to exceed 12,000 flight cycles or 48,000 flight hours, whichever occurs earlier.

(i) Prior to the accumulation of 37,500 total flight cycles or 90,000 total flight hours, whichever occurs earlier.

(ii) Within 72 months after accomplishment of the freeze plug repair specified in Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007.

Repair of Certain Cracking

(l) If any cracking is found during any inspection required by this AD, and Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, specifies to contact Boeing for appropriate action: Before further flight, repair the cracking using a method approved in accordance with the procedures specified in paragraph (o) of this AD.

No Reporting Requirement

(m) Although Boeing Service Bulletin 767–57A0097, Revision 1, dated October 18, 2007, specifies to submit certain information to the manufacturer, this AD does not include that requirement.

Credit for Actions Accomplished Previously

(n) Actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin 767–57A0097, dated September 29, 2005, are acceptable for compliance with the corresponding requirements of this AD.

Alternative Methods of Compliance (AMOCs)

(o)(1) The Manager, Seattle ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on May 16, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–11591 Filed 5–22–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 151

[Docket No. USCG–2004–19621]

RIN 1625–AA89

Dry Cargo Residue Discharges in the Great Lakes

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking and availability of Draft Environmental Impact Statement.

SUMMARY: The Coast Guard proposes to amend its regulations in accordance with a congressionally approved policy that allows the discharge of non-toxic and non-hazardous bulk dry cargo residues like limestone, iron ore, and coal in limited areas of the Great Lakes. New requirements for recordkeeping would be added and carriers would be encouraged to adopt voluntary control measures for reducing discharges. Discharges would be prohibited in certain special areas where they are now allowed. In addition, the Coast Guard announces the availability of the Draft Environmental Impact Statement prepared in support of the proposed rule.

DATES: Comments and related material must reach the Docket Management Facility on or before July 22, 2008. Comments sent to the Office of Management and Budget (OMB) on collection of information must reach OMB on or before July 22, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2004–19621 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov*.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on the Draft Environmental Impact Statement (DEIS), please contact Mr. Greg Kirkbride, U.S. Coast Guard, telephone 202–372–1479 or e-mail *Gregory.B.Kirkbride@uscg.mil*. If you have questions on this proposed rule, call LT Heather St. Pierre, U.S. Coast Guard, telephone 202–372–1432, e-mail *Heather.J.St.Pierre@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2004–19621), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time, click on ''Search for Dockets,'' and enter the docket number for this rulemaking (USCG–2004–19621) in the Docket ID box, and click enter. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

C. Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov*.

D. Public Meeting

We plan to hold one public meeting before July 22, 2008. The location and date of the meeting will be announced in a subsequent **Federal Register** notice.

II. Abbreviations

CFR United States Code of Federal Regulations
DCR Dry Cargo Residue
DEIS Draft Environmental Impact Statement
DHS Department of Homeland Security
DOT Department of Transportation
IEP Interim Enforcement Policy
NAICS North American Industry Classification System
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
RFA Regulatory Flexibility Act
SBA United States Small Business Administration

III. Background and Purpose

A substantial portion of Great Lakes shipping involves ''bulk dry cargos'': Principally limestone, iron ore, and coal, but also lesser quantities of other substances like cement and salt. During ship loading or unloading operations, small portions of these cargos often fall on ship decks or within ship unloading tunnels. This fallen dry cargo residue (DCR) can contaminate other cargos or pose safety risks to crew members. Traditionally, Great Lakes carriers have managed DCR by periodically washing both the deck and cargo unloading tunnels with water in a practice

commonly known as ''cargo sweeping.'' In order to reduce costs and minimize in-port time, ships typically conduct this cargo sweeping underway while transiting between ports, and the water and DCR together is washed off the ship and into the lake.

Under Coast Guard regulations that implement the Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*, DCR is an operational waste and constitutes garbage, the discharge of which into the navigable waters of the United States is prohibited. If these regulations were strictly enforced on the Great Lakes, they would put an end to the practice of cargo sweeping. However, since 1993, Great Lakes ships have operated under a Coast Guard ''interim enforcement policy'' (IEP) that allows ''incidental discharges'' of non-toxic and non-hazardous DCR on the Great Lakes. The IEP allows cargo sweeping only in defined waters, most of which are relatively deep and far from shore. Additionally, the IEP prohibits or restricts discharges in special areas that are considered environmentally sensitive.

In 1998, Congress directed that the Coast Guard ''shall continue to implement and enforce'' the IEP through September 2002 (Pub. L. 105–383, sec. 415). This mandate was renewed in 2000 and again in 2004 (Pub. L. 106–554, sec. 1117, and Pub. L. 108–293, sec. 623). The current (1997) version of the IEP appears in the docket for this rulemaking as Document ID USCG–2004–19621–0031.

In 2000, Congress passed Public Law 106–554, extending the IEP through September 2004. The 2000 legislation authorized but did not require the Coast Guard to adopt regulations consistent with the IEP. It also required us to study the IEP's effectiveness. Our study, available in the docket for this rulemaking as Document ID USCG–2004–19621–0010, recommended continuing the IEP, but noted the lack of available data and also recommended that the Coast Guard perform an environmental assessment of the IEP's long term effects.

In 2004, Congress again extended the IEP, this time until September 30, 2008. Section 623 of Public Law 108–293 gave the Coast Guard authority to regulate the discharge of DCR on the Great Lakes, notwithstanding any other law. The Coast Guard interprets this broad grant of authority to include the authority to regulate any operation, on water or on shore, related to the loading, transfer, or unloading of dry bulk cargo, or to cargo sweeping or other discharge of dry bulk cargo residue, on the Great Lakes. All of these operations relate to and are part and parcel of the discharge of dry bulk cargo, as contemplated by the statute. The statute also required the Coast Guard to begin the environmental analysis necessary to support new regulations, and we are now announcing the availability, in the docket, of the Draft Environmental Impact Statement (DEIS) prepared in accordance with that mandate. House Report 108–617, the conference report prepared in support of the 2004 legislation, states: ''It is expected that the [IEP] will be made permanent or replaced with an alternative regime that appropriately balances the needs of maritime commerce and environmental protection * * *''

On January 13, 2004, the Coast Guard announced in the **Federal Register** (69 FR 1994) that, if we could not promulgate new regulations before the expiration of congressional authorization for the IEP, we would begin enforcing a zero discharge policy on the Great Lakes as soon as the IEP expires. Enforcement of such a policy would end the practice of cargo sweeping on the Great Lakes. This could cause economic hardship and require a significant expenditure of Coast Guard resources. We are reluctant to impose such costs if there is no meaningful offsetting benefit to the environment. Therefore, in exercising our regulatory authority over Great Lakes DCR discharges, we seek an appropriate balance, as Congress intended, between commercial and environmental considerations. We also seek to avoid or minimize any gap during which enforcement of a zero discharge policy takes place by default.

IV. Discussion of Proposed Rule

In this NPRM, we propose a rule to replace the IEP. The DEIS now available for public review indicates that allowing the practice of cargo sweeping to continue in the short term (six to 10 years) would result only in minor indirect impacts on the Great Lakes. Therefore, the proposed rule would allow U.S. and foreign carriers conducting dry bulk cargo operations in the U.S. waters of the Great Lakes to continue sweeping non-toxic and non-hazardous DCR into most of the areas where they are currently allowed to do so under the IEP.

We remain concerned that the potential for risk from any practice, no matter how benign it appears to be, may increase over time. Beyond the short term of six to 10 years, the Coast Guard may need to take additional regulatory action to offset any risk from the indefinite continuation of cargo sweeping. No matter how minor that risk may be, proper environmental stewardship may require us to take additional steps to reduce the environmental impact of continued DCR discharges. For instance, we may need to mandate the use of control measures to further reduce the quantity of any incidental amounts of non-toxic and non-hazardous DCR being swept. Therefore, upon publication of the proposed final rule, we would simultaneously announce the opening of a new rulemaking, to consider this and other possible regulatory methods for addressing the long term impact of continued DCR discharges.

The Coast Guard intends to complete ongoing research on the economic costs and benefits of various control measures for reducing DCR. This research is critical because, although it is known that many control measures are in voluntary use, and appear to have a beneficial result in reducing DCR and cargo sweeping, almost nothing is known about the effectiveness of specific measures, in specific settings, or about the cost to implement those measures. We would also complete research on whether the geographical boundaries of the areas where cargo sweeping is allowed by the IEP require any modification. We estimate that this research will take up to three more years. Once our research is completed, we will be in a position to consider regulatory changes intended to minimize any long term impacts of cargo sweeping.

The proposed rule, subject to comments from the public, would modify the IEP's provisions in three key ways. First, we would encourage industry to voluntarily adopt control measures for reducing the accumulation of DCR and the amount of DCR that is swept overboard. Second, we would impose new recordkeeping requirements on carriers. Third, we would extend the protection against DCR sweeping that the IEP gives to areas considered ''special'' because they contain wildlife refuges, designated protection areas, or other habitats that are especially sensitive environmentally. These modifications are discussed in more detail in the following paragraphs.

A. Control Measures

The proposed rule would encourage U.S. and foreign carriers conducting dry bulk cargo operations on the Great Lakes to make voluntary use of measures to control and reduce the amount of DCR that falls on a ship's deck or within a ship's unloading tunnels and that ultimately may be swept into the Great Lakes. In the DEIS, we have identified

many possible control measures, some of which are already in use. Some of these measures are used onboard the ship, while others are used by the shoreside facilities where the ship loads or unloads its cargo. These control measures range from simply using tarps to collect DCR so that it can be returned to cargo holds, to sophisticated loading and unloading equipment designed to prevent DCR from falling in the first place. The economic benefit of reducing DCR accumulation or from returning DCR to cargo holds should help offset the cost of any proposed control measures.

Conceivably, future Coast Guard regulations could impose additional restrictions on the practice of cargo sweeping on the Great Lakes. For example, we could condition our allowance of discharges upon a carrier's use of control measures to reduce the amount of DCR accumulated and the amount of DCR swept overboard. If future regulations require the use of control measures other than those that a carrier voluntarily employs beforehand, among other potential benefits the Coast Guard could credit the carrier for its proactive experimentation with voluntary control measures and provide a phase-in period for implementation of the required measures. Data provided by carriers who voluntarily make use of shipboard or shoreside control measures should help us determine which measures are effective and which should be required, if any.

B. Recordkeeping

The proposed rule would require foreign carriers conducting dry bulk cargo operations on the U.S. waters of the Great Lakes, and U.S. carriers conducting those operations anywhere on the Great Lakes, to observe new recordkeeping requirements. Many carriers already voluntarily compile limited information on their cargo sweepings. However, the proposed recordkeeping requirements would apply not only to all cargo sweeping events, but also to every bulk dry cargo loading or unloading operation, whether or not the loading or unloading operation is followed by a cargo sweeping. These records, when reported to the Coast Guard, will give us a more comprehensive picture of what causes DCR accumulation, the conditions under which DCR is swept overboard, and the shipboard and shoreside control measures that reduce DCR accumulation and the amount swept overboard.

We propose that records be kept on a standard form and that carriers record information about:

- Cargo handled;
- Shoreside facilities involved in loading and unloading;
- Control measures used by the facility or by the ship;
- Time needed to implement control measures;
- Estimated volume of DCR resulting from each loading or unloading; and
- Date, time, ship location and speed during each sweeping event.

Under the proposed rule, the need for recordkeeping would vary depending on the ship's nationality and whether operations are conducted in U.S. or Canadian waters. The following examples illustrate how these variables would affect the need for recordkeeping:

Example 1: Canadian ship loads cargo in Canadian waters and sweeps DCR into Canadian waters—no recordkeeping required.

Example 2: Canadian ship loads cargo in Canadian waters and sweeps DCR into U.S. waters—recordkeeping required for the U.S. sweeping event, but not for the Canadian loading event.

Example 3: U.S. ship loads cargo in U.S. waters and sweeps DCR into U.S. waters—recordkeeping required both for the loading event and for the sweeping event.

Example 4: U.S. ship loads cargo in U.S. waters and sweeps DCR into Canadian waters (if allowed by Canadian law)—recordkeeping required both for the loading event and for the sweeping event.

Example 5: Canadian ship loads cargo in U.S. waters and sweeps DCR into Canadian waters—recordkeeping required for the U.S. loading event but not for the Canadian sweeping event.

Example 6: U.S. ship loads cargo anywhere in the Great Lakes without any accumulation of DCR—recordkeeping required for the loading event and to document that there was no sweeping.

We propose to require that carriers keep these records onboard for at least two years, and to submit copies of the records to the Coast Guard on a quarterly basis. This recordkeeping requirement would ensure that, while we continue our analysis of the costs and benefits associated with particular control measures, we would receive up-to-date information about these measures that can be included in our analysis.

C. Special Areas

The proposed rule would extend the IEP's restrictions against discharges in 13 areas considered ''special'' because they contain wildlife refuges, designated protection areas, or other habitats that are especially sensitive environmentally. In seven of those 13 areas, the IEP already prohibits all discharges. However, the IEP allows some DCR sweeping in six of the 13 areas. DCR sweeping historically has been allowed in the Detroit River National Wildlife Refuge in Lake Erie, portions of the Northern Refuge in Lake Michigan, and the Thunder Bay National Marine Sanctuary in Lake Huron. Limestone and clean stone can be swept in Green Bay (Lake Michigan), and in the Isle Royale National Park in Lake Superior. In the Western Basin of Lake Erie, the IEP allows limestone and clean stone sweepings, and also allows carriers on certain routes to sweep iron ore, coal, and salt DCR over the dredged navigation channels between Toledo Harbor Light and Detroit River Light.

The DEIS indicates that DCR sweepings have a minor environmental impact in these six special areas, which with the exception of the Western Basin's dredged channels, can be mitigated by prohibiting discharges. In most cases, sweeping could be prohibited in these six areas without a significant adverse effect on ship operations or safety, because ships would merely have to refrain from sweeping until they exit the special area. We believe there may be a few limestone or clean stone ships, operating in Green Bay and in the Western Basin, which never leave those areas. For those few ships, a prohibition of limestone or clean stone DCR discharges anywhere in Green Bay or the Western Basin could pose an extreme hardship. Exception of those few ships from the prohibition could relieve them from what would otherwise be a heavy regulatory burden. We specifically request comments related to this proposed exception, its limits, and the actual impact to shipping operations if we do not include the exception in our regulations.

Accordingly, in the proposed rule we would prohibit DCR discharges anywhere in the six special areas, with two exceptions. First, we propose retaining the IEP's limited exception for iron ore, coal, and salt DCR sweepings in Lake Erie's Western Basin because the DEIS indicates that prohibiting those sweepings would have no mitigating impact. Second, we propose that the prohibition of limestone or clean stone sweepings in Lake Michigan's Green Bay or in Lake Erie's Western Basin would not apply to ships that carry those substances exclusively within either of those two areas, for the reasons discussed in the preceding paragraph.

V. Regulatory Evaluation

A. Executive Order 12866

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and

does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

There is very little cost involved with requiring vessels to keep records of their bulk dry cargo residue sweepings and to make those records available to the Coast Guard. Moreover, many vessel operators already record this information voluntarily. We are also encouraging and not requiring the use of control measures to reduce the amount of residue swept into the Great Lakes.

1. DCR Recordkeeping Costs

The new recordkeeping provisions would require vessel operators to maintain logs to show which bulk dry cargoes are loaded, unloaded, and swept, when they are swept, how they are swept, how much is swept, what control measures, if any, are in place, and where sweepings take place. During the 2006 shipping season, 55 U.S.-flag vessels carrying dry-bulk cargos operated on the Great Lakes.

There are three types of responses. The first type is an entry on the form each time the vessel loads, unloads, or sweeps. Each loading and unloading operation and each sweeping event counts as a separate entry. Each of the 55 U.S.-flag dry cargo vessels operating on the Great Lakes makes an average of 60 trips each season. A trip is defined as a vessel going from one port to another. We assume that at each port, a vessel either loads or unloads cargo. Each trip is marked by one loading and one unloading operation, and sweeping occurs for 75 percent of the trips, resulting in a total of 2.75 recordings per trip. Therefore, we estimate that there will be approximately 9,075 (= 60 trips/vessel/season * 2.75 entries * 55 vessels) entries annually. It is anticipated the recordkeeping would be done by a person comparable to a Lieutenant with a loaded wage rate of $61 per hour, or $1.02 per minute, using year 2006 rates. The loaded wage rate reflects the full labor cost the employer pays and includes employee benefits such as insurance and vacation. We assume that each entry takes 5 minutes to complete. This equals a total of 45,375 minutes to complete all entries for the year. Therefore, the cost is $5.10 ($1.02/minute * 5 minutes) per entry, and the annual total cost for all entries is $46,282.50 (= 9,075 entries * $5.10/entry).

The second type of response is certification of a form by the vessel's Master. Each vessel makes 165 (= 60 trips * 2.75 entries/trip) entries per year. Each form is used to record 7 entries. Therefore, each of the 55 vessels completes 24 (= 165 entries/vessel/year ÷ 7 entries/form) forms per year to be certified by the vessel's Master. This equals 1,320 (= 24 forms/vessel/year * 55 vessels) total certifications per year. A Master would be equivalent to a Captain, with a loaded wage rate of $115 per hour, or $1.92 per minute, using year 2006 rates. We assume it takes a Master 5 minutes to certify each form. Therefore, it costs $9.60 (= 5 minutes/form * $1.92/minute) for a Master to certify one form. Since each vessel certifies 24 forms per year, the cost of certification by the vessel's Master per vessel is $230.40 (= $9.60/form * 24 forms) annually. Since there are 55 vessels, the annual burden of the certification is 6,600 (= 5 minutes/form * 24 forms/vessel * 55 vessels) minutes, and the total annual cost of the certification is $12,672 (= 6,600 minutes * $1.92/minute) for the entire U.S. fleet.

The third type of response is the quarterly submission of the forms to the Coast Guard. There are 220 submissions per year (= 55 vessels * 4 submissions/year/vessel). We assume that it takes each vessel 5 minutes to submit all completed forms for the quarter. Since there are 220 submissions per year, the total annual submission burden for the entire fleet is 1,100 minutes (= 220 submissions * 5 minutes), or $1,122 (= 1,100 minutes * $1.02/minute), assuming submissions are done by a person comparable to a Lieutenant, with a wage rate of $1.02 per minute, using year 2006 rates.

Therefore, the estimated total annual undiscounted cost of the proposed new recordkeeping requirement is $60,077 (= $46,283 recording cost + $12,672 Master certification cost + $1,122 submission cost) for the entire U.S. fleet. With discounting, the cost of the recordkeeping requirement would be $58,327 discounted at 3 percent and $56,147 discounted at 7 percent. The ten-year undiscounted cost of the recordkeeping requirement is $600,770; $512,469 discounted at 3 percent; and $421,956 discounted at 7 percent.

Table 1 below summarizes the ten-year undiscounted cost of the recordkeeping requirement, as well as the ten-year cost discounted at 7 percent and at 3 percent.

TABLE 1.—TOTAL TEN-YEAR COST OF DCR RECORDKEEPING FOR U.S. FLEET

Year	Undiscounted cost	Present value cost (7%)	Present value cost (3%)
2009	$60,077	$56,147	$58,327
2010	60,077	52,474	56,628
2011	60,077	49,041	54,979
2012	60,077	45,832	53,378
2013	60,077	42,834	51,823
2014	60,077	40,032	50,314
2015	60,077	37,413	48,848
2016	60,077	34,965	47,425
2017	60,077	32,678	46,044
2018	60,077	30,540	44,703
Total	600,770	421,956	512,469

The proposed rule would also require foreign carriers to keep records of loading and unloading at U.S. ports and to keep records of any DCR sweepings that are conducted while in U.S. waters of the Great Lakes. There are 33 Canadian vessels, each making an average of 42 trips per year into U.S. ports on the Great Lakes. There are 186 non-Canadian foreign vessels, each making an average of 4 trips per year into U.S. ports on the Great Lakes. We assume that a foreign vessel that makes a U.S. port call in the Great Lakes either loads or unloads cargo at a U.S. port. We also use the worst-case assumption that these foreign vessels sweep DCR into U.S. waters of the Great Lakes three-quarters of the time the vessels are in U.S. waters. Under these assumptions,

each of these foreign vessels makes 1.75 recordings per trip.

Each Canadian vessel makes 73.5 (= 42 trips * 1.75 entries) recordings per year. Since there are 33 Canadian vessels, the total number of entries per year by Canadian vessels is estimated to be 2,426 (= 73.5 recordings * 33 vessels) entries. Assuming it takes an average of 5 minutes to complete each entry, it would take approximately 12,130 (= 2,426 entries * 5 minutes) minutes to complete all entries. Using a wage rate of $1.02 per minute, the recordings would cost Canadian carriers a total of $12,373 (= 12,130 minutes * $1.02/minute). Since each vessel makes 73.5 entries per year, and each form is used to record 7 entries, this equals 11 (= 73.5 entries/vessel/year ÷ 7 entries/form) forms a year per vessel. Each of the 33 vessels completes 11 forms per year to be certified by the vessel's Master. This equals 363 (= 11 forms/vessel/year * 33 vessels) total certifications per year. We assume it takes a Master 5 minutes to certify each form. Therefore, it takes 1,815 (= 363 certifications * 5 minutes) minutes to certify all forms for the year. Using a Master wage rate of $1.92 per minute, the total cost of Master certification is $3,485 (= 1,815 minutes * $1.92/minute). In addition, there are a total of 132 (= 33 Canadian vessels * 4 submissions/vessel/year) submissions per year. We assume it takes each vessel 5 minutes to submit all completed forms for the quarter. Since there are 132 submissions per year, the total annual submission burden for the entire fleet of Canadian vessels is 660 (= 132 submissions/year * 5 minutes) minutes, or $673 (= 660 minutes * $1.02/minute). We estimate that the total annual cost of the recordkeeping requirement to Canadian carriers is $16,531 (= $12,373 recording cost + $3,485 Master certification cost + $673 submission cost).

Each non-Canadian foreign vessel makes 7 (= 4 trips * 1.75 entries) recordings per year. Since there are 186 non-Canadian foreign vessels, the total number of entries per year by non-Canadian foreign vessels is estimated to be 1,302 (= 186 vessels * 7 entries/vessel/year) entries. Assuming it takes an average of 5 minutes to complete each entry, it would take approximately 6,510 (= 1,302 entries * 5 minutes) minutes to complete all entries. Using a wage rate of $1.02 per minute, the recordings would cost non-Canadian foreign carriers a total of $6,640 (= 6,510 minutes * $1.02/minute). Since each vessel makes 7 entries per year, and each form is used to record 7 entries, each of the 186 vessels completes 1 form per year to be certified by the vessel's Master. This equals 186 total certifications per year. We assume it takes a Master 5 minutes to certify each form. Therefore, it takes 930 (= 186 certifications * 5 minutes) minutes to certify all forms for the year. Using a Master wage rate of $1.92 per minute, the total cost of Master certification is $1,786 (= 930 minutes * $1.92/minute). In addition, there are a total of 744 (= 186 non-Canadian foreign vessels * 4 submissions/vessel/year) submissions per year. We assume it takes each vessel 5 minutes to submit all completed forms for the quarter. Since there are 744 submissions per year, the total annual submission burden for the entire fleet of non-Canadian foreign vessels is 3,720 (= 744 submissions/year * 5 minutes) minutes, or $3,794 (= 3,720 minutes * $1.02/minute). We estimate that the total annual cost of the recordkeeping requirement to non-Canadian foreign carriers is $12,220 (= $6,640 recording cost + $1,786 Master certification cost + $3,794 submission cost).

We estimate that the total annual cost of the recordkeeping requirement to foreign carriers is $28,751 (= $16,531 cost to Canadian carriers + $12,220 cost to non-Canadian foreign carriers).

The proposed rule would also impose new restrictions on sweeping in protected or special areas. The proposed requirements would ban sweeping in Lake Huron's Thunder Bay, Lake Michigan's Northern Refuge, Lake Superior's Isle Royale National Park and the Detroit River at Lake Erie. Since all observed routes through these areas extend beyond the boundaries, banning dry cargo sweeping in these areas allows vessel operators to continue to sweep outside of the designated areas. In addition, the proposed rule would limit limestone sweeping in Lake Erie's Western Basin and Lake Michigan's Green Bay areas to vessels with routes exclusively inside these areas. Again, we consider all vessels that travel outside the protected or special areas to have the option of sweeping while outside of the boundaries. The proposed rule would not require vessels that travel exclusively inside these areas to modify behavior. As a result, there is no cost estimated for restricting sweeping in protected or special areas.

2. No-Action Alternative

Executive Order 12866 requires us to evaluate proposed alternatives including the No-Action Alternative. Under the No-Action Alternative, the Coast Guard would issue no new regulations to control incidental bulk dry cargo residues on the Great Lakes. Instead, the Coast Guard would enforce its existing regulation at 33 CFR 151.66. That regulation was issued pursuant to the Coast Guard's authority under the Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*, and prohibits the discharge of ''garbage,'' a term that includes any dry cargo residue, into the navigable waters of the U.S. Currently, a limited exception is made for DCR sweepings in the Great Lakes pursuant to the Coast Guard's interim enforcement policy. Congress has sanctioned the IEP, most recently in the Coast Guard and Maritime Transportation Act of 2004, but that sanction expires on September 30, 2008. After that date, the Coast Guard would enforce 33 CFR 151.66's prohibition of DCR sweepings in all U.S. navigable waters of the Great Lakes. Although the benefit of the No-Action Alternative is zero discharge of DCR, the estimated initial cost of the No-Action Alternative, as shown in Table 2, is $51,804,383, and the estimated annual cost is $35,730,000.

We are deferring, for consideration in a future rulemaking, any decision on how best to regulate DCR sweepings over the long term. The proposed rule would be put in place in part to help gather more information to assess the issue.

One possible method to achieve zero discharge is to sweep with brooms and shovel the deck after every loading and unloading along with washing the tunnel after every unloading. We have analyzed this method, because data is readily available, and because if a zero discharge requirement quickly went into effect, this method would require little planning or other advance work to put into practice. Our data suggests it would be the most effective and least expensive method for immediate implementation. After loading and unloading a vessel, the deck would be swept of DCR, and the swept DCR is assumed to be placed in the cargo hold or on shore. After unloading, the tunnel surfaces would be washed down and the washwater would be pumped to shore for disposal at a shoreside facility for pretreatment. Following pretreatment, the washwater would be transferred to the municipal sewer authority for final treatment.

Foreign dry bulk vessels that call at a U.S. port in the Great Lakes typically load or unload cargo at a U.S. port and then leave U.S. waters. Therefore, they have the option of waiting until they are out of U.S. waters to conduct sweeping. Under the No-Action Alternative, they could wait until they are out of U.S. waters; therefore, there would be no cost to foreign dry bulk vessels under the No-Action Alternative.

Costs to U.S. vessels associated with the broom and shovel method, as an example, to achieve the No-Action Alternative include the following: [1]

- Assuming DCR washwater pretreatment facilities would be built at any port receiving or shipping dry cargo, 181 such facilities would be needed. The capital cost for those facilities is estimated at $8,950,633, which would be incurred in the first year, and the annual operations and maintenance cost is estimated at $321,000.
- The sewer usage charge is estimated to be $2.00 per 1,000 gallons of washwater. The average amount of washwater to be discharged is estimated at 30,000 gallons per trip. Since each ship that transports dry cargo makes an estimated 60 trips per year, each ship would produce approximately 1.8 million gallons of washwater annually, and since there are 55 ships engaged in transporting dry cargo on the Great Lakes, the total amount of washwater to be discharged would be 99 million gallons per year. Since the cost of sewer usage is $2.00 per 1,000 gallons of washwater, the total cost of sewer usage is $198,000 annually for the entire fleet.
- Interior piping and pumps would be required to be installed on each vessel and would cost an average of $129,500 per vessel. Since there are 55 vessels, the total cost of the piping and pumps is estimated at $7,122,500 for the entire fleet. We assume retrofitting or replacement of interior pumps and piping will occur during winter months when the vessels are not in service.
- The total cost of brooms and shovels for all vessels would be $1,250.
- Additional time at the facility would be required to conduct deck sweepings and tunnel washdowns. We assume it takes 4 people 2.5 hours to sweep the deck every time a vessel loads and unloads cargo and that it takes 1 person 3.5 hours to wash the tunnel each time a vessel unloads cargo, resulting in a delay time of 6 (= 2.5 hours + 3.5 hours) hours per trip due to the deck sweepings and tunnel washdowns. Since each vessel makes an estimated 60 trips per year, the delay per vessel is approximately 360 hours annually, and since there are 55 vessels, the total annual delay is 19,800 hours. The Coast Guard estimates that the hourly cost of vessel operation is $1,700; [2] thus, the total cost of the time delay is estimated at $33,660,000 per year for the entire fleet of U.S. vessels.
- There is also a labor cost for deck sweepings and tunnel washdowns. We assume it takes 4 people an average of approximately 2.5 hours to sweep the deck of a vessel after each loading and unloading event. This equals 20 hours of labor for deck sweeping per trip. Assuming the loaded wage rate is $20 per hour, the labor cost would be $400 (= 20 hours * $20/hour) per trip. Each vessel makes 60 trips per year; therefore, for each vessel, the labor cost of deck sweepings is $24,000 (= $400 per trip * 60 trips per vessel) per year. Since there are 55 vessels, the total annual cost of deck sweepings after loadings and unloadings is $1,320,000 (= $24,000 annual cost per vessel * 55 vessels) for the entire fleet. In addition, we assume it takes 1 person an average of approximately 3.5 hours to wash the tunnel after each unloading event. This equals 3.5 burden hours of labor after each unloading event. Assuming the wage rate is $20 per hour, the labor cost to wash the tunnel would be $70 (= 3.5 hours * $20/hour) after each unloading event. Each vessel makes 60 trips per year. Therefore, for each vessel, the labor cost for washing the tunnel after each unloading is $4,200 (= $70 per event * 60 trips) per year. Since there are 55 vessels, the total annual cost of tunnel washdowns is $231,000 (= 4,200 per vessel * 55 vessels) for the entire fleet. The total annual labor cost of deck sweepings and tunnel washdowns is $1,551,000 (= $1,320,000 deck sweeping labor cost + $231,000 tunnel washdown labor cost) for the entire fleet.

Therefore, the total undiscounted initial cost of the No-Action Alternative is estimated at $51,804,383, and the total undiscounted annual cost is estimated at $35,730,000. Table 2 below itemizes the cost of the No-Action Alternative.

TABLE 2.—NO-ACTION ALTERNATIVE ITEMIZED COST LIST

	Initial	Annual
Pretreatment Facilities	$8,950,633	N/A
Operations & Maintenance	321,000	$321,000
Sewer Usage	198,000	198,000
Piping & Pumps	7,122,500	N/A
Brooms & Shovels	1,250	N/A
Delay	33,660,000	33,660,000
Labor	1,551,000	1,551,000
Total	51,804,383	35,730,000

Table 3 below summarizes the ten-year undiscounted cost of the No-Action Alternative, as well as the ten-year cost discounted at 7 percent and at 3 percent.

TABLE 3.—TOTAL TEN-YEAR COST OF NO-ACTION ALTERNATIVE

Year	Undiscounted cost	Present value cost (7%)	Present value cost (3%)
2009	$51,804,383	$48,415,311	$50,295,517
2010	35,730,000	33,392,523	34,689,320
2011	35,730,000	31,207,966	33,678,952
2012	35,730,000	29,166,323	32,698,011
2013	35,730,000	27,258,246	31,745,642

[1] CH2M Hill has provided cost data for this method, through phone conversations, emails, memos, and the DEIS.

[2] USCG estimate based on operating costs data from the U.S. Army Corps of Engineers for 2002 and 2005 and the Lake Carriers Association for 2007.

TABLE 3.—TOTAL TEN-YEAR COST OF NO-ACTION ALTERNATIVE—Continued

Year	Undiscounted cost	Present value cost (7%)	Present value cost (3%)
2014	35,730,000	25,474,996	30,821,012
2015	35,730,000	23,808,408	29,923,312
2016	35,730,000	22,250,848	29,051,760
2017	35,730,000	20,795,185	28,205,592
2018	35,730,000	19,434,753	27,384,070
Total	373,374,383	281,204,559	328,493,189

The ten-year cost of the No-Action Alternative is $373,374,383 when undiscounted; $328,493,189 when discounted at a rate of 3 percent; and $281,204,559 when discounted at a rate of 7 percent.

B. Small Entities

In accordance with the Regulatory Flexibility Act (RFA, 5 U.S.C. 601 *et seq.*), the Coast Guard must assess whether a rule would have a significant economic impact on a substantial number of small entities.

A small entity may be:

- A small business that, defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act (15 U.S.C. 632);
- A small independent not-for-profit organization, and;
- A small governmental jurisdiction (locality with fewer than 50,000 people).

Although the proposed rule would affect both U.S. and foreign vessels, for purposes of the small entities analysis, entities affected by the proposed rule would be U.S.-flag vessel owners that carry dry bulk cargo and operate on the Great Lakes. We determined which entities were small, based on the North American Industry Classification System (NAICS) using public and proprietary business databases. The NAICS code, company information such as the number of employees and annual revenues are obtained by utilizing these databases. By using the United States Small Business Administration (SBA) criteria for small businesses and the associated NAICS code for a particular business, we are able to determine whether a business is small or large.[3] In some cases, businesses are small based on the number of employees, though many businesses are classified based on their annual revenues.

There are 13 small businesses that would be affected by the proposed rule. We have made efforts to reduce the impact on these entities, including the use of standardized forms and allowing electronic submissions. The estimated total annual cost of the proposed new recordkeeping requirement is $60,077 or $1,092 per vessel per year.

We address the projected reporting and recordkeeping requirements as well as the type and professional skills necessary for the preparation of reports and records in the cost analysis and Collection of Information sections of this report.

This Initial Regulatory Flexibility Act Analysis addresses the following:

- The reason the agency is considering this action;
- The objectives of and legal basis for the proposed rule;
- The number and types of small entities to which the rule would apply;
- The classes of small entities that would be subject to the requirements of the proposed rule;
- Other relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule, and;
- Significant alternatives to the component under consideration that accomplish the stated objectives of applicable statutes and may minimize any significant economic impact of the proposed rule on small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. Pursuant to section 212 of that Act, the Coast Guard will prepare a Small Entity Compliance Guide to assist small entities in complying with this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult LT St. Pierre (see **FOR FURTHER INFORMATION CONTACT**). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

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

1. Reason for Agency Action

Under 33 CFR 151.66, a Coast Guard regulation that implements the Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*, cargo residue is treated as operational waste, which meets the definition of ''garbage'' under 33 CFR 151.05, and, therefore, its discharge into the navigable waters of the United States is prohibited. If strictly enforced on the Great Lakes, this regulation would put an end to cargo sweeping. Since 1993, Great Lakes shipping has operated under a Coast Guard IEP that allows ''incidental discharges'' of non-toxic and non-hazardous bulk DCR to continue in certain U.S. waters of the Great Lakes. Congress first approved the IEP in 1998 and has mandated its continuation until September 30, 2008 or until the Coast Guard issues new regulations relating to DCR on the Great Lakes, whichever comes first. Congress has expressed an expectation that any new regulations would appropriately balance the needs of maritime commerce and environmental protection. The Coast Guard has stated that if the IEP expires before new regulations can be issued, 33 CFR 151.66 will be enforced in all U.S. waters of the Great Lakes.

Enforcement of 33 CFR 151.66 in the Great Lakes could cause economic hardship and require the significant expenditure of Coast Guard resources, possibly with no significant benefit to the environment. Therefore, we propose allowing the continuation of present DCR practices in the Great Lakes, with

[3] Readers can access small business information online at *http://www.sba.gov/size/indextableofsize.html.*

the addition of new recordkeeping requirements.

2. Objective and Legal Basis

The proposed rule would meet the congressional objective of striking an appropriate balance between the needs of maritime commerce and environmental protection. The recordkeeping requirement could greatly increase our ability to understand the practice of dry cargo sweeping, monitor the practice, and if necessary subject it to further controls in the future. Our proposed mandatory DCR recordkeeping requirements would provide additional data in support of our cost/benefit assessment of possible alternative ways of managing DCR. Section 623 of Public Law 108–293 authorized the Coast Guard to promulgate regulations governing the discharge of dry bulk cargo residue on the Great Lakes, notwithstanding any other law. This proposed rule would amend 33 CFR Part 151.

3. Number of Types of Small Entities Affected

We determined that 13 small businesses are affected by this proposed rule. Of the 13 small businesses, we found revenue data for 9 companies.

To estimate the impact on small businesses, we divided the total annual recordkeeping cost of $60,077 by the total number of vessels for an estimate of $1,092 per vessel. We then multiply this by the number of vessels that each small business owns. We divided this cost by the average annual revenues for each small business to obtain a proportion of the cost to annual revenues. This allows us to determine the annual cost impact of this proposed rule on small businesses, based on SBA's criteria for small businesses and company information obtained through the online databases. Table 4 presents the annual revenue impacts for the 9 small companies that we researched with known average annual revenues.[4]

TABLE 4.—ESTIMATED REVENUE IMPACT OF THE PROPOSED RULE FOR SMALL BUSINESSES THAT OWN U.S.-FLAG DRY-BULK VESSELS OPERATING ON THE GREAT LAKES

Percent impact on annual revenue	Annual	
	Number of small entities with known revenue data	Percent of small entities with known revenue data
0–3%	9	100
> 3–5%	0	0
> 5–10%	0	0
> 10–20%	0	0
> 20%	0	0
Total	9	100

As shown, annually, the proposed rule would have a 3 percent or less impact on all of the small businesses that own vessels that would have to comply with the recordkeeping requirement of this proposed rule.[5] Thus, while the proposed rule would affect 13 small entities, the costs are relatively minimal. To put the per vessel annual recordkeeping cost of $1,092 in context, this cost is less the vessel's hourly operating cost, which we estimate is $1,700 per hour. Consequently, the data suggest that this proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities, and we request comments on whether you believe this finding is correct.

We are interested in the potential impacts from this proposed rule on small businesses and we request public comment on these potential impacts. If you think that your business, organization, or government jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES**. In your comment, explain why, how, and to what degree you think this rule would have an economic impact on you.

4. Classes of Entities Affected by the Proposed Rule

We classified small businesses by the NAICS code previously mentioned for those businesses that had known company information and determined whether a business was small or large by using the SBA size standards matched to the NAICS codes. Based on the industry classification codes, we found that about 44 percent of the small businesses that we analyzed are classified as ''Navigational Services to Shipping'' and ''Packaging and Labeling,'' each representing about 22 percent of the small companies that we analyzed. The remaining 56 percent of the small businesses that we analyzed are comprised of five different industry classification codes for a total of seven NAICS codes. All of the nine small businesses that we analyzed represent seven different NAICS codes. Table 5 presents the types of small entities that the proposed rule would affect.

TABLE 5.—NAICS CODES, DESCRIPTIONS, DEFINITIONS, AND NUMBER AND PERCENT OF SMALL BUSINESSES AFFECTED BY THE PROPOSED RULE

NAICS code	Description	Small business definition	Number of small entities	Percent of small entities
488330	Navigational Services to Shipping	< $6.5M annual rev	2	22.2

[4] When estimating revenue impacts, we do not discount annual costs or annual revenues.

[5] These data are based on the small businesses that we sampled from the total population and from the data that we obtained using the online public and proprietary business databases.

TABLE 5.—NAICS CODES, DESCRIPTIONS, DEFINITIONS, AND NUMBER AND PERCENT OF SMALL BUSINESSES AFFECTED BY THE PROPOSED RULE—Continued

NAICS code	Description	Small business definition	Number of small entities	Percent of small entities
561910	Packaging and Labeling Services	< $6.5M annual rev	2	22.2
486910	Pipeline Transportation of Refined Petroleum.	< 1500 employees	1	11.1
488320	Marine Cargo Handling	< $23.5M annual rev	1	11.1
522110	Commercial Banking	< $165M in assets	1	11.1
483211	Inland Water Freight Transportation	< 500 employees	1	11.1
813910	Business Associations	< $6.5M annual rev	1	11.1
Total			9	100.0

5. Other Federal Rules

Current Coast Guard regulations on garbage pollution found at 33 CFR Sections 151.51 through 151.77 would prohibit the sweeping of DCR into the Great Lakes. Section 623 of Public Law 108–293 requires the Coast Guard to enforce its IEP, which allows limited DCR sweeping on the Great Lakes, until September 30, 2008. Additionally, section 623(b) of Public Law 108–293 authorizes the Coast Guard to promulgate regulations governing the sweeping of dry bulk cargo residue on the Great Lakes, notwithstanding any other law. The proposed rule would amend 33 CFR Part 151 to allow the sweeping of dry bulk cargo residue on the Great Lakes notwithstanding any other law.

6. Regulatory Alternatives

The No-Action Alternative has an estimated total initial cost of $51,804,383 or $941,898 per vessel, and it has an estimated total annual cost of $35,730,000 or $649,636 per vessel, and therefore, could have a significant economic impact on a substantial number of small entities.

To estimate the impact on small businesses initially, we divided the first year costs for implementing the No-Action Alternative by the number of vessels. We then multiply this figure by the number of vessels that each small business owns. We divided this cost by the average annual revenues for each small business to obtain a proportion of the initial cost to annual revenues. This allows us to determine the initial cost impact of this proposed rule on small businesses, based on SBA's criteria for small businesses and company information obtained through the online databases. We also estimated the annual cost impact on small businesses using the same methodology explained above. Again, we divided the annual recurring costs that each small business would incur under the No-Action Alternative by the number of vessels. We then multiply this figure by the number of vessels that each small business owns. We divided this cost by the average annual revenues for each small business to obtain a proportion of the annual costs to annual revenues.

Table 6 presents the initial and recurring annual revenue impacts for the sample of nine small companies that we researched with known average annual revenues.[6] Table 6 shows that under the No-Action Alternative, there would be over 80 percent impact on annual revenues for approximately 56 percent of small businesses initially, and there would be over 80 percent impact on annual revenues for approximately 44 percent of small businesses annually.

TABLE 6.—ESTIMATED REVENUE IMPACT OF THE NO-ACTION ALTERNATIVE FOR SMALL BUSINESSES THAT OWN U.S.-FLAG DRY-BULK VESSELS OPERATING ON THE GREAT LAKES

Percent impact on annual revenue	Initial		Annual	
	Number of small entities with known revenue data	Percent of small entities with known revenue data	Number of small entities with known revenue data	Percent of small entities with known revenue data
0–20%	3	33	3	33
> 20–40%	0	0	0	0
> 40–60%	0	0	1	11
> 60–80%	1	11	1	11
> 80%	5	56	4	44
Total	9	100	9	100

D. Collection of Information

This proposed rule would call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and

[6] When estimating revenue impacts, we do not discount initial and annual costs or annual revenues.

completing and reviewing the collection.

Title: Dry Cargo Residue Sweepings in the Great Lakes.

Summary of the Collection of Information: The new DCR recordkeeping provisions would require vessel operators to maintain a DCR log to document what dry cargos are loaded, unloaded, and swept, when they are swept, how they are swept, how much is swept, what control measures, if any, are in place, and where, when, and how fast the vessel is traveling when the sweepings take place.

Need for Information: By making DCR recordkeeping mandatory, we will greatly increase our ability to understand the practice of dry cargo sweeping, monitor the practice, and if necessary, subject the practice of DCR sweeping to further controls in the future.

Proposed Use of Information: Our proposed mandatory DCR recordkeeping requirements would provide additional data in support of our cost/benefit assessment of reasonable methods for reducing DCR discharges over the long term, beyond the next six to 10 years.

Description of the Respondents: The respondents would be U.S. and foreign vessels that carry dry-bulk cargo and operate on U.S. waters of the Great Lakes. During the 2006 shipping season, 55 U.S. vessels and 219 foreign vessels carrying dry-bulk cargos operated on the Great Lakes. The respondents include these 274 vessels conducting the DCR recordkeeping, handling the submissions, and certifying each form.

Number of Respondents: The total number of vessels that handle Great Lakes dry bulk cargo shipments is 274 (= 55 U.S. vessels + 33 Canadian vessels + 186 non-Canadian foreign vessels).

Frequency of Response: There are three types of responses. The first type is an entry on the form each time the vessel loads, unloads, or sweeps. Each loading and unloading operation and each sweeping event counts as a separate entry. From the Draft Environmental Impact Statement, each of the 55 U.S.-flag dry cargo vessels operating on the Great Lakes makes an average of 60 trips each season. Each trip is marked by one loading and one unloading operation, and sweeping occurs for 75 percent of the trips, resulting in a total of 2.75 recordings per trip. A trip is defined as a vessel going from one port to another. We assume that at each port, a vessel either loads or unloads cargo. Therefore, we estimate that there will be approximately 9,075 [= (60 trips/vessel/season * 2.75 entries) * 55 vessels] entries annually by U.S. vessels.

There are 33 Canadian vessels, each making an average of 42 trips per year into U.S. ports on the Great Lakes. There are 186 non-Canadian foreign vessels, each making an average of 4 trips per year into U.S. ports on the Great Lakes. We assume that a foreign vessel that makes a U.S. port call in the Great Lakes either loads or unloads cargo at a U.S. port. We also use the worst-case assumption that these foreign vessels sweep DCR into U.S. waters of the Great Lakes three-quarters of the time the vessels are in U.S. waters. Under these assumptions, each of these foreign vessels makes 1.75 recordings per trip. Each Canadian vessel makes 73.5 (= 42 trips * 1.75 entries) recordings per year. Since there are 33 Canadian vessels, the total number of entries per year by Canadian vessels is estimated to be 2,426 (= 73.5 recordings * 33 vessels) entries. Each non-Canadian foreign vessel makes 7 (= 4 trips * 1.75 entries) recordings per year. Since there are 186 non-Canadian foreign vessels, the total number of entries per year by non-Canadian foreign vessels is estimated to be 1,302 entries.

The second type of response is certification of a form by the vessel's Master. Each U.S. vessel makes 165 (= 60 trips * 2.75 entries/trip) entries per year. Each form is used to record 7 entries. Therefore, each of the 55 U.S. vessels completes 24 forms per year to be certified by the vessel's Master. This equals 1,320 total certifications per year by the U.S. fleet. Since each Canadian vessel makes 73.5 entries per year, and each form is used to record 7 entries, this equals 11 forms a year per vessel. Each of the 33 Canadian vessels completes 11 forms per year to be certified by the vessel's Master. This equals 363 total certifications per year by the Canadian fleet. Since each non-Canadian foreign vessel makes 7 entries per year, and each form is used to record 7 entries, each of the 186 non-Canadian foreign vessels completes 1 form per year to be certified by the vessel's Master. This equals 186 total certifications per year by the fleet of non-Canadian foreign vessels.

The third type of response is the quarterly submission of the forms to the Coast Guard. There are 220 submissions per year (= 55 U.S. vessels * 4 submissions/year/vessel) by the U.S. fleet. There are a total of 132 (= 33 Canadian vessels * 4 submissions/vessel/year) submissions per year by the Canadian fleet. There are a total of 744 (= 186 non-Canadian foreign vessels * 4 submissions/vessel/year) submissions per year by the fleet of non-Canadian foreign vessels.

Therefore, we estimate that there will be approximately 10,615 (= 9,075 form entries + 1,320 Master certifications + 220 submissions) total responses per year by the U.S. fleet; 2,921 (= 2,426 form entries + 363 Master certifications + 132 submissions) total responses per year by the Canadian fleet; and 2,232 (= 1,302 form entries + 186 Master certifications + 744 submissions) total responses per year by the fleet of non-Canadian foreign vessels.

Burden of Response: We estimate that there are 9,075 entries per year by U.S. vessels. It is anticipated the recordkeeping would be done by a person comparable to a Lieutenant with a wage rate of $61 per hour, or $1.02 per minute, using year 2006 rates. We assume that each entry takes 5 minutes to complete. This equals a total of 45,375 minutes to complete all entries for the year. Therefore, the cost is $5.10 per entry, and the annual total cost for all entries by the U.S. fleet is $46,282.50 (= 9,075 entries/year * $5.10/entry). Assuming it takes an average of 5 minutes to complete each of the 2,426 entries by the Canadian fleet, it would take approximately 12,130 (= 2,426 entries * 5 minutes) minutes to complete all entries. Using a wage rate of $1.02 per minute, the recordings would cost Canadian carriers a total of $12,373 (= 12,130 minutes * $1.02/minute). Assuming it takes an average of 5 minutes to complete each of the 1,302 entries by the non-Canadian foreign fleet, it would take approximately 6,510 (= 1,302 entries * 5 minutes) minutes to complete all entries. Using a wage rate of $1.02 per minute, the recordings would cost non-Canadian foreign carriers a total of $6,640 (= 6,510 minutes * $1.02/minute).

The proposed rule also requires certification by the vessel's Master of each form. A Master would be equivalent to a Captain, with a wage rate of $115 per hour, or $1.92 per minute, using year 2006 rates. We assume it takes a Master 5 minutes to certify each form. Therefore, it costs $9.60 for a Master to certify one form. Since each vessel certifies 24 forms per year, the cost of certification by the vessel's Master per vessel is $230.40 (= 24 forms/vessel * $9.60/form) annually. Since there are 55 U.S. vessels, the annual burden of the certification is 6,600 (= 5 minutes/form * 24 forms/vessel * 55 vessels) minutes, and the total annual cost of the certification is $12,672 (= 6,600 minutes * $1.92/minute) for the entire U.S. fleet. We assume it takes a Master of a Canadian vessel 5 minutes to certify each form. Therefore, it takes 1,815 (= 363 certifications * 5 minutes) minutes to

certify all forms for the year. Using a Master wage rate of $1.92 per minute, the total cost of Master certification by the Canadian fleet is $3,485 (=1,815 minutes * $1.92/minute). We assume it takes a Master of a non-Canadian foreign vessel 5 minutes to certify each form. Therefore, it takes 930 (= 186 certifications * 5 minutes) minutes to certify all forms for the year. Using a Master wage rate of $1.92 per minute, the total cost of Master certification for the fleet of non-Canadian foreign vessels is $1,786 (= 930 minutes * $1.92/minute).

In addition, we assume that it takes each vessel 5 minutes to submit all completed forms for the quarter. Since there are 220 submissions per year, the total annual submission burden for the entire U.S. fleet is 1,100 minutes, or $1,122 (= 1,100 minutes * $1.02/minute), assuming submissions are done by a person comparable to a Lieutenant, with a wage rate of $1.02 per minute, using year 2006 rates. We assume it takes each Canadian vessel 5 minutes to submit all completed forms for the quarter. Since there are 132 submissions per year, the total annual submission burden for the entire fleet of Canadian vessels is 660 minutes, or $673 (= 660 minutes * $1.02/minute). We assume it takes each non-Canadian foreign vessel 5 minutes to submit all completed forms for the quarter. Since there are 744 submissions per year, the total annual submission burden for the entire fleet of non-Canadian foreign vessels is 3,720 minutes, or $3,794 (= 3,720 minutes * $1.02/minute).

Estimate of Total Annual Burden: We estimate that the total annual time burden for the U.S. fleet that would result from the collection of information is 53,075 (= 45,375 recording minutes + 6,600 Master certification minutes + 1,100 submission minutes) minutes, and the total annual cost burden is $60,077 (= $46,283 recording cost + $12,672 Master certification cost + $1,122 submission cost) for the entire fleet. The annual burden per vessel is approximately $1,092.31 (= $60,077 total annual cost ÷ 55 vessels).

We estimate that the total annual time burden of the recordkeeping requirement is 14,605 (= 12,130 recording minutes + 1,815 Master certification minutes + 660 submission minutes) minutes and that the total annual cost of the recordkeeping requirement to Canadian carriers is $16,531 (= $12,373 recording cost + $3,485 Master certification cost + $673 submission cost). We estimate that the total annual time burden of the recordkeeping requirement for non-Canadian foreign carriers is 11,160 (= 6,510 recording minutes + 930 Master certification minutes + 3,720 submission minutes) minutes and that the total annual cost of the recordkeeping requirement to non-Canadian foreign carriers is $12,220 (= $6,640 recording cost + $1,786 Master certification cost + $3,794 submission cost). Therefore, we estimate that the total annual time burden of the recordkeeping requirement to foreign carriers is 25,765 (= 14,605 minutes for Canadian carriers + 11,160 minutes for non-Canadian foreign carriers) minutes and that the total annual cost of the recordkeeping requirement to foreign carriers is $28,751 (= $16,531 cost to Canadian carriers + $12,220 cost to non-Canadian foreign carriers).

Paperwork Reduction Act. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this proposed rule to OMB for its review of the collection of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection. We specifically ask you to comment on whether you think voluntary recordkeeping would be better than requiring recordkeeping, and if so, why. If you prefer voluntary recordkeeping, would you be willing to report voluntarily each quarter using the proposed Coast Guard form?

If you submit comments on the collection of information, submit them both to OMB and to the Docket Management Facility where indicated under **ADDRESSES**, by the date under **DATES.** To ensure that the comments on collection of information are received by OMB on time, the preferred method is by e-mail at *oira_submission@omb.eop.gov* subject line ATTN: Desk Officer, DHS–USCG or fax at 202–395–6566, ATTN: Desk Officer, DHS–USCG. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, ATTN: Desk Officer, DHS–USCG.

You need not respond to a collection of information unless we have published a currently valid control number from OMB for that collection in the **Federal Register**. Before the requirements for this collection of information become effective, we will publish notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the collection. If OMB approves the collection, our publication of that control number in the **Federal Register** or the CFR will constitute display of that number; see 5 CFR 1320.3(f)(3), as required under 44 U.S.C. 3506(c)(1)(B).

The No-Action Alternative would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Federalism

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

F. Unfunded Mandates Reform Act

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

G. Taking of Private Property

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

H. Civil Justice Reform

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

I. Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to

safety that might disproportionately affect children.

J. Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

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

L. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). A draft ''Environmental Impact Statement'' (EIS) is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. We encourage the public to submit comments on the draft EIS.

List of Subjects in 33 CFR Part 151

Administrative practice and procedure, Oil pollution, Penalties, Reporting and recordkeeping requirements, Water pollution control.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 151 as follows:

PART 151—VESSELS CARRYING OIL, NOXIOUS LIQUID SUBSTANCES, GARBAGE, MUNICIPAL OR COMMERCIAL WASTE, AND BALLAST WATER

Subpart A—Implementation of MARPOL 73/78 and the Protocol on Environmental Protection to the Antarctic Treaty as It Pertains to Pollution From Ships

1. The authority citation for part 151 is revised to read as follows:

Authority: 33 U.S.C. 1321, 1902, 1903, 1908; 46 U.S.C. 6101; Pub. L. 104–227 (110 Stat. 3034); Pub. L. 108–293 (118 Stat. 1063), § 623; E.O. 12777, 3 CFR, 1991 Comp. p. 351; DHS Delegation No. 0170.1, sec. 2(77).

2. Revise § 151.66 to read as follows:

§ 151.66 Operating requirements: Discharge of garbage in the Great Lakes and other navigable waters.

(a) Except as otherwise provided in this section, no person on board any ship may discharge garbage into the navigable waters of the United States.

(b) On the United States' waters of the Great Lakes, commercial ships, excluding non-self propelled barges, may discharge bulk dry cargo residues in accordance with this paragraph and paragraph (c) of this section. Owners and operators of ships to which these paragraphs apply are encouraged to minimize the volume of dry cargo residues discharged through the use of suitable residue control measures onboard and by loading and unloading cargo at facilities that use suitable shoreside residue control measures. As used in Table 151.66(b):

Bulk dry cargo residues means non-hazardous and non-toxic residues of dry cargo carried in bulk, including limestone and other clean stone, iron ore, coal, salt, and cement. It does not include residues of any substance known to be toxic or hazardous, such as, nickel, copper, zinc, lead, or materials classified as hazardous in provisions of law or treaty;

Caribou Island and Southwest Bank Protection Area means the area enclosed by rhumb lines connecting the following coordinates, beginning on the northernmost point and proceeding clockwise: 47°30.0′ N, 85°50.0′ W; 47°24.2′ N, 85°38.5′ W; 47°04.0′ N, 85°49.0′ W; 47°05.7′ N, 85°59.0′ W; 47°18.1′ N, 86°05.0′ W;

Mile means a statute mile, and refers to the distance from the nearest land or island;

Milwaukee Mid-Lake Special Protection Area means the area enclosed by rhumb lines connecting the following coordinates, beginning on the northernmost point and proceeding clockwise: 43°27.0′ N, 87°14.0′ W; 43°21.2′ N, 87°02.3′ W; 43°03.3′ N, 87°04.8′ W; 42°57.5′ N, 87°21.0′ W; 43°16.0′ N, 87°39.8′ W;

Six Fathom Scarp Mid-Lake Special Protection Area means the area enclosed by rhumb lines connecting the following coordinates, beginning on the northernmost point and proceeding clockwise: 44°55′ N, 82°33′ W; 44°47′ N, 82°18′ W; 44°39′ N, 82°13′ W; 44°27′ N, 82°13′ W; 44°27′ N, 82°20′ W; 44°17′ N, 82°25′ W; 44°17′ N, 82°30′ W; 44°28′ N, 82°40′ W; 44°51′ N, 82°44′ W; 44°53′ N, 82°44′ W; 44°54′ N, 82°40′ W;

Waukegan Special Protection Area means the area enclosed by rhumb lines connecting the following coordinates, beginning on the northernmost point and proceeding clockwise: 42°24.3′ N, 87°29.3′ W; 42°13.0′ N, 87°25.1′ W; 42°12.2′ N, 87°29.1′ W; 42°18.1′ N, 87°33.1′ W; 42°24.1′ N, 87°32.0′ W; and

Western Basin means that portion of Lake Erie west of a line due south from Point Pelee.

TABLE 151.66(B).—BULK DRY CARGO RESIDUE DISCHARGES ALLOWED ON THE GREAT LAKES

Location	Cargo	Discharge allowed except as noted
Tributaries, their connecting rivers, and St. Lawrence River.	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes.
	All other cargos	Prohibited.
Lake Ontario	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes.
	Iron ore	Prohibited within 6 miles.
	All other cargos	Prohibited within 13.8 miles.
Lake Erie	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes; prohibited in the Detroit River National Wildlife Refuge; prohibited in Western Basin except for vessels operating exclusively within Western Basin.
	Iron ore	Prohibited within 6 miles; prohibited in the Detroit River National Wildlife Refuge; prohibited in Western Basin, except that a vessel may incidentally discharge its cargo over the dredged navigation channels between Toledo Harbor Light and Detroit River Light if it unloads in Toledo or Detroit and immediately thereafter loads new cargo in Toledo, Detroit, or Windsor.
	Coal, salt	Prohibited within 13.8 miles; prohibited in the Detroit River National Wildlife Refuge; prohibited in Western Basin, except that a vessel may incidentally discharge its cargo over the dredge navigation channels between Toledo Harbor Light and Detroit River Light if it unloads in Toledo or Detroit and immediately thereafter loads new cargo in Toledo, Detroit, or Windsor.
	All other cargos	Prohibited within 13.8 miles; prohibited in the Detroit River National Wildlife Refuge; prohibited in Western Basin.
Lake St. Clair	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes.
	All other cargos	Prohibited.
Lake Huron except Six Fathom Scarp Mid-Lake Special Protection Area.	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes; prohibited in the Thunder Bay National Marine Sanctuary.
	Iron ore	Prohibited within 6 miles and in Saginaw Bay; prohibited in the Thunder Bay National Marine Sanctuary; prohibited for vessels up bound along the Michigan thumb as follows: (a) Between 5.8 miles northeast of entrance buoys 11 and 12 to the track line turn abeam of Harbor Beach, prohibited within 3 miles; and (b) For vessels bound for Saginaw Bay only, between the track line turn abeam of harbor Beach and 4 nautical miles northeast of Point Aux Barques Light, prohibited within 4 miles and not less than 10 fathoms of depth.
	Coal, salt	Prohibited within 13.8 miles and in Saginaw Bay; prohibited in the Thunder Bay National Marine Sanctuary; prohibited for vessels up bound from Alpena into ports along the Michigan shore south of Forty Mile Point within 4 miles and not less than 10 fathoms of depth.
	All other cargos	Prohibited within 13.8 miles and in Saginaw Bay; prohibited in the Thunder Bay National Marine Sanctuary.
Lake Michigan	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes; prohibited within the Milwaukee Mid-Lake and Waukegan Special Protection Areas; prohibited within the Northern Refuge; prohibited within Green Bay except for vessels operating exclusively within Green Bay.
	Iron ore	Prohibited in the Northern Refuge; north of 45° N, prohibited within 12 miles and in Green Bay; south of 45° N, prohibited within 6 miles, and prohibited within the Milwaukee Mid-Lake and Waukegan Special Protection Areas and in Green Bay; except that discharges are allowed at: (a) 4.75 nautical miles off Big Sable Point Betsie, along established LVA track lines; and (b) Along 056.25° LCA track line between due east of Poverty Island to a point due south of Port Inland Light.
	Coal	Prohibited in the Northern Refuge; prohibited within 13.8 miles and prohibited within the Milwaukee Mid-Lake and Waukegan Special Protection Areas and in Green Bay; except that discharges are allowed: (a) Along 013.5° LCA track line between 45° N and Boulder Reef, and along 022.5° LCA track running 23.25 miles between Boulder Reef and the charted position of Red Buoy #2; (b) Along 037° LCA track line between 45°20′ N and 45°42′ N; (c) Along 056.25° LCA track line between points due east of Poverty Island to a point due south of Port Inland Light; and (d) At 3 nautical miles for coal carried between Mainstee and Ludington along customary route.
	Salt	Prohibited in the Northern Refuge; prohibited within 13.8 miles and prohibited within the Milwaukee Mid-Lake and Waukegan Special Protection Areas and in Green Bay.
	All other cargos	Prohibited in the Northern Refuge; prohibited within 13.8 miles and prohibited within the Milwaukee Mid-Lake and Waukegan Special Protection Areas and in Green Bay.

TABLE 151.66(B).—BULK DRY CARGO RESIDUE DISCHARGES ALLOWED ON THE GREAT LAKES—Continued

Location	Cargo	Discharge allowed except as noted
Lake Superior	Limestone and other clean stone.	Prohibited where there is an apparent impact on wetlands, fish spawning areas, and potable water intakes; and prohibited within Isle Royal National Park and the Caribou Island and Southwest Bank, Stannard Rock, and Superior Shoal Protection Areas.
	Iron ore	Prohibited within 6 miles (within 3 miles off northwestern shore between Duluth and Grand Marais); and prohibited within Isle Royal National Park and the Caribou Island and Southwest Bank, Stannard Rock, and Superior Shoal Protection Areas.
	Coal, salt	Prohibited within 13.8 miles (within 3 miles off northwestern shore between Duluth and Grand Marais); and prohibited within Isle Royal National Park and the Caribou Island and Southwest Bank, Stannard Rock, and Superior Shoal Protection Areas.
	Cement	Prohibited within 13.8 miles (within 3 miles offshore west of a line due north from Bark Point); and prohibited within Isle Royal National Park and the Caribou Island and Southwest Bank, Stannard Rock, and Superior Shoal Protection Areas.
	All other cargos	Prohibited within 13.8 miles; and prohibited within Isle Royal National Park and the Caribou Island and Southwest Bank, Stannard Rock, and Superior Shoal Protection Areas.

(c)(1) The master, owner, operator, or person in charge of any commercial ship loading, unloading, or discharging bulk dry cargo in the United States' waters of the Great Lakes and the master, owner, operator, or person in charge of a U.S. commercial ship transporting bulk dry cargo and operating anywhere on the Great Lakes, excluding non-self propelled barges, must ensure that a written record is maintained on the ship that fully and accurately records information on:

(i) Each loading or unloading operation on the United States' waters of the Great Lakes, or in the case of U.S. commercial ships on any waters of the Great Lakes, involving bulk dry cargo; and

(ii) Each discharge of bulk dry cargo residue that takes place in United States' waters, or in the case of U.S. commercial ships on any waters, of the Great Lakes.

(2) For each loading or unloading operation, the record must describe:

(i) The date of the operation;

(ii) Whether the operation involved loading or unloading;

(iii) The name of the loading or unloading facility;

(iv) The type of bulk dry cargo loaded or unloaded;

(v) The method or methods used to control the amount of bulk dry cargo residue, either onboard the ship or at the facility;

(vi) The time spent to implement methods for controlling the amount of bulk dry cargo residue; and

(vii) The estimated volume of bulk dry cargo residue created by the loading or unloading operation that is to be discharged.

(3) For each discharge, the record must describe:

(i) The date and time the discharge started, and the date and time the discharge ended;

(ii) The ship's position, in latitude and longitude, when the discharge started and when the discharge ended; and

(iii) The ship's speed during the discharge.

(4) Records must be kept on Coast Guard Form CG–33, a facsimile of which appears below as Form 151.66(c). The records must be certified by the master, owner, operator, or person in charge and kept in written form onboard the ship for at least two years. Copies of the records must be forwarded to the Coast Guard at least once each quarter, no later than the 15th day of January, April, July, and October. The record copies must be provided to the Coast Guard using only one of the following means:

(i) E-mail to *DCRRecordkeeping@USCG.mil*;

(ii) Fax to (202) 372–1926; or

(iii) Mail to U.S. Coast Guard: Commandant (CG–522), ATTN: DCR RECORDKEEPING, CGHQ Room 1210, 2100 Second Street, SW., Washington, DC 20593–0001.

BILLING CODE 4910–15–P

Form 151.66(c): Great Lakes Bulk Dry Cargo Residue Reporting Form.

U.S. DEPARTMENT OF HOMELAND SECURITY U.S. COAST GUARD CG-33 Rev. (02-08)	**BULK DRY CARGO RESIDUE REPORTING FORM**								**OMB Number 1625-0072** **Expires:**		
									OFFICIAL/IMO NO.		
MASTER'S CERTIFICATION:									**VESSEL NAME:**		
For Cargo Loading & Unloading Operations									***For Residue Sweeping Operations Only***		
Date	**Cargo Involved**[1]	**Operation** *(check one)*		**Facility Name**	**Control Measures Used**[2] *(see list of codes)*		**Time Spent to Implement Control Measure** *(hrs)*	**Estimated Residue to be Swept into Water** (m^3)	**Sweeping Start**	**Sweeping Stop**	**Vessel Speed (kts)**
		Load	*Unload*		Facility / Vessel				*Date/Time(D/T) Ship's Position (Lat/Long)*	*Date/Time(D/T) Ship's Position (Lat/Long)*	
					Facility	*Vessel*					
									D/T: Lat: Long:	D/T: Lat: Long:	
									D/T: Lat: Long:	D/T: Lat: Long:	
									D/T: Lat: Long:	D/T: Lat: Long:	
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Please see footnotes on next page

Remarks:

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The Coast Guard estimates that the average burden for this report is 15 minutes. You may submit any comments concerning the accuracy of this estimate or any suggestions for reducing the burden to: Commandant (CG-5232), U.S. Coast Guard Room 1400, 2100 Second Street SW, Washington, D.C. 20593-0001

Reset

NOTES:

[1] **Cargo Involved:** Provide the common name of the cargo (e.g., coal, taconite, sand, limestone, grain, salt, etc.)
When multiple cargo types are discharged, please create a separate entry for each type

[2] **Control Measures:** Enter the code(s) below for each dry cargo residue control measure(s) used during cargo handling operations, for both cargo facilities (if known), and for your vessel.

Return to Form

Cargo Involved	Facility Control Measures Code	Measure
	A	Enclosed conveyor
iron ore	B	Troughed conveyor
taconite	C	Conveyor skirts
scale	D	Belt Scrapers
coal/coke	E	Water/mist for dust control
grain	F	Conveyor capacity indicators
seed	G	Deck remote controls of conveyors
wood pulp	H	Stop conveyor while ship or belt is repositioned
potash	I	Delay loading/unloading during high wind
fertilizer	J	Radio Communication between deck and loader
limestone	K	Crew training on procedures to reduce residue
sand/gravel	L	Limit vertical angle of conveyor boom
dolomite	M	Plow feeder
clay	N	Loading chute, incl. Telescoping or conveyors
aggregates	O	Chemical surfactants
salt	P	Suction pumped cargo, slurry transport,
gypsum		pneumatic or screw conveyors
cement	Q	Other (describe measure on "Remarks" line
Other		on front of form)

Vessel Control Measures Code	Measure
1	Enclosed conveyor
2	Troughed conveyor
3	Conveyor skirts
4	Belt Scrapers
5	Water/mist for dust control
6	Conveyor capacity indicators
7	Deck remote controls of conveyors
8	Stop conveyor while ship or belt is repositioned
9	Delay loading/unloading during high wind
10	Radio Communication between deck and loader
11	Crew training on procedures to reduce residue
12	Limit vertical angle of conveyor boom
13	Broom & shovel (to return to hold or shore)
14	Tarps to collect residue(to return to hold or shore)
15	Cargo hold vibrator
16	Watertight gate seal
17	Cargo hold lining (teflon or kevlar)
18	Minimize hatch removal during poor weather
19	Careful cargo hold gate operation
20	Other (describe measure on "Remarks" line on front of form)

Equivalence Table for estimating residue

Cargo	Density (lbs/ft^3)	Equivalent Volume for 350 lbs of DCR	Volume in m^3
Coal	50	7 ft^3	0.2
Limestone	150	2.3 ft^3	0.07
Taconite	222	1.6ft^3	0.05

Note: One 5 gallon bucket is equivalent to 0.019m^3

Dated: May 14, 2008.

Dana A. Goward,

Acting Assistant Commandant for Marine, Safety, Security and Stewardship, U.S. Coast Guard.

[FR Doc. E8–11343 Filed 5–22–08; 8:45 am]

BILLING CODE 4910–15–C

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R09–OAR–2006–0306; FRL–8570–7]

Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM–10; Revision of Designation; Redesignation of the San Joaquin Valley Air Basin PM–10 Nonattainment Area to Attainment; Approval of PM–10 Maintenance Plan for the San Joaquin Valley Air Basin; Approval of Commitments for the East Kern PM–10 Nonattainment Area; Extension of Public Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: EPA is extending the public comment period for the proposed rule entitled ''Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM–10; Revision of Designation; Redesignation of the San Joaquin Valley Air Basin PM–10 Nonattainment Area to Attainment; Approval of PM–10 Maintenance Plan for the San Joaquin Valley Air Basin; Approval of Commitments for the East Kern PM–10 Nonattainment Area.'' The proposed rule was published on April 25, 2008 (73 FR 22307). The State of California has since provided technical corrections to the motor vehicle emissions budgets in the 2007 San Joaquin Valley PM–10 Maintenance Plan that EPA is proposing to approve. EPA believes the technical corrections are minor and do not impact other aspects of the April 25, 2008 proposal. EPA is extending the public comment period for the proposed rule until June 10, 2008 in order to provide the public with the opportunity to consider these technical corrections.

DATES: The public comment period for this proposed rule is extended until June 10, 2007.

ADDRESSES: Submit your comments, identified by docket number EPA–R09–OAR–2006–0306, by one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *E-mail: lo.doris@epa.gov.*

(3) *Mail or deliver:* Doris Lo (AIR–2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through the *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an anonymous access system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While

all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed directly below.

FOR FURTHER INFORMATION CONTACT: Doris Lo, EPA Region IX, (415) 972–3959, *lo.doris@epa.gov.*

SUPPLEMENTARY INFORMATION: On April 21, 2008 the Regional Administrator signed a proposed rule entitled ''Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM–10; Revision of Designation; Redesignation of the San Joaquin Valley Air Basin PM–10 Nonattainment Area to Attainment; Approval of PM–10 Maintenance Plan for the San Joaquin Valley Air Basin; Approval of Commitments for the East Kern PM–10 Nonattainment Area.'' This rule was published on April 25, 2008 (73 FR 22307) and, among other things, proposed to approve county by county subarea motor vehicle emissions budgets (MVEB) in the 2007 San Joaquin Valley PM–10 Maintenance Plan (2007 Plan) for the San Joaquin Valley Air Basin (SJVAB) PM–10 nonattainment area [1] for the years 2005 and 2020. See 73 FR 22307, 22315–22317, Table 4. The California Air Resources Board (CARB) used its mobile source emission model, EMFAC2007, to estimate the direct particulate matter of ten microns or less (PM–10) emissions and oxides of nitrogen (NO_X) emissions for the MVEBs.

CARB has provided EPA with technical corrections to the 2020 MVEBs for Merced, San Joaquin, Stanislaus and Tulare counties in the 2007 Plan. See the May 13, 2008 letter to Mr. Wayne Nastri from James N. Goldstene. As discussed in the letter, the MVEBs for these four counties were incorrectly calculated because the input processor for the EMFAC2007 emissions model used the wrong travel activity data for 2020. The correct MVEBs are shown in revised Table 4 below, which replaces Table 4 in the proposed rule at 73 FR 22316–22317:

TABLE 4.—MOTOR VEHICLE EMISSIONS SUBAREA BUDGETS (TONS PER DAY) SAN JOAQUIN VALLEY AIR BASIN 2007 PLAN *

County	2005		2020	
	PM–10	NO_X	PM–10	NO_X
Fresno	13.5	59.2	16.1	23.2
Kern **	12.1	88.3	14.7	39.5
Kings	3.1	16.7	3.6	6.8
Madera	3.6	13.9	4.7	6.5
Merced	6.2	39.2	6.4	12.9
San Joaquin	9.1	42.6	10.6	17.0
Stanislaus	5.6	29.7	6.7	10.8
Tulare	7.3	25.1	9.4	10.9
Total	60.5	314.7	72.2	127.6

* The budgets are based on attainment and maintenance of the 24-hour PM–10 NAAQS. The annual standard was revoked on December 18, 2006. See 71 FR 61144.

** MVEBs in Table 4 are only for the SJVAB portion of Kern County.

The difference between the 2020 budgets found in the 2007 Plan and the 2020 budgets provided in the May 13, 2008 letter are small and Valley-wide result in no change in total PM–10 emissions and an increase of only 0.2 tons per day in NO_X emissions. EPA believes that the changes in the budgets do not impact the maintenance demonstration in the 2007 Plan because they are small. Therefore these technical corrections have no effect on EPA's preliminary conclusion that the subarea 2020 MVEBs for Merced, San Joaquin, Stanislaus and Tulare counties are approvable (73 FR 22316–22317) or on any other aspects of the proposed rule.

EPA is extending the public comment period for the proposed rule until June 10, 2008 in order to provide the public with the opportunity to consider these technical corrections.

Dated: May 15, 2008.

Wayne Nastri,

Regional Administrator, Region 9.

[FR Doc. E8–11605 Filed 5–22–08; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 144

[ASPELTCI]

RIN 0991–AB44

Office of the Assistant Secretary for Planning and Evaluation; State Long-Term Care Partnership Program: Reporting Requirements for Insurers

AGENCY: Office of the Assistant Secretary for Planning and Evaluation (OASPE), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule sets forth proposed reporting requirements for private insurers that issue qualified long-term care insurance policies in States participating in the State Long-Term Care Partnership Program established under the Deficit Reduction Act (DRA) of 2005. Section 6021 of the Deficit Reduction Act of 2005 requires that the Secretary specify a set of reporting requirements and collect data from insurers on qualifying long-term care insurance policies issued under the program and the subsequent use of the benefits under these policies. Under a State Long-Term Care Partnership Program, an amount equal to the benefits received under of the long-term care insurance policy is disregarded in determining the assets of an individual for purposes of Medicaid eligibility and estate recovery.

[1] The nonattainment area includes the entire counties of San Joaquin, Fresno, Kings, Madera, Merced, Stanislaus and Tulare and part of Kern County.

DATES: To be assured consideration, comments must be received at the address provided below, no later than 5 p.m. on July 22, 2008.

ADDRESSES: In commenting, please refer to file code ASPE:LTCI. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically*. You may submit electronic comments on specific issues in this regulation to *http://www.Regulations.gov*. Click on the link ''Comment or Submission'' and enter the keyword ''ASPE:LTCI''. (Attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word.)

2. *By regular mail*. You may mail written comments (one original and two copies) to the following address only: Office of Disability, Aging, and Long-Term Care, Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Attention: ASPE:LTCI, Hunter McKay, 200 Independence Avenue, SW., Room 424–E, Washington, DC 20201.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail*. You may send written comments (one original and two copies) to the following address only: Office of Disability, Aging, and Long-Term Care, Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Attention: ASPE:LTCI, Hunter McKay, 200 Independence Avenue, SW., Room 424–E, Washington, DC 20201.

4. *By hand or courier*. If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to the following address: Room 424–E, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the mail drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by mailing your comments to the addresses provided at the end of the ''Collection of Information Requirements'' section in this document.

Submitting Comments: We welcome comments from the public on all issues set forth in this proposed rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code ASPE:LTCI and the specific ''issue identifier'' that precedes the section on which you choose to comment.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.Regulations.gov*. Click on the link ''Comment or Submission'' on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Department of Health and Human Services, 200 Independence Avenue, SW., Washington, DC 20201, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–XXX–XXXX.

Electronic Access

This **Federal Register** document is also available from the **Federal Register** online database through *GPO Access*, a service of the U.S. Government Printing Office. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can access the database by using the World Wide Web; the Superintendent of Documents' home page address is *http://www.gpoaccess.gov/*, by using local WAIS client software, or by telnet to *swais.access.gpo.gov*, then login as guest (no password required). Dial-in users should use communications software and modem to call (202) 512–1661; type swais, then login as guest (no password required).

FOR FURTHER INFORMATION CONTACT: Hunter McKay, (202) 205–8999.

SUPPLEMENTARY INFORMATION:

I. Scope of This Proposed Rule

This proposed rule describes the reporting requirements that we are proposing to require of all insurers that issue qualified long-term care insurance policies under the State Long-Term Care Partnership Program. In addition to publishing these regulations, The Department anticipates taking other actions to further the implementation of the Partnership for Long Term Care. One such action is publication in the near future of a **Federal Register** Notice containing Partnership State Reciprocity Standards. This standard outlines an agreement whereby states can provide Medicaid asset disregards for Partnership policies purchased in other states.

II. Background

(If you choose to comment on issues in this section, please include the caption ''History of Partnership Programs'' at the beginning of your comment.)

A. Historical Overview of State Long-Term Care Partnership Programs

1. Initial Development of Programs

In the late 1980's, a number of State Medicaid programs began to work with private insurance companies to create a bridge between Medicaid and insurance for long-term care. The goal of these collaborations was to create private insurance policies that were more affordable and provide better financial protection to consumers against large liabilities for long-term care costs than the policies generally available at that time. The result of these collaborations was the establishment of State Long-Term Care Partnership Programs that provided for expanded access to Medicaid by allowing applicants who use long-term care insurance policies to have higher assets and still be eligible for Medicaid. The additional amount of assets that an individual is allowed to have is equivalent to the amount paid by the insurance policy on his or her behalf. These State partnerships provided an incentive for insurers to offer affordable, high quality benefits and for consumers to protect themselves against the high cost of long-term care through the purchase of insurance policies that can be used in conjunction with benefits provided under Medicaid.

Four States (California, Connecticut, Indiana, and New York) initially implemented Partnership Programs in 1993. As part of the implementation process, each State outlined a set of data reporting requirements for participating insurers. The data that were to be collected were intended to allow each

State to monitor program activities and evaluate the impact of the Partnership Program on Medicaid long-term care expenditures. The insurers who participated in these partnerships recommended, as part of the design of the data collection requirements, that the participating States use a unified set of reporting requirements to streamline the reporting burden on the participating insurers. The participating insurers believed that if each State designed its own reporting requirements, the administrative costs for the program would be prohibitive. The four States agreed with the participating insurers and adopted a uniform set of reporting criteria.

The four initial States launched their Partnership Programs using existing State authority through amendments to their State Medicaid plans. Each State requested a change in the treatment of assets in the Medicaid financial eligibility test. No other Federal authority was necessary at that time to operate the programs.

2. Omnibus Reconciliation Act of 1993

The Omnibus Reconciliation Act of 1993 (OBRA 1993), Public Law 103–66, contained language that changed the conditions under which Medicaid State plan amendments relating to asset disregards for private long-term care insurance could be approved. OBRA 1993 allowed California, Connecticut, Indiana, and New York, as well as Iowa and Massachusetts, to continue their initial Long-Term Care Partnership Programs. However, OBRA 1993 specified a set of requirements for any additional States that chose to operate a Partnership Program. Any State, other than the initial four partnership States, that sought a Medicaid State plan amendment on or after May 14, 1993 was required to abide by the following additional conditions:

a. Estate Recovery

States establishing Long-Term Care Partnership Programs on or after May 14, 1993, were required to recover from the estates of Medicaid recipients in States with partnership agreements expenses incurred for the provision of long-term health care under Medicaid. Assets that were disregarded in the initial financial eligibility process were also exempt from estate recovery in the initial four States with Partnership Programs. States establishing new Partnership Programs were only allowed to disregard assets in the initial eligibility process but not in the estate recovery process. After a Medicaid recipient who had a long-term care insurance policy issued under a State Long-Term Partnership Program died, the State was required to recover an amount equivalent to what Medicaid spent on his or her behalf from the deceased recipient's estate, including any protected assets under the State Long-Term Care Partnership Program.

b. No Waiver of Estate Recovery

States establishing Long-Term Care Partnership Programs on or after May 14, 1993, were precluded from waiving the estate recovery requirement for Medicaid recipients who had obtained long-term care insurance policies under a State Long-Term Care Partnership Program.

c. Expanded Definition of Estate

States establishing Long-Term Care Partnership Program on or after May 14, 1993, were also required to use a specific definition of ''estate'' for recovery purposes when recovery of Medicaid expenditures was against the estates of Medicaid recipients who had obtained long-term care insurance policies issued under a State Long-Term Care Partnership Program. This definition was more expansive than the definition that was generally used by States.

While OBRA 1993 did not forbid additional States from attempting to establish new Long-Term Care Partnership Programs under the new conditions, the impact was essentially the same as a ban. A few States tried unsuccessfully to launch partnership programs under the new conditions. Other interested States passed enabling legislation with contingency language that allowed the State to proceed if the OBRA 1993 partnership provisions were repealed. No subsequent Federal legislation related to Long-Term Care Partnership Programs was enacted until Public Law 109–171 (the DRA of 2005). As discussed in detail under section II.A.3. of this proposed rule, the DRA of 2005 included provisions that allow States to offer specific asset disregards for Medicaid eligibility purposes under a new set of conditions.

3. Deficit Reduction Act (DRA) of 2005

Section 6021(a)(1) of the DRA of 2005 amended section 1917(b)(1)(C)(i) and added new sections 1917(b)(1)(C)(iii) through (vi) to the Act that provide for an expansion of State long-term care insurance partnerships through a new set of conditions. Under this provision, States may establish qualified State long-term care insurance partnerships, defined in the Act as an approved Medicaid State plan amendment under Title XIX of the Act that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if certain requirements specified in sections 1917(b)(1)(C)(iii)(I) through (VII) of the Act are met. In other words, States establishing Partnership Programs must offer a dollar of asset disregard for every dollar paid out under a long-term care insurance policy issued under a State Long-Term Care Partnership Program.

Section 1917(b)(1)(C)(iii)(II) of the Act provides that the insurance policy must be a qualified long-term care insurance policy as defined in section 7702B(b) of the Internal Revenue Code of 1986, that is issued not earlier than the effective date of the State plan amendment. (If an individual has an existing long-term care insurance policy that does not qualify as a qualified partnership policy due to the issue date of the policy, and that policy is exchanged for another policy, the State insurance commissioner or other State authority must determine the issue date for the policy that is received in exchange. Under this provision, a long-term care insurance policy includes a certificate issued under a group insurance contract.)

Among other requirements specified in the statute for qualified long-term care insurance partnerships—

- The long-term care insurance policy must (1) be issued to an insured individual who is a resident of the State in which coverage first became effective under the policy (sections 1917(b)(1)(C)(iii)(I) of the Act); (2) be certified by the State insurance commissioner or other appropriate authority that the policy meets specific provisions of the National Association of Insurance Commissioners (NAIC) October 2000 Model Regulation and Model Act (sections 1917(b)(1)(C)(iii)(III) and 1917(b)(5)(B) of the Act); and (3) include certain protections against inflation on an annual basis (section 1917(b)(1)(C)(iii)(IV) of the Act).
- The State Medicaid agency must provide information and technical assistance to the State insurance department on the insurance department's role of assuring that any individual who sells a long-term care insurance policy under the partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care (section 1917(b)(1)(C)(iii)(V) of the Act).
- Issuers of long-term care insurance policies under a State qualified long-

term care insurance partnership must provide regular reports to the Secretary, in accordance with regulations of the Secretary, that include notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate to the administration of State long-term care insurance partnerships (section 1917(b)(1)(C)(iii)(VI) of the Act). Section 1917(b)(1)(C)(v) of the Act provides that the regulations required under section 1917(b)(1)(C)(iii)(VI) of the Act shall be promulgated after consultation with the NAIC, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data to be reported and the frequency with which such reports are to be made. In addition, the Secretary, as appropriate, shall provide copies of the reports provided in accordance with that clause to the State involved.

- The State may not impose any requirement affecting the terms of benefits of a policy under the partnership program unless the State imposes such requirement on long-term care insurance policies without regard to whether the policy is covered under the partnership or is offered in connection with such a partnership (section 1917(b)(1)(C)(iii)(VII) of the Act).

Section 1917(b)(1)(C)(iv) of the Act provides that a State that had a State plan amendment approved as of May 14, 1993, satisfies the requirements of the statute under clause (II) and may continue as a qualified partnership program if the Secretary determines that the State plan amendment provides for consumer protection standards that are no less stringent than the consumer protection standards that applied under such a State plan amendment as of December 31, 2005.

B. Implementing Regulations

Currently, there are no Federal regulations directly related to State operation of State Long-Term Care Partnership Programs. In areas in which the program coordinates benefits with Medicaid coverage of long-term care, the existing Medicaid regulations at 42 CFR Chapter IV, Subchapter C, are applicable. In 2006, States were provided with guidance on the implementation of State Long-Term Care Partnership Programs under the DRA of 2005.

To implement section 1917(b)(1)(C)(iii)(VI) and 1917(b)(1)(C)(iv) of the Act, as directed by the statute, we are proposing to set forth in regulations the requirements for reporting information and data on qualified long-term care insurance policies issued under State Long-Term Care Partnership Programs under an approved State plan amendment.

C. States Currently Operating Long-Term Care Partnership Programs

California, Connecticut, Indiana, Iowa, Massachusetts, and New York had approved State Long-Term Partnership Programs under an approved State plan amendment as of May 14, 1993. They were ''grandfathered'' as satisfying the statutorily imposed requirements when pursuant to section 1917(b)(1)(C)(iv) of the Act, the Secretary determined that the State plan amendments of these States provide protection no less stringent than that applied under their State plan amendments as of December 31, 2005.

As of December 2007, seven other States offer State Long-Term Care Partnership policies for sale under the DRA provisions: Florida, Idaho, Kansas, Minnesota, Nebraska, South Dakota, and Virginia. Nine States have approved State plan amendments for qualified State Long-Term Care Partnership Programs although policies had not yet been issued pursuant to those programs: Colorado, Florida, Georgia, Iowa, Minnesota, Missouri, North Dakota, Nevada, Ohio, and Oregon. Four States have submitted State plan amendments for which approval is pending: Arizona, New Hampshire, Oklahoma, and Pennsylvania. Ten other States are in the process of developing Partnership Programs: Illinois, Maine, Maryland, Michigan, Montana, New Jersey, Rhode Island, Texas, Vermont, and Wisconsin.

III. Provisions of This Proposed Rule

A. Legislative Authority

As stated earlier, the DRA of 2005 requires insurers participating in State Long-Term Care Partnership Programs to provide regular reports to the Secretary in a manner in accordance with regulations of the Secretary. The reports must include notification regarding when benefits provided under the policy have been paid and the amount of the benefits paid, notification regarding when the policy otherwise terminates, and any other information as the Secretary determines may be appropriate to the administration of State long-term care insurance partnerships. Section 1917(b)(1)(C)(iv) of the Act provides that the regulations required under section 1917(b)(1)(C)(iii)(VI) must be promulgated after consultation with the NAIC, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and must specify the type and format of the data to be reported and the frequency with which the reports are to be made. In addition, the Secretary, as appropriate, must provide copies of the reports provided in accordance with that clause to the State involved.

B. Collaboration With States, Insurers, Insurance Regulators, and Consumers in the Development of Reporting Requirements

(If you choose to comment on issues in this section, please include the caption ''Consultations with Stakeholders'' at the beginning of your comment.)

In accordance with section 1917(b)(1)(C)(iv) of the Act, as added by the DRA of 2005, we have consulted with numerous stakeholders in the development of the reporting requirements presented in this proposed rule. In addition to one-on-one consultations with stakeholders representing States, insurers, consumers, and regulators, we have established a Technical Expert Panel to provide a forum for the exchange of ideas, perspectives, and expertise regarding the specification of individual data items. The Technical Expert Panel consists of approximately 25 members representing insurers, States, consumer organizations, the NAIC, the Federal Government, and the policy research community. The panel members were selected in January 2007, from responses to invitations sent by HHS along with an initial draft of the reporting requirements. We held numerous meetings and teleconferences with the panel members to discuss and further develop the draft reporting requirements and to obtain further input on partnership implementation. The reporting requirements presented in this proposed rule represent the product of this ongoing stakeholder input process. We plan to work on an ongoing basis with the Technical Expert Panel.

C. Specific Proposed Reporting Requirements

(If you choose to comment on issues in this section, please include the caption ''Types of Data to be Reported'' at the beginning of your comment.)

In consultation with stakeholders and the Technical Expert Panel, we have developed proposed requirements for insurers for reporting data under the State Long-Term Care Partnership Program under two categories: (1) Registry data; and (2) claims data. These two categories would require the submission of data in four distinct file types. Generally, participating long-term care insurers would report under only two of these files. For all four file types, we are proposing to require insurers to report on only those insured individuals, policyholders, and claimants who have active qualified long-term care insurance partnership policies or certificates. The proposed reporting requirements would not apply to insurance policies or certificates that are not partnership qualified.

Insurer reporting specifications would be detailed in an HHS document entitled ''State Long-Term Care Partnership Insurer Reporting Requirements'' which we expect will be available from *http://aspe.hhs.gov/daltcp/reports/2008/PartRepReq.pdf* no later than June 1, 2008. We are in the process of developing an integrated database through which insurers would submit these data. We are proposing that data would be submitted through a secure Web site that meets all current Health Insurance Portability and Accountability Act requirements for security of personal health information.

1. Registry Data

We are proposing to require insurers to report data, on a semiannual basis, on all insured individuals who have been issued qualified long-term care insurance policies or certificates under qualified State Long-Term Care Partnership Programs; that is, for the 6-month reporting periods of January 1 through June 30 and July 1 through December 31 of each year. The reports must include data on qualified long-term care insurance partnership policies sold on either an individual basis or a group basis, as long as individual-level data are available to the insurer. These data include, but are not limited to, the following:

- Current identifying information on each insured individual.
- The name of the insurance company and the issuing State.
- The effective date and terms of coverage under the policy.
- The coverage period and benefits.
- The annual premium.
- Other information as specified by the Secretary in ''State Long-Term Care Insurance Partnership Insurer Reporting Instructions.''

2. Claims Data

We are proposing to require insurers to report data, for each quarter of the calendar year, on all benefit claims paid for all insured individuals who have been issued qualified long-term care insurance policies or certificates (individual policies or under group coverage plans) under qualified State Long-Term Care Partnership Programs. These data include, but are not limited to, the following:

- Current identifying information on the insured individual.
- The type and cash amount of the benefits paid during the reporting period and lifetime to date.
- Remaining lifetime benefits.
- Other information as specified by the Secretary in ''State Long-Term Care Insurance Partnership Insurer Reporting Instructions.''

3. Frequency of Reports and Deadlines for Submission

(If you choose to comment on issues in this section, please include the caption ''Frequency and Deadlines for Reports'' at the beginning of your comment.)

We are proposing to require insurers to submit data for different reporting periods, depending upon the file type.

We are proposing to require insurers to submit the required registry data to the Secretary on a semiannual basis; that is, for the 6-month reporting period of January 1 through June 30 and July 1 through December 31 of each year. The proposed deadline for submittal of registry data reports is 30 days after the end of the reporting period.

4. Transition Provision

For insurers who have issued or exchanged a qualified Partnership policy prior to the effective date of the final regulations we issue, we are proposing a transition provision. We are proposing that the first reports required for these insurers will be the reports that pertain to the reporting period that begins no more than 120 days after the effective date of the final regulations.

5. Format and Manner of Reporting Data

(If you choose to comment on issues in this section, please include the caption ''Format for Reports'' at the beginning of your comment.)

We are proposing to require that insurers submit the required data in the format and manner specified by the Secretary in the HHS-issued insurer reporting specifications document, ''State Long-Term Care Insurance Partnership Insurer Reporting Instructions.'' As we mentioned earlier, we are in the process of developing an integrated database that would be accessible through a secure Web site, and we plan to issue instructions as to how insurers would access and input the required data into the HHS reporting system.

6. Use of Submitted Reports

(If you choose to comment on issues in this section, please include the caption ''Use of Reports'' at the beginning of your comment.)

The overall purpose of the data is twofold, first to be used in efforts to monitor program performance at both the state and federal level, and second to provide data for a longer-term evaluation of the effectiveness of the Partnership program. HHS and the States participating in the State Long-Term Care Partnership Program would use the information provided by insurers in compliance with the proposed reporting requirements for analytical studies and for program monitoring. The data provided by each insurer would reflect the combined experience of all State Long-Term Care Partnership Programs in terms of policies sold and benefits used. We plan to use the data to produce reports for Congress and other interested stakeholders on the implementation of the State Long-Term Care Partnership Program. In addition, we plan to use the data to generate individual State-level reports that would be used by the States to track the implementation of the Partnership Program at the State level.

HHS does not intend to use the data to determine asset disregard levels for individuals who participate in the State Long-Term Care Partnership Program and eventually apply for Medicaid coverage. We would not collect data on ''point in time'' information regarding the amount of insurance benefits used by claimants, nor exact information on when private insurance benefits may be exhausted, which clearly would depend upon how claimants use benefits to purchase long-term care services. The computation of asset disregard levels and the determination of Medicaid eligibility coverage are matters that will be dealt with among the insurer, the insured individual, and the State Medicaid eligibility office. We expect that when insured individuals exhaust their insurance coverage (or otherwise become eligible for Medicaid prior to the exhaustion of benefits), insurers will provide them with documentation of their participation in the State Long-Term Care Partnership Program and of the amount of benefits that the insured received. This documentation will become part of the entire documentation provided by the insured individual at

the time he or she applies for Medicaid. The Medicaid eligibility office will then determine, based upon the documentation provided by the applicant, the asset disregard level that will be applied.

It is possible that State Medicaid programs may wish to access the collected data for monitoring purposes, to help them anticipate the number of insured individuals who may become eligible for Medicaid asset disregards over a projected time period. For example, through reports provided to each State from the integrated database, States would know how many partnership policyholders are ''in claim'' during any 3-month reporting period. States would also know, approximately, to what extent policyholders who are in claim have utilized the insurance benefits for which they are eligible and the amount of benefits remaining under their policy maximums. However, once an insured individual exhausts his or her insurance benefits under the policy, his or her eligibility for Medicaid would still depend upon the amount of available assets he or she retains, relative to his or her asset disregard, as well as other Medicaid eligibility criteria. For example, an insured individual may be eligible for an asset disregard of $150,000, but still retains $250,000 in countable assets. In this case, he or she would have to spend down $100,000 of his or her available assets before applying for Medicaid coverage. Thus, in general terms, States would be able to use the data to project future applications for Medicaid (and their potential budgetary impacts) but, at the individual level, the specific financial circumstances of each insured individual would determine his or her eligibility for Medicaid coverage.

D. Additional State-Mandated Reporting Requirements

(If you choose to comment on issues in this section, please include the caption ''Additional State Reporting'' at the beginning of your comment.)

The DRA explicitly states that there is nothing in the statute that prohibits States from imposing additional reporting requirements on insurers participating in the Long-Term Care Partnership Program, beyond the Federal reporting requirements that we are proposing in this proposed rule. However, we believe that the information that would be made available to the Secretary and to the States participating in the Long-Term Care Partnership Program through these proposed mandated reporting requirements would be sufficient to meet the policy analysis and program monitoring needs of the States. We, as well as the stakeholders participating in the development of these proposed reporting requirements, attempted to achieve a proper balance between the legitimate needs of the Federal Government and State governments to monitor the implementation and operation of the State Long-Term Care Partnership Program, and the desire not to impose undue cost burdens on participating insurers, to the point where they may consider it not economically beneficial to participate in the Partnership Program.

E. Confidentiality of Information

(If you choose to comment on issues in this section, please include the caption ''Confidentiality'' at the beginning of your comment.)

We are proposing to provide in the regulations that the data collected and reported under the requirements of the regulations in this proposed rule would be subject to the confidentiality of information requirements specified in regulations under 42 CFR Part 401, Subpart B, and 45 CFR Part 5, Subpart F and any other applicable confidentiality statute or regulation.

F. Provision of Reports to Partnership States

(If you choose to comment on issues in this section, please include the caption ''Furnishing Reports to States'' at the beginning of your comment.)

Section 1917(b)(1)(C)(v) of the Act provides that the Secretary, as appropriate, must provide copies of the reports provided by insurers to the State involved. We plan to make reports containing the reported data available to States in a timely and efficient manner.

G. Incorporation of Reporting Requirements in the Code of Federal Regulations

(If you choose to comment on issues in this section, please include the caption ''Regulation Text'' at the beginning of your comment.)

We are proposing to establish under Title 45, Subtitle A, Subchapter B, Part 144 of the Code of Federal Regulations a new Subpart B to incorporate the requirements for the reporting of data by insurers on qualified long-term care insurance policies issued under State Long-Term Care Partnership Programs that are established under an approved Medicaid State plan amendment.

Specifically—

Proposed § 144.200 contains the basis for the regulations.

Proposed § 144.202 includes definitions used throughout the subpart.

Proposed § 144.204 specifies the applicability of the regulations under the subpart.

Proposed § 144.206 specifies the requirements for reporting of long-term care partnership program data and the frequency with which insurers must report the data.

Proposed § 144.208 specifies the deadlines for submission of reports.

Proposed § 144.210 specifies the format and manner in which the data are to be reported.

Proposed § 144.212 specifies the confidentiality of information requirements that will be applied.

Proposed § 144.214 specifies the action that the Secretary will take if an insurer fails to report the required data by the specified deadlines.

IV. Response to Public Comments

Because of the large number of public comments that we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of the preamble of this proposed rule, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Collection of Information Requirements

The Department of Health and Human Services has determined that this notice of proposed rulemaking contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520). In compliance with the requirement of section 3506(c)(2)(A) of the PRA, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Further, the Department acknowledges that this regulation is covered under the Privacy Act and that this collection of data constitutes a System of Records. The Department anticipates publishing a System of Records Notice. 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 described below, e-mail your request, including your name, address, phone number, as well as the caption ''Collection of Information Requirements'' at the beginning of your comment, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be received with 60 days.

Title: Partnership for Long-Term Care Insurer Reporting Requirements.

Description: This information collected under the proposed rule is intended for insurers participating in the Partnership for Long-Term Care as authorized by the Deficit Reduction Act of 2005. Insurers will provide data in the proscribed format to the Department on Partnership certified long-term care insurance policies. The requirements include the identity of the policy holder, the type of coverage purchased and the amount of insurance benefits used. Data from this submission will be provided to state Medicaid agencies to assist in determining the amount of asset protection earned by program participants.

It is estimated that insurers participating in the Partnership will be able to provide the necessary reports from data currently within their insurance operations systems. Fulfilling the reporting requirements will require that they write programs to extract the data in the manner specified by the Department. There are no costs to the respondents, other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS AND BURDEN COSTS

CFR section	Type of respondent	Number of respondents	Number of responses per respondents	Average response per respondent (in hours)	Total burden hours
45 CFR 144.206	Insurers	30	6	45/60	135

Public comments addressed as a result of this notice will be taken into account in the formal OMB request for clearance for this data collection. Prior to the effective date of this final rule, HHS will publish a notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the new information collection provisions in the final rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

VI. Regulatory Impact Analysis

(If you choose to comment on issues in this section, please include the caption ''Impact'' at the beginning of your comment.)

A. Overall Impact

We have examined the impacts of this proposed rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

B. Executive Order 12866

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

While we have determined that this proposed rule is not economically significant, it is however a significant regulatory action. We estimate that the aggregate cost to participating private insurers of implementing the reporting requirements in this proposed rule would be approximately $1,500,000.

C. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most insurance companies are not considered to be small entities because they generally have revenues of more than $29 million in any 1 year. (For details, see the Small Business Administration's final rule that sets forth size standards for industries at 65 FR 69432, November 17, 2000.) For purposes of the RFA, all insurance companies are not considered to be small entities. Individuals and States are not included in the definition of a small entity. However, we are soliciting comments on our estimates and analysis of the impact of this proposed rule on insurers.

There are approximately 100 insurance companies located nationwide that issue long-term care insurance policies. We expect that, of these 100 companies, approximately 30 insurance companies will participate in qualified State Long-Term Care Partnership Programs. Currently, there are 15 to 20 companies operating in States that are selling or have issued qualified long-term care insurance policies under the State Long-Term Care Partnership Programs. As of December 2007, approximately 300,000 policies have been sold. We believe this represents approximately 80 percent of the policies that might be sold when the Partnership Programs are established nationwide. We anticipate that the number of insurance companies selling qualified long-term care insurance partnership policies might increase by about 10 as more States obtain approved State plan amendments to operate State Long-Term Care Partnership Programs.

As we stated earlier, insurers participating in the original four Partnership Programs have been reporting data on policies sold and benefits used in the program for more than a decade. The proposed reporting requirements in this proposed rule were designed to take advantage of data already available in insurer data sets. Insurers would not be asked to collect new data, but simply to recode existing data into a common format for submission to the Secretary. It is estimated that participating insurers would have to make a one-time investment to produce the computer programs necessary to compile the reports. Should the reporting requirement change in the future there will also be a cost to make the necessary changes. We are estimating that the

programming would require 400 hours of labor on average (this number will vary widely by company depending the type of systems used) to create the necessary changes. We also estimate an average cost per hour of programming time of $125. The cost per company is estimated at $50,000 and the total estimate for all companies is estimated at $1.5 million.

Subsequently, there would be a much smaller investment to run the quarterly and semi-annually reports. The data submissions were designed to be primarily snapshots of data elements in the insurers' files with very little tabulation or summary reporting. We note that all of the currently participating insurers participated in the development of the proposed reporting requirements in this proposed rule and have given their consensus to the proposed requirements.

D. Small Rural Hospitals

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any proposed rule (and subsequent final rule) that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. This proposed rule does not affect small rural hospitals.

E. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $120 million. This proposed rule would not mandate any requirements for State, local, or tribal governments. However, it would affect private sector costs to insurance companies who sell qualified long-term care insurance partnership policies. We note that participation by insurers in the Partnership Program is voluntary. We have also determined that the costs of reporting the required data are not significant.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this proposed rule would not have a substantial effect on State and local governments.

List of Subjects in 45 CFR Part 144

Health care, Health insurance, Reporting and recordkeeping.

For the reasons stated in the preamble of this proposed rule, we are proposing to amend 45 CFR subtitle A, subchapter B, part 144 as set forth below:

Subchapter B—Requirements Relating to Health Care Access

PART 144—REQUIREMENTS RELATING TO HEALTH INSURANCE COVERAGE

1. The authority citation for part 144 is revised to read as follows:

Authority: Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, 300gg–92 as amended by HIPAA (Pub. L. 104–191, 110 Stat. 1936), MHPA (Pub. L. 104–204, 110 Stat. 2944, as amended by Pub. L. 107–116, 115 Stat. 2177), NMHPA (Pub. L. 104–204, 110 Stat. 2935), WHCRA (Pub. L. 105–227, 112 Stat. 2681–436)) and section 103(c)(4) of HIPAA; and secs. 1102 and 1917(b)(1)(C)(iii)(VI) of the Social Security Act (42 U.S.C. 1302 and 1396p(b)(1)(C)(iii)(VI)).

2. A new subpart B is added to read as follows:

Subpart B—Qualified State Long-Term Care Insurance Partnerships: Reporting Requirements for Insurers

Sec.

144.200 Basis.
144.202 Definitions.
144.204 Applicability of regulations.
144.206 Reporting requirements.
144.208 Deadlines for submission of reports.
144.210 Form and manner of reports.
144.212 Confidentiality of information.
144.214 Actions for noncompliance with reporting requirements.

Subpart B—Qualified State Long-Term Care Insurance Partnerships: Reporting Requirements for Insurers

§ 144.200 Basis.

This subpart implements—

(a) Section 1917(b)(1)(C) (iii)(VI) of the Social Security Act, (Act) which requires the issuer of a long-term care insurance policy issued under a qualified State long-term care insurance partnership to provide specified regular reports to the Secretary. (b) Section 1917(b)(1)(C)(v) of the Act, which specifies that the regulations of the Secretary under section 1917(b)(1)(C)(iii)(VI) of the Act shall be promulgated after consultation with the National Association of Insurance Commissioners, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representative of consumers of long-term care insurance policies, and shall specify the type and format of the data to be reported and the frequency with which such reports are to be made. This section of the statute also provides that the Secretary provide copies of the reports to the States involved.

§ 144.202 Definitions.

As used in this subpart—

Partnership qualified policy refers to a qualified long-term insurance policy issued under a qualified State long-term care insurance partnership.

Qualified long-term insurance care policy means an insurance policy that has been determined by a state insurance commissioner to meet the requirements of sections 1917(b)(1)(C)(iii)(I) through (IV) and 1917(b)(5) of the Act. It includes a certificate issued under a group insurance contract.

Qualified State long-term care insurance partnership means an approved Medicaid State plan amendment that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy that has been determined by a state insurance commissioner to meet the requirements of section 1917(b)(a)(C)(iii) of the Act. It includes any Medicaid State plan amendment approved as of May 4, 1993, that meets the requirements of section 1917(b)(1)(C)(iii) of the Act and for which the Secretary determines that the State plan amendment provides for consumer protection standards that are no less stringent than the consumer protection standards that applied under the State plan amendment as of December 31, 2005.

§ 144.204 Applicability of regulations.

The regulations contained in this subpart for reporting data apply only to those insurers that have issued qualified long-term care insurance policies to individuals under a qualified State long-term care insurance partnership.

§ 144.206 Reporting requirements.

(a) *General requirement.* Any insurer that sells a qualified long-term care insurance policy under a qualified State long-term care insurance partnership must submit, in accordance with the requirements of this section, data on insured individuals, policyholders, and claimants who have active partnership

qualified policies or certificates for a reporting period.

(b) *Specific requirements.* Insurers of qualified long-term care insurance policies must submit the following data to the Secretary by the deadlines specified in paragraph (c) of this section:

(1) *Registry of active individual and group partnership qualified policies or certificates.* (i) Insurers must submit data on—

(A) Any insured individual who held an active partnership qualified policy or certificate at any point during a reporting period, even if the policy or certificate was subsequently cancelled, lost partnership qualified status, or otherwise terminated during the reporting period; and

(B) All active group long-term care partnership qualified insurance policies, even if the identity of the individual policy/certificate holder is unavailable.

(ii) The data required under paragraph (b)(1)(i) of this section must cover a 6-month reporting period of January through June 30 or July 1 through December 31 of each year; and

(iii) The data must include, but are not limited to—

(A) Current identifying information on the insured individual;

(B) The name of the insurance company and issuing State;

(C) The effective date and terms of coverage under the policy.

(D) The annual premium.

(E) The coverage period.

(F) Other information, as specified by the Secretary in ''State Long-Term Care Partnership Insurer Reporting Instructions.''

(2) *Claims paid under partnership qualified policies or certificates.* Insurers must submit data on all partnership qualified policies or certificates for which the insurer paid at least one claim during the reporting period. This includes data for employer-paid core plans and buy-up plans without individual insured data. The data must—

(i) Cover a quarterly reporting period of 3 months;

(ii) Include, but are not limited to—

(A) Current identifying information on the insured individual;

(B) The type and cash amount of the benefits paid during the reporting period and lifetime to date;

(C) Remaining lifetime benefits;

(D) Other information, as specified by the Secretary in ''State Long-Term Care Partnership Insurer Reporting Instructions.''

§ 144.208 Deadlines for submission of reports.

(a) Transition provision for insurers who have issued or exchanged a qualified partnership policy prior to the effective date of these regulations. The first reports required for these insurers will be the reports that pertain to the reporting period that begins no more than 120 days after the effective date of the final regulations.

(b) All reports on the registry of qualified long-term care insurance policies issued to individual and individuals under group coverage specified in § 144.206(b)(1)(ii) must be submitted within 30 days of the end of the 6-month reporting period.

(c) All reports on the claims paid under qualified long-term care insurance policies issued to individual and individuals under group coverage specified in § 144.206(b)(2)(i) must be submitted within 30 days of the end of the 3-month quarterly reporting period.

§ 144.210 Form and manner of reports.

All reports specified in § 144.206 must be submitted in the form and manner specified by the Secretary in insurer reporting instructions.

§ 144.212 Confidentiality of information.

Data collected and reported under the requirements of this subpart are subject to the confidentiality of information requirements specified in regulations under 42 CFR part 401, subpart B, and 45 CFR part 5, subpart F.

§ 144.214 Notifications of noncompliance with reporting requirements.

If an insurer of a qualified long-term care insurance policy does not submit the required reports by the due dates specified in this subpart, the Secretary notifies the appropriate State insurance commissioner within 45 days after the deadline for submission of the information and data specified in § 144.208.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: February 12, 2008.

Ben Sasse,

Assistant Secretary for Planning and Evaluation.

Dated: February 12, 2008.

Michael O. Leavitt,

Secretary.

Editorial Note: The Office of the Federal Register received this document on May 20, 2008.]

[FR Doc. E8–11559 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

RIN 0648–AV30

Fisheries in the Western Pacific; Precious Corals Fisheries; Black Coral Quota and Gold Coral Moratorium

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

ACTION: Notice of availability of fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the Western Pacific Fishery Management Council proposes to amend the Fishery Management Plan for the Precious Corals Fisheries of the Western Pacific Region (Amendment 7). If approved by the Secretary of Commerce, Amendment 7 would designate the Au'au Channel, Hawaii, black coral bed as an ''Established Bed'' with a harvest quota of 5,000 kg every two years that applies to Federal and State of Hawaii waters, and establish a 5–year moratorium on the harvest of gold coral throughout the U.S. western Pacific. The proposed amendment is intended to prevent overfishing and achieve optimum yield of precious coral resources.

DATES: Comments on Amendment 7, which includes an environmental assessment, must be received by July 22, 2008.

ADDRESSES: Comments on the amendment, identified by 0648–AV30, may be sent to either of the following addresses:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal www.regulations.gov; or
- Mail: William L. Robinson, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Instructions: All comments received are a part of the public record and will generally be posted to *www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address, etc.) submitted voluntarily by the commenter may be publicly accessible. Do not submit Confidential Business Information, or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in

Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 7, including an environmental assessment, are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, or web site *www.wpcouncil.org*.

FOR FURTHER INFORMATION CONTACT: Brett Wiedoff, NMFS PIR, 808–944–2272.

SUPPLEMENTARY INFORMATION: This **Federal Register** document is also accessible at the Office of the **Federal Register** at *www.gpoaccess.gov/fr*.

Precious coral fisheries in the U.S. western Pacific are managed under the Fishery Management Plan for the Precious Corals Fisheries of the Western Pacific Region (FMP), which was developed by the Council, approved by the Secretary of Commerce, and implemented by NMFS. The Council has submitted Amendment 7 to NMFS for review under the Magnuson-Stevens Fishery Conservation and Management Act. This document announces that the amendment is available for public review and comment for 60 days. NMFS will consider public comments received during the comment period with respect to the approval, partial approval, or disapproval of Amendment 7.

Research has shown that the biomass of the Au'au Channel black coral population has decreased by at least 25 percent in the last 30 years. Data collected during submersible dives showed a decline in both recruitment and relative abundance of legal-sized black coral colonies. The decline in recruitment may be related to competition with alien coral species and fishing pressure. The highly-invasive soft coral, *Carijoa riisei*, has been found overgrowing large areas of black coral habitat, particularly in deep water between 80–110 m. Additionally, fishery harvests of shallower black coral populations have been increasing, stressing these populations further.

In Amendment 7, the Council recommends that Au'au Channel black corals be designated as an ''Established Bed'' with a harvest quota of 5,000 kg every two years. This quota would apply in both Federal and State of Hawaii waters, and all existing Federal gear and size restrictions would continue to apply.

Current estimates of the linear growth rate for gold coral is about 6.6 cm/yr, suggesting that large colonies are relatively young. These estimates are based on the assumption that growth rings are laid down annually, as in other precious corals (e.g., black and pink corals). Recent research on the growth of gold corals, however, has found that gold corals may grow much slower, possibly 0.004 to 0.0014 cm/yr. Such growth rates indicate that some gold coral colonies are thousands of years old and, thus, susceptible to over-harvesting.

Unlike the active black coral fishery in Hawaii, the gold coral fishery in the U.S. western Pacific is currently dormant. With recent research results that challenge current assumptions about gold coral growth rates, the Council is also recommending in Amendment 7 a 5–year moratorium on the harvest of gold corals, during which time research will be conducted on gold coral age structures, growth rates, and correlations between length and age. The research results would be considered by the Council and NMFS prior to the expiration of the five-year moratorium on harvesting.

The actions recommended by the Council are intended to prevent overfishing and achieve optimum yield of black corals, and to prevent overfishing and stimulate research on gold corals.

Public comments on the proposed amendment must be received by July 22, 2008 to be considered by NMFS in the decision to approve, partially approve, or disapprove the amendment. A proposed rule to implement the amendment has been submitted for Secretarial review and approval. NMFS expects to publish and request public comment on the proposed rule in the near future.

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

Dated: May 16 2008.

Emily H. Menashes,

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

[FR Doc. E8–11536 Filed 5–22–08; 8:45 am]

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Notices

Federal Register
Vol. 73, No. 101
Friday, May 23, 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

Agricultural Marketing Service

[Docket # AMS–LS–07–0055; LS–07–06]

Pork Promotion, Research, and Consumer Information Program: Request for Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of Request for Referendum; request for comments on new information collection.

SUMMARY: The United States Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) intends to conduct a Request for Referendum among eligible pork producers and importers of hogs, pigs, pork, and pork products to determine if those persons want a referendum on the Pork Promotion, Research, and Consumer Information Order (Order), commonly known as the Pork Checkoff Program, as authorized by the Pork Promotion, Research, and Consumer Information Act of 1985.

The Request for Referendum is being conducted as a result of a settlement of a lawsuit entered into February 28, 2001, with USDA and the Michigan Pork Producers Association, Inc., et al. (Plaintiffs). Under the settlement agreement, USDA will conduct a Request for Referendum among eligible pork producers and importers to determine whether producers and importers favor holding a referendum on the Pork Checkoff Program. Eligible producers and importers will be able to participate during a specified period announced by USDA.

If the Request for Referendum indicates that 15 percent of the total number of eligible producers and importers want a referendum on the Pork Checkoff Program, the referendum will be conducted within 1 year after the results of the Request for Referendum are announced. If results of the Request for Referendum indicate that a referendum is not supported, a referendum would not be conducted.

AMS also is withdrawing in this issue of the **Federal Register**, the proposed rule concerning submission of information that was published on March 13, 2003 [68 FR 11996].

DATES: Pursuant to the Paperwork Reduction Act of 1995 (PRA), comments on the information collection burden that would result from this Notice must be received by July 22, 2008.

ADDRESSES: Comments on the Information Collection must be posted online at *http://www.regulations.gov* or sent to Kenneth R. Payne, Chief, Marketing Programs, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251; Telephone: (202) 720–1115; Fax: (202) 720–1125. Comments will be made available for public inspection at the above address during regular business hours or via the Internet at *http://www.regulations.gov.* All comments should reference the docket number, Docket No. AMS–LS–07–0055; LS–07–06, the date, and the page number of this issue of the **Federal Register**. Pursuant to the PRA, send comments regarding the accuracy of the burden estimate; ways to minimize the burden, including the use of automated collection techniques or other forms of information technology; or any other aspect of this information collection to the above address.

In addition, comments concerning the information collection should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th St., NW., Room 725, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief, Marketing Programs Branch, at (202) 720–1115, by fax at (202) 720–1125, or by e-mail at *Kenneth.Payne@usda.gov.*

SUPPLEMENTARY INFORMATION: The Pork Promotion, Research, and Consumer Information Act of 1985 (Act) (7 U.S.C. 4801–4819) provides for the establishment of a coordinated program of promotion and research designed to strengthen the pork industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for pork and pork products. The program is financed by an assessment of 0.40 percent of the market value of domestic and imported hogs and pigs and an equivalent amount on imported pork and pork products. Pursuant to the Act, an Order was made effective September 5, 1986, and the collection of assessments began on November 1, 1986.

The Request for Referendum is being conducted as a result of a settlement of a lawsuit entered into February 28, 2001, with USDA and the Plaintiffs. On February 28, 2001, USDA entered into a settlement agreement with the Plaintiffs that was based on the guiding principle that the National Pork Board should operate independently of the National Pork Producers Council, and any successor or similar organization, while the Pork Checkoff Program is in effect. Under the settlement agreement, USDA will conduct a Request for Referendum among eligible pork producers and importers to determine whether 15 percent of those eligible producers and importers want a referendum on the Pork Checkoff Program. If the requisite number of producers and importers request a referendum, it would be conducted within 1 year from the date the results of the Request for Referendum are announced. If these requirements are not met, a referendum will not be conducted.

For the purposes of determining the total number of pork producers for the Request for Referendum, AMS will utilize the most recent data published by National Agricultural Statistics Service (NASS) in its February 2008, ''Farms, Land in Farms, and Livestock Operations'' report. The report shows that, for the year of 2007, the total number of farm operations with hogs and pigs, including those in Puerto Rico, was 67,140. Also, according to the U.S. Customs and Border Protection (Customs) data, there are approximately 2,306 importers who imported hogs, pigs, pork, or pork products during calendar year 2007. Based upon this data, the number of producers and importers who would be eligible to participate in the Request for Referendum is approximately 69,446.

AMS will conduct the Request for Referendum during a 4-week period announced by the Secretary sometime in 2008. Producers who were engaged in pork production and importers engaged in the importation of hogs, pigs, pork, or

pork products between January 1, 2007, and December 31, 2007, will be eligible to participate. Producers will be afforded the opportunity to participate in the Request for Referendum through county Farm Service Agency (FSA) offices. Using FSA offices to support the Request for Referendum process will allow for the greatest opportunity for those eligible producers to participate. FSA would coordinate State and county FSA roles in conducting the Request for Referendum by (1) confirming producer eligibility, (2) canvassing and counting requests, and (3) reporting the results to AMS.

Importers will be afforded the opportunity to participate in the Request for Referendum through the USDA's Agricultural Marketing Service (AMS). Importers would request a form by telephone, fax, or e-mail from USDA's AMS Marketing Programs Branch. Completed form LS 54–1, Customs Form 7501, or any other supporting documentation as needed, should be returned via fax or e-mail to the same office. AMS will determine importer eligibility.

Finally, given the above, AMS is withdrawing the proposed rule concerning submission of information that appeared in the March 13, 2003 [68 FR 11996], issue of the **Federal Register**. The proposed rule was designed to better identify the number of eligible producers from whom assessments were collected. AMS intended to use this information to establish the total number of pork producers that would be utilized in determining whether the 15 percent threshold requirement contained in the Act for conducting a referendum had been met. Further, that information could have been used in subsequent referenda to determine the number of eligible producers. Upon further review, AMS determined that utilizing the most recent 2007 data published by NASS in its February 2008 ''Farms, Land in Farms, and Livestock Operations'' report to determine the total number of farm operations with hogs and pigs, and 2007 Customs data to determine the total number of importers who imported hogs, pigs, pork, or pork products, would result in the most accurate information available.

AMS has developed the following Q & A's to better understand the purpose and procedures of the Request for Referendum.

Why is AMS conducting the Request for Referendum?

The Request for Referendum is being conducted as a result of a settlement of a lawsuit entered into February 28, 2001, between the Michigan Pork Producers and of the Plaintiffs and USDA. In order to fulfill their obligations under the settlement agreement, USDA will conduct a Request for Referendum among eligible pork producers and importers to determine whether producers and importers favor holding a referendum on the Pork Checkoff Program.

When will the Request for Referendum be conducted?

AMS anticipates conduct of the Request for Referendum during a 4-week period established by the Secretary in 2008 and will announce the starting date in the **Federal Register** and by a nationwide press release.

Who is eligible to participate?

Persons engaged in the production of hogs or pigs in the United States for sale in commerce and importers engaged in the importation of hogs, pigs, pork or pork products. Participation is voluntary and will indicate that participant desires a referendum on the Pork Checkoff Program. Only those persons who desire a referendum on the Pork Checkoff Program would participate.

What are the eligibility criteria?

Producers and importers must (1) have been engaged in the production of hogs or pigs in the United States for sale in commerce or importation of hogs, pigs, pork or pork products between January 1, 2007, and December 31, 2007, and, (2) be at least 18 years of age on or before December 31, 2007.

Will contract growers be allowed to participate?

AMS has determined that contract growers, who do not own, but do raise, provide care, and feed hogs and pigs for owner, including a parent company, will be allowed to participate in the Request for Referendum. Since these contract growers produce hogs and pigs for sale in commerce and their livelihoods depend on raising hogs and pigs, they are considered producers for purposes of this Request for Referendum and will be eligible to participate.

What is the eligible age for producers and importers?

In order to remain consistent with other USDA agencies, such as the FSA, AMS has also determined that individuals must be of legal voting age in order to participate. This is also consistent with the 2008 NASS report, ''Farms, Land in Farms, and Livestock Operations,'' which reports a total number of farm operations with hogs and pigs that includes contract growers but excludes youth projects.

What proof or supporting documentation must be submitted to FSA?

Producers must submit completed form LS 54–1 and supporting documentation, including sales receipts, feed and veterinary bills, etc.* * *, to the appropriate county FSA office as proof of eligibility. Importers must submit completed form LS 54–1, Customs Form 7501, and any other supporting documentation as needed, that demonstrates the importation of hogs, pigs, pork, or pork products as proof of eligibility. Participants will also have to certify this information on an official form.

Where do producers and importers participate?

Producers will participate at the county FSA office where FSA maintains and processes the producer's administrative farm records or at the county FSA office serving the county where the producer owns or rents land. A person engaged in production of hogs or pigs in the United States for sale in commerce who operates in more than one county will participate in the county FSA office where the person does most of his or her business. Importers will participate through USDA's AMS. Importers may obtain and return the LS–54–1 form through the Marketing Programs Branch, Livestock and Seed Program, AMS, USDA or via the Internet at *http://www.ams.usda.gov/LSMarketingPrograms.*

Where do I obtain Form LS–54–1?

Producers: Form LS–54–1 may be obtained by mail, fax, or in person from the county FSA offices or on USDA's Web site at *http://www.ams.usda.gov/LSMarketingPrograms.*

Importers: Form LS–54–1 may be obtained via mail, facsimile, or telephone from Kenneth R. Payne, Chief, Marketing Programs, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251; Telephone: 202–720–1115; Fax: (202) 720–1125; via e-mail at *Kenneth.Payne@usda.gov;* or via the Internet at *http://www.ams.usda.gov/LSMarketingPrograms.*

Where do I return Form LS–54–1?

Producers: Completed form LS 54–1 and supporting documentation must be returned to the county FSA office where FSA maintains and processes the producer's administrative farm records,

or at the county FSA office serving the county where the producer owns or rents land. A producer engaged in production of hogs or pigs in the United States for sale in commerce who operates in more than one county will participate in the county FSA office where the producer conducts most of his or her business. Completed form and supporting documentation, such as sales receipts, feed and veterinary bills, etc. * * *, must be returned to county FSA offices by fax or in person no later than the last day of voting period or, if returned by mail, they must be postmarked by the last day of the voting period.

Importers: Completed form LS 54–1, Customs Form 7501, and supporting documentation as needed must be returned to AMS by fax at (202) 720–1125, or in person no later than the last day of voting period or, if returned by mail, they must be postmarked by the last day of the voting period. Importers must use a form of express mail service if returning forms via mail to Kenneth R. Payne, Chief, Marketing Programs, Livestock and Seed Program, AMS, USDA, Room 2628–S, STOP 0251, 1400 Independence Avenue, SW., Washington, DC 20250–0251.

How do I locate the nearest county FSA office?

Eligible producers can determine the location of county FSA offices by contacting the nearest county FSA office, the State FSA office, or on FSA's Web site at *http://www.fsa.usda.gov/pas/default.asp.* From the options available on this Web page select ''Contact Us'' and locate the service center closest to you. Some county FSA offices service multiple counties.

What is FSA's role in the Request for Referendum?

FSA will coordinate State and county FSA roles in conducting the Request for Referendum by (1) Confirming producer eligibility, (2) canvassing and counting requests, and (3) reporting the results to AMS.

What action will cause a referendum?

If the Request for Referendum indicates that 15 percent of the total number of eligible producers and importers want a referendum on the Pork Checkoff Program, it will be conducted within 1 year after the results of the survey are announced. If results of the Request for Referendum indicate that a referendum is not supported, a referendum would not be conducted.

Paperwork Reduction Act

Form LS 54–1 is being submitted to the Office of Management and Budget for approval to determine if producers and importers want a referendum.

In accordance with the PRA [44 U.S.C. 3501 *et seq.*], this notice announces that AMS is requesting approval from the Office of Management and Budget (OMB) for a new information collection.

Title: Pork Promotion, Research, and Consumer Information Program Procedures to Hold a Request for Referendum.

OMB Number: 0581–NEW.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .2 hours per response.

Respondents: Pork producers and importers.

Estimated Number of Respondents: 7,500.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,500 total hours.

Abstract: The purpose of this Notice is to provide producers and importers who have been engaged in pork production in the United States for sale in commerce or the importation of hogs, pigs, pork or pork products the opportunity to participate in a nationwide Request for Referendum. This Notice will require eligible producers and importers to complete Form LS–54–1 in its entirety. The form will require signature to certify that the signatory either is in the business of producing hogs and pigs in the United States for sale in commerce or in the business of importing hogs, pigs, pork or pork products into the United States. In addition, participants must be 18 years of age or older prior to the conclusion of the representative period. Participating in the Request for Referendum is voluntary and will indicate that participant desires a referendum on the Pork Checkoff Program. Only those producers or importers who want a referendum on the Pork Checkoff Program should participate. Producers must submit completed form LS 54–1 and supporting documentation, including sales receipts, feed and veterinary bills, etc.* * *, as proof of eligibility. Importers must submit completed form LS 54–1, Customs Form 7501, or any other supporting documentation as needed that demonstrates the importation of hogs, pigs, pork, or pork products as proof of eligibility.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the proposed Order and the USDA's oversight of the program, including whether the information will have practical utility; (b) the accuracy of USDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: May 16, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–11554 Filed 5–22–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0056]

Notice of Request for Extension of Approval of an Information Collection; User Fee Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the collection of user fees.

DATES: We will consider all comments that we receive on or before July 22, 2008.

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

Federal eRulemaking Portal: Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0056* to submit or view comments and to view supporting and related materials available electronically.

Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS–2008–0056, Regulatory Analysis and Development, PPD, APHIS, Station3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your

comment refers to Docket No. APHIS–2008–0056.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on user fees, contact Ms. Kris Caraher, User Fees Section Head, FMD, MRPBS, APHIS, 4700 River Road Unit 54, Riverdale, MD 20737–1232, (301) 734–5743. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS* Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: User Fee Regulations.

OMB Number: 0579–0094.

Type of Request: Extension of approval of an information collection.

Abstract: Section 2509 of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended, authorizes the Animal and Plant Health Inspection Service (APHIS) to collect user fees for agricultural quarantine and inspection (AQI) services, for providing for the inspection and certification of plants and plant products offered for export or transiting the United States, and for providing veterinary diagnostic services and services related to the importation and exportation of animals and animal products.

Although certain AQI functions, but not the laws or regulations upon which they are premised, were transferred from APHIS to the Customs and Border Protection (CBP) bureau of the Department of Homeland Security in 2002, APHIS remains responsible for the regulations related to AQI activities, including the user fee regulations. APHIS also remains responsible for administration of the user fee programs.

Neither APHIS nor CBP receives an appropriation to fund these activities; instead, user fees are calculated and assessed to ensure full cost recovery of each user fee program. If the information was not collected, the agencies would not be able to perform the services since the fees collected are necessary to fund the work.

Requesters of services usually are repeat customers, and, in many cases, request that we bill them for our services. Also, the 1996 Debt Collection Improvement Act requires that agencies collect tax identification numbers (TINs) from all persons doing business with the government for purposes of collecting delinquent debts. Without a TIN, service cannot be provided on a credit basis.

The requests for services are in writing, by telephone, or in person. The information contained in each request identifies the specific service requested and the time in which the requester wishes the service to be performed. This information is necessary in order for the animal import centers and port offices to schedule the work and to calculate the fees due.

APHIS is responsible for ensuring that the fees collected are correct and that they are remitted in full and in a timely manner. To ensure this, thearty (ticketing agents for transportation companies) responsible for collecting and remitting fees must allow APHIS personnel to verify the accuracy of the fees collected and remitted, and otherwise determine compliance with the statute and regulations. We also require that whoever is responsible for making fee payments advise us of the name, address, and telephone number of a responsible officer who is authorized to verify fee calculations, collections, and remittances.

This information collection is necessary for APHIS to effectively collect fees, ensure remittances in a timely manner, and determine proper credit for payment of international air passenger, aircraft clearance, commercial truck, commercial railroad car, commercial vessel, phytosanitary certificate, import/export, and veterinary diagnostic user fees.

We have reviewed the paperwork requirements of the user fee programs and have made every possible effort to streamline our processes and minimize the impact on the public. Whenever possible, we use existing billing/collection methods to minimize the cost to the Agency.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.0251 hours per response.

Respondents: Arriving international passengers, owners and operators of arriving international means of conveyance, importers/exporters who wish to import or export plants and plant products, and importers/exporters who wish to import or export animals and animal products.

Estimated annual number of respondents: 46,729.

Estimated annual number of responses per respondent: 5.246.

Estimated annual number of responses: 245,122.

Estimated total annual burden on respondents: 6,154 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 15th day of May 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–11616 Filed 5–22–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0048]

Notice of Request for Approval of an Information Collection; Permit for Reshipment of Swine From Slaughtering Facilities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: New information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this

notice announces the Animal and Plant Health Inspection Service's intention to request approval of an information collection activity for reshipment of swine associated with regulations for livestock removed from slaughtering facilities.

DATES: We will consider all comments that we receive on or before July 22, 2008.

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

Federal eRulemaking Portal: Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0048* to submit or view comments and to view supporting and related materials available electronically.

Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS–2008–0048, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0048

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on reshipment of swine associated with regulations for livestock removed from slaughtering facilities, contact Dr. David Pyburn, Senior Staff Veterinarian, Aquaculture, Swine, Equine and Poultry Programs, NCAHP, VS, APHIS, 210 Walnut Street Room 891, Des Moines, IA 50309; (515) 284–4122. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS* Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION: *Title:* Permit for Reshipment of Swine From Slaughtering Facilities.

OMB Number: 0579-xxxx.

Type of Request: Approval of a new information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et. seq.*), the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, is authorized, among other things, to prevent the interstate spread of livestock diseases and to eradicate such diseases from the United States when feasible. In connection with this mission, APHIS' Veterinary Services (VS) program conducts animal disease surveillance programs, including diagnostic testing.

The regulations in 9 CFR, Subchapter C, Part 71, ''General Provisions,'' provide for the collection of blood and tissue samples from livestock (horses, cattle, bison, captive cervids, sheep and goats, swine, and other farmed animals) and poultry at slaughtering or rendering establishments. Persons moving livestock and poultry interstate for slaughter or rendering may only move the animals to slaughtering or rendering establishments that have been listed by the Administrator of APHIS.

Livestock or poultry may not be removed from the premises of a slaughtering or rendering establishment except under a permit issued by APHIS and in accordance with applicable regulations of USDA's Food Safety and Inspection Service. Swine may be moved from a slaughtering establishment only with a permit that restricts such movement to either a holding facility or another slaughtering establishment and prohibits their return to the farm for feeding or breeding purposes, which could expose other farm animals to diseases that may be carried by animals intended for slaughter. Any person wishing to transport slaughter swine under a permit for reshipment must submit an application to APHIS' Veterinary Services program for their review and approval.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, 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 information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.16666 hours per response.

Respondents: Purchasers of market swine from slaughter facilities designated for shipment to alternate holding or slaughtering facilities.

Estimated annual number of respondents : 60.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 60.

Estimated total annual burden on respondents: 10 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 14th day of May 2008 .

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–11650 Filed 5–22–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Plan Revision for Shoshone National Forest, WY

AGENCY: Forest Service, USDA.

ACTION: Notice of adjustment for resuming the land management plan revision process.

SUMMARY: The USDA Forest Service is resuming preparation of the Shoshone National Forest revised land management plan as directed by the National Forest Management Act. Preparation of the revised plan was halted when the 2005 Forest Service planning rule was enjoined. A new planning rule (36 CFR part 219) was implemented on April 21 2008 allowing the planning process to be resumed. This notice resumes the plan revision process under the new planning rule.

DATES: Resumption is effective upon publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bryan Armel, Planning Staff Officer, Shoshone National Forest, 808 Meadow

Lane Avenue, Cody, Wyoming, 82414, telephone 307.578.5134, or *barmel@fs.fed.us.* Information on this revision is also available at the Shoshone National Forest Web site at *http://www.fs.fed.us/r2/shoshone/projects/planning/revision/revision_index.shtml.*

SUPPLEMENTARY INFORMATION:

Notification of initiation of the plan revision process for the 1986 Shoshone National Forest Land and Resource Management Plan was provided in the **Federal Register** on September 20, 2005 (**Federal Register** Vol. 70, No. 181). The plan revision was initiated under the planning procedures contained in the 2005 Forest Service planning rule (36 CFR part 219 (2005)). On March 30, 2007, the federal district court for the Northern District of California enjoined the Forest Service from implementing and using the 2005 planning rule until the agency provided notice and comment and conducted an assessment of the rule's effects on the environment and completed consultation under the Endangered Species Act. Revision of the Shoshone National Forest Land and Resource Management Plan under the (36 CFR part 219 (2005)) rule was suspended in response to the injunction. On April 21, 2008 the Forest Service adopted a new planning rule. This rule (36 CFR part 219 (2008)) was adopted following completion of an environmental impact statement and consultation under the Endangered Species Act. This new planning rule explicitly allows the resumption of plan revisions started under the previous rule (36 CFR part 219 (2005)) based on a finding that the revision process conforms to the new planning rule (36 CFR 219.14(b)(3)(ii)).

From 2005 until 2007, the Shoshone National Forest prepared draft documents including an ecosystem sustainability analysis, comprehensive evaluation report, and draft plan components. The development and content of those documents and components are consistent with the 2008 planning rule. Beginning in May 2005 and prior to injunction of the 2005 planning rule, the Shoshone National Forest conducted public and cooperator meetings in five local communities, including approximately 52 public meetings, 13 Government Cooperators Work Group meetings, 2 field trips, and 1 revision fair. Draft documents, reports, and assessments were made available to the public for informal review and comment throughout the process. Public collaboration processes that occurred are consistent with the 2008 planning rule. Results from collaboration will be used as the revision process resumes. The remainder of the revision process will be conducted in accordance with all Forest Service directives applicable to the 2008 planning rule.

Based on the discussions above, I find that the planning actions taken prior to April 21, 2008 conform to the planning process of the 2008 planning rule and for that reason the plan revision process does not need to be restarted. The Shoshone National Forest is resuming its plan revision process by scheduling public meetings to explain how the Shoshone's revision process will adjust to the 2008 Planning Rule, distribute pre-release versions of the draft proposed plan, and present a timeline for the remainder of the revision process.

Authority: 16 U.S.C. 1600–1614; 36 CFR 219.14.

Dated: May 16, 2008.

Rebecca Aus,

Forest Supervisor, Shoshone National Forest.

[FR Doc. E8–11499 Filed 5–22–08; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List: Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletion from the Procurement List.

SUMMARY: This action deletes from the Procurement List a product previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* June 22, 2008.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Kimberly M. Zeich, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@jwod.gov.*

SUPPLEMENTARY INFORMATION:

Deletion:

On March 28, 2008, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (73 FR16639) of proposed deletions to the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the product listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action should not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product deleted from the Procurement List.

End of Certification

Accordingly, the following product is deleted from the Procurement List:

Product:

Cover, Ironing Board and Pad Set

NSN: M.R. 968.
NPA: Chester County Branch of the PAB, Coatesville, PA.
Contracting Activity: Defense Commissary Agency (DeCA), Fort Lee, VA.

Kimberly M. Zeich,

Director, Program Operations.

[FR Doc. E8–11608 Filed 5–22–08; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to the Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments must be received on or before: June 22, 2008.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

For Further Information or to Submit Comments Contact: Kimberly M. Zeich,

Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@jwod.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each product or service will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Insulation Panels & Blanket

NSN: 2510–01–251–8548—Thermal.
NSN: 2510–01–335–7363—Vehicular Cab.
NSN: 2510–01–421–8067—Vehicular Cab.
NSN: 2510–01–251–9995—Vehicular Cab.
Coverage: C-List for the requirements of the Defense Supply Center Columbus.
NPA: New York City Industries for the Blind, Inc., Brooklyn, NY.
Contracting Activity: Defense Supply Center Columbus, Columbus, OH.

Tape, Double-Sided

NSN: 7510–00–NIB–0826.
NSN: 7510–00–NIB–0827.
Coverage: A-List for the total Government requirements as specified by the General Services Administration.
NSN: 7510–00–NIB–0825.
Coverage: B-List for the broad Government requirement as specified by the General Services Administration.
NPA: Alphapointe Association for the Blind, Kansas City, MO.
Contracting Activity: General Services Administration, Office Supplies & Paper Products Acquisition Ctr, New York, NY.

Services

Service Type/Location: Custodial Services, John F. Kennedy Space Center, NASA Kennedy Space Center, Kennedy Space Center, FL.
NPA: Brevard Achievement Center, Inc., Rockledge, FL.
Contracting Activity: Kennedy Space Center, Kennedy Space Center, FL.
Service Type/Location: Food Service Attendant, 183rd Capitol Airport, Air National Guard Base, 3101 J. David Jones Parkway, Springfield, IL.
NPA: United Cerebral Palsy of the Land of Lincoln, Springfield, IL.
Contracting Activity: United States Air Force, 183rd Fighter Wing, Air National Guard, Springfield, IL.
Service Type/Location: Food Service Attendant, Ohio Air National Guard Base, 179th Airlift Wing, 1947 Harrington Memorial Road, Dining Hall Bldg. 420B, Mansfield, OH.
NPA: Rehabilitation Service of North Central Ohio, Inc., Mansfield, OH.
Contracting Activity: Air National Guard, 179th Airlift Group, Mansfield, OH.

Kimberly M. Zeich,

Director, Program Operations.

[FR Doc. E8–11607 Filed 5–22–08; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).
Title: Fishermen's Contingency Fund.
OMB Control Number: 0648–0082.
Form Number(s): NOAA 88–164, 88–166.
Type of Request: Regular submission.
Burden Hours: 1,008.
Number of Respondents: 100.
Average Hours per Response: Applications, 10 hours; 15-day reports, 5 minutes.
Needs and Uses: The Fishermen's Contingency Fund compensates U.S. commercial fishermen for loss of or damage to their fishing vessels or fishing gear, plus 50% of resulting economic loss, caused by oil and gas industry activities on the U.S. Outer Continental Shelf. In order to be compensated, fishermen must file a report and an application to NOAA.
Affected Public: Business or other for-profit organizations.
Frequency: On occasion.
Respondent's Obligation: Required to obtain or retain benefits.
OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: May 20, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11596 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).
Title: U.S. Pacific Albacore Logbook.
OMB Control Number: 0648–0223.
Form Number(s): 88–197.
Type of Request: Regular submission.
Burden Hours: 4,000.
Number of Respondents: 4,000.
Average Hours per Response: 1.
Needs and Uses: U.S. fishermen, participating in the Pacific albacore tuna fishery, are required to obtain a Highly Migratory Species Fishery Management Plan and/or a High-Seas Fishery Compliance Act permit. A requirement for the permits is to complete and submit logbooks documenting their daily fishing activities, including catch

and effort for each fishing trip. The submissions must be made within 30 days of the completion of a trip. The information obtained is used by the agency to assess the status of Pacific albacore stocks and to monitor the fishery. The agency also provides an electronic alternative to the hard copy form. Use of this electronic logbook is voluntary.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: May 20, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11597 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Vessel Monitoring System Requirement for American Samoa Pelagic Longline Fishery.

OMB Control Number: 0648–0519.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 96.

Number of Respondents: 40.

Average Hours per Response: VMS installation, 4 hours; and annual maintenance, 2 hours (Automatic transmissions are not counted as burden).

Needs and Uses: Under Amendment 11 to the Fishery Management Plan for Pelagic Fisheries of Western Pacific Region, owners of large vessels (>50 ft in length) registered for use with American Samoa longline limited access permits must allow National Marine Fisheries Service (NMFS) to install vessel monitoring system (VMS) units on their vessels when directed to do so by NMFS enforcement personnel. VMS units automatically send periodic reports on the position of the vessel. NMFS uses the reports to monitor the vessel's location and activities while enforcing area closures. NMFS pays for the units and messaging.

Affected Public: Business or other for-profit organizations.

Frequency: Annually and hourly.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: May 20, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11598 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Survey of Income and Program Participation (SIPP) Wave 2 of the 2008 Panel

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before July 22, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Patrick J. Benton, Census Bureau, Room HQ–6H045, Washington, DC 20233–8400, (301) 763–4618.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the SIPP, which is a household-based survey designed as a continuous series of national panels. New panels are introduced every few years with each panel usually having durations of one to four years. Respondents are interviewed at 4-month intervals or ''waves'' over the life of the panel. The survey is molded around a central ''core'' of labor force and income questions that remain fixed throughout the life of the panel. The core is supplemented with questions designed to address specific needs, such as obtaining information on household members' participation in government programs as well as prior labor force patterns of household members. These supplemental questions are included with the core and are referred to as ''topical modules.''

The SIPP represents a source of information for a wide variety of topics and allows information for separate topics to be integrated to form a single, unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic-policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population. The SIPP has provided these kinds of data on a continuing basis since 1983 permitting levels of economic well-being and changes in these levels to be measured over time.

The 2008 panel is currently scheduled for 4 years and will include 13 waves of interviewing beginning September 2008. Approximately 65,300 households were selected for the 2008 panel, of

which, 45,000 households are expected to be interviewed. We estimate that each household contains 2.1 people, yielding 94,500 person-level interviews in Wave 1 and subsequent waves. Three waves will occur in the 2008 SIPP Panel during FY 2009. The total annual burden for 2008 Panel SIPP interviews would be 141,750 hours in FY 2009.

The topical modules for the 2008 Panel Wave 2 collect information about:

- Work Disability History
- Education and Training History
- Marital History
- Fertility History
- Migration History
- Household Relationships
- Tax Rebate

Wave 2 interviews will be conducted from January 2009 through April 2009.

A 10-minute reinterview of 3,100 people is conducted at each wave to ensure accuracy of responses. Reinterviews would require an additional 1,553 burden hours in FY 2009.

II. Method of Collection

The SIPP is designed as a continuing series of national panels of interviewed households that are introduced every few years with each panel having durations of 1 to 4 years. All household members 15 years old or over are interviewed using regular proxy-respondent rules. During the 2008 panel, respondents are interviewed a total of 13 times (13 waves) at 4-month intervals making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit will be followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these individuals move, they are not followed unless they happen to move along with a Wave 1 sample individual.

III. Data

OMB Control Number: 0607–0944.

Form Number: SIPP/CAPI Automated Instrument.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 94,500 people per wave.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 143,303.

Estimated Total Annual Cost: $0.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 20, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11581 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Establishment of the Emerging Technology and Research Advisory Committee

SUMMARY: The Bureau of Industry and Security (BIS) is announcing the creation of and recruiting individuals for a technical advisory committee that will review and provide recommendations to the Department of Commerce on emerging technology and research issues. The Emerging Technology and Research Advisory Committee (ETRAC) will advise the Department and other agency officials on (i) identifying emerging technologies and research and development activities that may be of interest from a dual-use perspective; (ii) prioritizing new and existing controls to determine which are of greatest consequence to national security from a deemed export perspective; and (iii) addressing the implications of dual-use export control requirements on research activities.

DATES: To respond to the recruitment notice, please send a copy of your resume by 5 p.m. EDT, June 24, 2008.

ADDRESSES: Interested parties may submit their resume to Ms. Yvette Springer at *Yspringer@bis.doc.gov* or mail to U.S. Department of Commerce, Bureau of Industry and Security, 14th Street and Constitution Ave., NW., Room 1093, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Mark Crawford, Office of Technology Evaluation, Bureau of Industry and Security, *telephone:* (202) 482–4933 or *e-mail: mcrawfor@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

BIS is proposing the establishment of a technical advisory committee, the Emerging Technology and Research Advisory Committee (ETRAC), under the terms of section 5(h) of the Export Administration Act of 1979, as amended (EAA), 50 U.S.C. app. 2401–2420 (2000), the International Emergency Economic Powers Act, 50 U.S.C. 1701–1707 (2007), and the Federal Advisory Committee Act (FACA) (5 U.S.C. app. 2 (2005)), which will provide an important vehicle for gathering necessary data as part of the Department's efforts to ensure that export controls continue to apply to sensitive items and keep pace with technological and research innovation without stifling U.S. competitiveness.

BIS's decision to establish the ETRAC drew on three sources: Public comments submitted to BIS last year regarding the Commerce Control List (CCL), the report recently issued by the Deemed Export Advisory Committee (DEAC), a Federal advisory committee charged with making recommendations to the Secretary regarding BIS's deemed export policy and a new Presidential directive calling for BIS to regularly reassess and update the CCL.

First, in response to a notice of inquiry, ''Request for Public Comments on a Systematic Review of the Commerce Control List,'' published in the **Federal Register** on July 17, 2007, BIS received public comments stating that the CCL was not keeping pace with technology and suggesting that university experts play a greater role in updating the list.

Second, on December 20, 2007, the DEAC submitted its final report, The Deemed Export Rule in the Era of Globalization, to the Secretary of Commerce. The DEAC recommended that BIS create a panel of outside experts in the fields of science and engineering to conduct a ''zero-based'' annual review of the list of technologies on the CCL subject to deemed export licensing policy. The DEAC also suggested that the Department increase the focus on and ''build higher fences around those elements of technical knowledge that could have the greatest consequences in the national/homeland

security sphere by systematically reviewing the Commerce Control List, with advice from independent experts, to eliminate those items and technologies that have little or no such consequences.''

The DEAC's recommendations contained in the report constitute a written request from representatives of a substantial segment of an industry that produces goods or technology subject to export controls, a requirement under Section 5(h) of the EAA for the establishment of a technical advisory committee. Specifically, the DEAC's members were senior officials with significant experience in business, educational research, and national homeland security matters related to scientific and engineering knowledge. As such, they represented a substantial segment of an affected industry that produces items subject to export controls, namely, the U.S. technology community, which is engaged in producing technical data and providing technical assistance.

Finally, the President issued a *Dual-Use Trade Reform* directive on January 22, 2008 that called for export controls to be constantly reassessed to ensure that they control the export and reexport of sensitive items while minimizing their impact on U.S. economic competitiveness and innovation. In order to meet this objective, the President directed the Secretary of Commerce to develop a regularized process that would consider input by technical advisory committees in the review and updating of the CCL.

The ETRAC will be charged with identifying emerging technologies and research and development activities that may be of interest from a dual-use perspective, prioritizing new and existing controls related to deemed exports to determine which are of greatest consequence to national security, and examining how research is performed to understand the impact that the Export Administration Regulations have on academia, federal laboratories, and industry.

Emerging Technology and Research Advisory Committee (ETRAC): Notice of Recruitment of Members [The membership is drawn from both private and public sectors, based on the description below as well as the draft charter.]

BIS is recruiting members for the ETRAC. The ETRAC will comprise a maximum of 25 members and will feature a balanced membership that will include diverse points of view. It will consist of experts from academia, federal laboratories, and industry to ensure a comprehensive discussion of emerging technologies and research and development activities and their implications with regard to national and economic security. ETRAC members will be appointed by the Secretary of Commerce and serve a term of not more than one year. Each member will be required to hold a secret security clearance prior to appointment. These clearances are necessary so that members may be permitted access to sensitive intelligence and law enforcement information related to the ETRAC's mission. The ETRAC will also reach out to other government and non-government experts to ensure a broad and thorough review of the issues.

To respond to the recruitment notice, please send a copy of your resume to the individual identified under the **ADDRESSES** heading. This Notice of Recruitment will be open until June 24, 2008.

Dated: May 20, 2008.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E8–11638 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet June 10, 2008, 9 a.m., Room 4830, in the Herbert C. Hoover Building, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the Public.
3. Opening remarks by Bureau of Industry and Security.
4. Regulations update.
5. Export Enforcement update.
6. Working group reports.
7. Automated Export System (AES) update.

Closed Session

8. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 section 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than June 3, 2008.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee.

The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on May 13, 2008, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 sec.(10)(d)), that the portion of the meeting dealing with matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 section 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: May 20, 2008.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E8–11635 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Proposed Information Collection; Comment Request; Application for an Export Trade; Certificate of Review

AGENCY: International Trade Administration.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on its continuing information collections, as required by the

Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 22, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 or via the Internet at *dHynek@doc.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to: Shirley Hooker, Export Trading Company Affairs, Industry Analysis, phone: (202) 482–5131, e-mail: *shirley_hooker@ita.doc.gov* and fax: (202) 482–1790.

SUPPLEMENTARY INFORMATION:

I. Abstract

Title III of the Export Trading Company Act (hereinafter ''the Act'') of 1982 (Pub. L. 97–290, 15 U.S.C. 4001 *et seq.*), authorizes the Secretary of Commerce to issue, with the concurrence of the Attorney General, an Export Trade Certificate of Review to any person that establishes that its proposed export trade, export trade activities, and methods of operation meet the four standards found in Section 303 (a) of the Act, 15 U.S.C. 4001 *et seq.* An Export Trade Certificate of Review provides the certificate holder and its members with limited antitrust immunity for specified export-related activities. Application for an Export Trade Certificate of Review is voluntary. The information to be collected is found at 15 CFR part 325—Export Trade Certificates of Review. The collection of information is necessary for both the Departments of Commerce and Justice to conduct an antitrust analysis, in order to determine whether the applicant's proposed export-related conduct meets the standards in Section 303(a) of the Act. The collection of information constitutes the essential basis of the statutory determinations to be made by the Secretary of Commerce and the Attorney General.

The Department of Commerce conducts its economic and legal analysis of the information supplied by applicants through Export Trading Company Affairs and the Office of the General Counsel. In the Department of Justice, analysis is conducted by the Antitrust Division.

Title III was enacted to reduce uncertainty regarding the application of U.S. antitrust laws to export activities—especially joint export activities involving domestic competitors. Among other benefits, the Export Trade Certificate of Review provides its holder and members named in the Certificate with (a) immunity from government actions under state and federal antitrust laws for the export conduct specified in the Certificate, and (b) some protection from frivolous private suits, by limiting liability in private actions to actual damages when the challenged activities are covered by an Export Trade Certificate of Review.

II. Method of Collection

Form ITA–4093P is sent by request to U.S. firms.

III. Data

OMB Number: 0625–0125.

Form Number: ITA–4093P.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; not-for-profit institutions, and state, local or tribal government.

Estimated Number of Respondents: 12 .

Estimated Time per Response: 32 hours .

Estimated Total Annual Burden Hours: 384.

Estimated Total Annual Cost to Public: $55,296.

IV. Request for Comments

Comments are invited (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and costs) 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 forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 20, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11582 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration.

Title: Foreign-Trade Zones Application.

OMB Control Number: 0625–0139.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 6,651.

Number of Respondents: 74.

Average Hours per Response: 38 to 151 hours (depending on type of application).

Needs and Uses: The Foreign-Trade Zone Application is the vehicle by which individual firms or organizations apply for foreign-trade zone (FTZ) status, subzone status, or expansion of an existing zone. The FTZ Act and regulations require that an application with a description of the proposed project be made to the FTZ Board (19 U.S.C. 81b and 81f; 15 CFR 400.24–26) before a license can be issued or a zone can be expanded. It is also required that applications contain detailed information on facilities, financing, operational plans, proposed manufacturing operations, need, and economic impact. The manufacturing activity in zones, which is primarily conducted in subzones, can involve issues related to domestic industry and trade policy impact. Such applications must include specific information on the Customs tariff-related savings that result from zone procedures and the economic consequences of permitting such savings. The FTZ Board needs complete and accurate information on the proposed operation and its economic effects because the Act and regulations authorize the Board to restrict or prohibit operations that are detrimental to the public interest.

Affected Public: State, local, or tribal government; not-for-profit institutions; and business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of

Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Fax number (202) 395–7285 or via the Internet at *David_Rostker@omb.eop.gov*.

Dated: May 20, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–11600 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Dayton Research Institute, et al., Notice of Consolidated Decision on Applications, for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 2104, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Docket Number: 08–010. Applicant: University of Dayton Research Institute, Dayton, OH 45469–0106. Instrument: Electron Microscope, Model FEI Quanta 600 FEG. Manufacturer: FEI Company, Czech Republic. Intended Use: See notice at 73 FR 21310, April 21, 2008.

Docket Number: 08–011. Applicant: University of Minnesota Institute of Technology Characterization Facility, Minneapolis, MN 55455. Instrument: Electron Microscope, Model Tecnai G2 F30 Twin. Manufacturer: FEI Company, Netherlands. Intended Use: See notice at 73 FR 21310, April 21, 2008.

Docket Number: 08–012. Applicant: Alfred E. Mann Foundation for Scientific Research, Santa Clarita, CA 91355. Instrument: Electron Microscope, Model FEI Inspect S. Manufacturer: FEI Company, Czech Republic. Intended Use: See notice at 73 FR 21310, April 21, 2008.

Docket Number: 08–013. Applicant: National Institutes of Health, Bethesda, MD 20892. Instrument: Electron Microscope, Model Tecnai G2 20 Twin. Manufacturer: FEI Company, Netherlands. Intended Use: See notice at 73 FR 21310, April 21, 2008.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. Reasons: Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: May 19, 2008.

Faye Robinson,

Director, Statutory Import Programs Staff, Import Administration.

[FR Doc. E8–11624 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–533–813)

Certain Preserved Mushrooms from India: Notice of Court Decision Not in Harmony with Final Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 8, 2008, the United States Court of International Trade (CIT) sustained the results of redetermination made by the Department of Commerce (the Department) pursuant to the CIT's remand in *Agro Dutch Industries Limited v. United States*, Slip Op. 07–185 (December 26, 2007) (*Agro Dutch II*). *See Agro Dutch Industries Limited v. United States*, Slip Op. 08–50 (May 8, 2008) (*Agro Dutch III*). Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (Timken), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results of the administrative review of the antidumping duty order on certain preserved mushrooms from India covering the period of review (POR) of February 1, 2000, through January 31, 2001. *See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 67 FR 46172 (July 12, 2002), and accompanying Issues and Decisions Memorandum (*Final Results*).

EFFECTIVE DATE: May 23, 2008.

FOR FURTHER INFORMATION CONTACT: David Goldberger or Katherine Johnson, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4136 or (202) 482–4929, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 12, 2002, the Department issued its final results in the antidumping duty administrative review of certain preserved mushrooms from India covering the POR of February 1, 2000, through January 31, 2001. *See Final Results*. Agro Dutch challenged three aspects of the Department's *Final Results*: (1) that the use of partial facts available and adverse inferences for certain of its sales was improper; (2) that the methodology used to determine Agro Dutch's constructed value was in error; and (3) that the calculation of its imputed credit expenses was in error.

In *Agro Dutch Industries Limited v. United States*, Slip Op. 07–25 (February 16, 2007) (*Agro Dutch I*), the CIT upheld the Department's determinations on issues (2) and (3) regarding constructive value and imputed credit expense methodologies. However, with respect to the first issue, that the use of partial facts available and adverse inferences for certain of Agro Dutch's sales was improper, the CIT instructed the Department on remand to revisit its determination that the use of partial facts available and adverse inferences was warranted for the transactions where the Department applied them.

On March 3, 2007, the Department filed its remand redetermination and further explained its use and application of facts available in this review. In *Agro Dutch II*, the CIT did not accept the Department's explanation and again remanded the case to the Department, instructing the Department to either reopen the proceeding for the limited purpose of obtaining satisfactory answers to the Department's questions that generated the Department's use of partial facts available, or make a determination on the basis of facts available without imputing an adverse inference on the record evidence obtained during the review.

On April 3, 2008, the Department issued its final results of redetermination pursuant to *Agro Dutch II*. The remand redetermination explained that, in accordance with the CIT's instructions, the Department analyzed the information on the record and made its determination for certain Agro Dutch sales on the basis of facts

available without imputing an adverse inference. The Department's redetermination resulted in a change from the Final Results weighted–average margin for *Agro Dutch* from 27.80 percent to 1.54 percent.

Timken Notice

In its decision in *Timken*, 893 F.2d at 341, the CAFC held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's decision in *Agro Dutch III* on May 8, 2008, constitutes a final decision of that court that is not in harmony with the Department's *Final Results*. This notice is published in fulfillment of the publication requirements of *Timken*. Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. In the event the CIT's ruling is not appealed or, if appealed, upheld by the CAFC, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on entries of the subject merchandise during the POR from Agro Dutch based on the revised importer–specific assessment rates calculated by the Department.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: May 19, 2008.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11622 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–274–804]

Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago: Notice of Final Results of Antidumping Duty Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has determined that Arcelor Mittal Point Lisas Limited (AMPL) is the successor-in-interest to Mittal Steel Point Lisas Limited (MSPL) and, as a result, should be accorded the same treatment previously accorded to MSPL in regard to the antidumping duty order on carbon and certain alloy steel wire rod from Trinidad and Tobago as of the date of publication of this notice in the **Federal Register**.

DATES: *Effective Date:* May 23, 2008.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or Stephanie Moore; AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5973 or (202) 482–3692, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 30, 2008, MSPL requested that the Department initiate and conduct an expedited changed circumstances review to determine whether AMPL is the successor-in-interest to MSPL.

On March 27, 2008, the Department initiated this review and made its preliminary determination that AMPL is the successor-in-interest to MSPL and should be treated as such for antidumping duty cash deposit purposes. *See Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago: Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 73 FR 17952 (April 2, 2008) (*Preliminary Results*). In the *Preliminary Results,* we stated that interested parties could request a hearing or submit case briefs and/or written comments to the Department no later than 30 days after publication of the *Preliminary Results* in the **Federal Register**, and submit rebuttal briefs, limited to the issues raised in those case briefs, seven days subsequent to the case briefs due date. We did not receive any hearing requests or comments on the *Preliminary Results*.

Scope of the Order

The merchandise subject to this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel

and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003. *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of Changed Circumstances Review,* 68 FR 64079 (November 12, 2003).

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under the order are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Final Results of Changed Circumstances Review

Based on the information provided by AMPL, and the fact that the Department did not receive any comments during the comment period following the preliminary results of this review for the reasons discussed in the *Preliminary Results,* the Department hereby determines AMPL is the successor-in-interest to MSPL for antidumping duty cash deposit purposes.

Instructions to U.S. Customs and Border Protection

The Department will instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of all shipments of the subject merchandise produced and exported by AMPL entered, or withdrawn from warehouse, for consumption, on or after the publication date of this notice at zero percent (*i.e.* MSPL's cash deposit rate). This deposit rate shall remain in effect until publication of the final results of the ongoing administrative review, in which AMPL/MSPL is participating.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.306. 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 sanctionable violation.

This notice is in accordance with sections 751(b) and 777(i)(1) of the Act, and section 351.216(e) of the Department's regulations.

Dated: *May 19, 2008.*

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11618 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–894)

Certain Tissue Paper Products from the People's Republic of China: Correction to Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 23, 2008.

FOR FURTHER INFORMATION CONTACT: Julia Hancock, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1394.

SUPPLEMENTARY INFORMATION:

CORRECTION:

On April 22, 2008, the Department of Commerce (''the Department'') published in the **Federal Register** the affirmative preliminary determination that certain tissue paper products (''tissue paper'') produced by Vietnam Quijiang Paper Co., Ltd. (''Quijiang'') are circumventing the antidumping duty order on tissue paper from the People's Republic of China (''PRC''), as provided in section 781(b) of the Tariff Act of 1930, as amended (''the Act''). *See Certain Tissue Paper Products from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 73 FR 21580 (April 22, 2008) (''*Preliminary Determination*''). Subsequent to the issuance of the *Preliminary Determination*, we identified an inadvertent error in the Notice.

In the ''Suspension of Liquidation'' section of the *Preliminary Determination*, we stated that the Department will direct the U.S. Customs and Border Protection (''CBP'') to ''suspend liquidation and require cash deposit of estimated duties, at the PRC–wide rate, on all unliquidated entries of tissue paper produced by Quijiang that were entered, or withdrawn from warehouse for consumption, on or after September 5, 2006, the date of initiation of the circumvention inquiry, through the date of publication of the preliminary determination.'' *See Preliminary Determination*, 73 FR at 21587. Section 351.225(l)(2) of the applicable regulations provides that we shall order suspension of liquidation ''on or after the date of initiation'' of the

inquiry and does not provide an end date. Accordingly, the *Preliminary Determination* should be corrected to indicate that, pursuant to section 773(d) of the Act, we will: (1) direct CBP to suspend liquidation and to require a cash deposit of estimated duties, at the PRC–wide rate, on all unliquidated entries of tissue paper produced by Quijiang that were entered, or withdrawn from warehouse, for consumption on or after September 5, 2006, the date of initiation of the circumvention inquiry, with the exception described in the *Preliminary Determination*; and (2) remove any mention of an end date of such suspension from our cash deposit instructions.

This correction to the affirmative preliminary circumvention determination is published in accordance with section 781(b) of the Act and 19 CFR 351.225.

Dated: May 13, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–11623 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–570–851)

Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 23, 2008.

SUMMARY: The Department of Commerce (the ''Department'') is currently conducting a new shipper review of the antidumping duty order on certain preserved mushrooms from the People's Republic of China (''PRC'') covering the period February 1, 2007, through July 31, 2007. We preliminarily determine that the sale made by Dujiangyan Xingda Foodstuff Co., Ltd. (''Xingda''), was not made below normal value (''NV''). If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on entries of subject merchandise during the period of review (''POR'') for any importer–specific assessment rates that are above *de minimis*.

FOR FURTHER INFORMATION CONTACT: Zev Primor at (202) 482–4114; AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On February 19, 1999, the Department published in the **Federal Register** an amended final determination and antidumping duty order on certain preserved mushrooms from the PRC. *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From the People's Republic of China*, 64 FR 8308 (February 19, 1999) (''*Order*''). On August 30, 2007, we received a timely new shipper review request in accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.214(c), from exporter and producer, Xingda. On September 27, 2007, the Department published a notice in the **Federal Register** initiating a new shipper review for Xingda. *See Certain Preserved Mushrooms from the People's Republic of China: Initiation of New Shipper Antidumping Duty Review*, 72 FR 54899 (September 27, 2007).

On March 19, 2008, the Department published a notice in the **Federal Register** of the extension of the preliminary results by 60 days to May 19, 2008. *See Certain Preserved Mushrooms From the People's Republic of China: Extension of Preliminary Results for Eleventh Antidumping Duty New Shipper Review*, 73 FR 14771 (March 19, 2008).

We issued the standard antidumping duty questionnaire, along with the standard importer questionnaire for new shipper reviews, on September 27, 2007, and received responses in October and November 2007. We issued supplemental questionnaires covering sections A, C, and D of the original questionnaire on January 29, 2008, and received timely responses to those questionnaires. We also issued additional section D supplemental questionnaires on April 18, and April 21, 2008, respectively, and received timely responses from Xingda.

Period of Review

The POR covers February 1, 2007, through July 31, 2007.

Scope of the Order

The products covered by this order are certain preserved mushrooms, whether imported whole, sliced, diced, or as stems and pieces. The certain preserved mushrooms covered under this order are the species Agaricus bisporus and Agaricus bitorquis. ''Certain Preserved Mushrooms'' refers to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars in a suitable liquid medium, including, but not limited to, water, brine, butter or butter sauce. Certain preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are ''brined'' mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.[1]

Excluded from the scope of this order are the following: (1) All other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including ''refrigerated'' or ''quick blanched mushrooms'' (3) dried mushrooms; (4) frozen mushrooms; and (5) ''marinated,'' ''acidified,'' or ''pickled'' mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this order is classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153 and 0711.51.0000 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this order is dispositive.

Bona Fide Analysis

Consistent with the Department's practice, we investigated the *bona fide* nature of the sale made by Xingda for this new shipper review. In evaluating whether or not a single sale in a new shipper review is commercially reasonable, and therefore *bona fide*, the Department considers, *inter alia*, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5)

[1] On June 19, 2000, the Department affirmed that ''marinated,'' ''acidified,'' or ''pickled'' mushrooms containing less than 0.5 percent acetic acid are within the scope of the antidumping duty order. *See* Recommendation Memorandum-Final Ruling of Request by Tak Fat, *et al.* for Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China,'' dated June 19, 2000. On February 9, 2005, this decision was upheld by the United States Court of Appeals for the Federal Circuit. *See Tak Fat v. United States*, 396 F.3d 1378 (Fed. Cir. 2005).

whether the transaction was made on an arm's–length basis. See Tianjin Tiancheng Pharm. Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1250 (CIT 2005). Accordingly, the Department considers a number of factors in its bona fide analysis, ''all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.'' *See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (citing Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) and accompanying Issues and Decision Memorandum).

We preliminarily found that the U.S. sale made by Xingda during the POR was made on a *bona fide* basis. Specifically, we found that: (1) The timing of the sale does not indicate that the sale might not be *bona fide*; (2) the price and quantity of the sale were within the range of the prices and quantities of other entries of subject merchandise from the PRC into the United States during the POR, based upon the Department's review of data obtained from CBP; (3) Xingda and its customer did not incur any extraordinary expenses arising from the transaction; (4) the sale was resold at a profit; and (5) the sale was made between unaffiliated parties at arm's–length.[2]

Based on our review of the record evidence concerning the *bona fide* nature of this sale, as well as Xingda's eligibility for a separate rate (*see* ''Separate Rates Determination'' section, below) and the Department's determination that the seller was not affiliated with any exporter or producer that had previously shipped subject merchandise to the United States, we preliminarily determine that Xingda has met the requirements to qualify as a new shipper during the POR. Therefore, for purposes of these preliminary results, we are treating the sale of subject merchandise to the United States as an appropriate transaction for this new shipper review.

NME Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non–market economy (''NME'') country. *See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006). In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. None of the parties to this proceeding have contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates Determination

A designation of a country as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Act. Accordingly, there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in the *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991), (''Sparklers'') as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*'').

Absence of De Jure Control

Evidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes: (1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

In the instant review, Xingda submitted a complete response to the separate rates section of the Department's questionnaire. The evidence submitted in the instant review by Xingda includes government laws and regulations on corporate ownership and control, business licenses, and narrative information regarding the company's operations and selection of management. The evidence provided by Xingda supports a preliminary finding of a *de jure* absence of government control over its export activities because: (1) there are no controls on exports of subject merchandise, such as quotas applied to, or licenses required for, exports of the subject merchandise to the United States; and (2) legislative enactments exist decentralizing control of companies. *See* Xingda's Section A Response at Exhibits 2–7 (October 26, 2007).

Absence of De Facto Control

The absence of *de facto* government control over exports generally is based on whether the respondent: (1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management. *See Silicon Carbide*, 59 FR at 22586–87; *Sparklers*, 56 FR at 20589; *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

In its questionnaire responses, Xingda submitted evidence demonstrating an absence of *de facto* government control over its export activities. Specifically, this evidence indicates that: (1) the company sets its own export prices independent of the government and without the approval of a government authority; (2) the company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) the company has a general manager with the authority to negotiate and bind the company in an agreement; (4) the general manager is selected by the shareholders' meeting, and the general manager appoints the manager of each department; and (5) there is no restriction on the company's use of export revenues. Therefore, we have preliminarily found that Xingda established *prima facie* that it qualifies for a separate rate under the criteria established by *Silicon Carbide* and *Sparklers*.

Surrogate Country

When the Department investigates imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's factors of production

[2] *See* Calculation Memorandum from Zev Primor, Sr. International Trade Compliance Analyst, to The File via Mark Manning, Program Manager, Office 4, ''*Bona Fide* Sales Analysis for Dujiangyan Xingda Foodstuff Co., Ltd.,'' dated concurrently with this notice.

(''FOPs''), valued in a surrogate market–economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market–economy countries that are at a level of economic development comparable to that of the NME country and are significant producers of comparable merchandise. The sources of the surrogate values we have used in this new shipper review are discussed under the ''Normal Value'' section, below. On January 29, 2008, the Department determined that India, Indonesia, the Philippines, Colombia, and Thailand are countries comparable to the PRC in terms of economic development, and requested comments from interested parties on selecting the appropriate surrogate country for this review. *See* Letter to All Interested Parties, RE: New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China: Dujiangyan Xingda Foodstuffs Co., Ltd., dated March 19, 2008. No party submitted surrogate country selection comments.

On April 21, 2008, the Department examined the export levels [3] of subject merchandise from the above–mentioned countries and found that India and Indonesia are significant producers of comparable merchandise. *See* Memorandum from Zev Primor, Sr. International Trade Compliance Analyst, to Abdelali Elouaradia, Director, ''Antidumping Duty New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China: Selection of a Surrogate Country,'' dated April 21, 2008, (''Surrogate Country Memorandum'') at 4. However, since India has exports in both of the HTS subheadings identified for subject merchandise, while Indonesia has exports under only one of the HTS subheadings, we found that the Indian export data are more comprehensive and representative of subject merchandise than Indonesian export data. *Id.* at 5. In selecting the appropriate surrogate country, the Department examines the availability and reliability of data from the countries deemed to be economically comparable and significant producers of subject merchandise. For a description of our practice, *see* Department Policy Bulletin No. 04.1: Non–Market Economy Surrogate Country Selection Process (March 1, 2004). India has been the primary surrogate country in numerous past segments for this proceeding. In those past segments, the Department found India's import statistics to be an available and reliable source for surrogate values. *Id.* at 4. Therefore, since India: (1) is a significant producer of comparable merchandise, whose production of subject merchandise is more comprehensive than Indonesia's production; (2) is at a similar level of economic development as the PRC; and (3) has publicly available and reliable data, which the Department has relied upon for numerous segments of this proceeding, the Department selected India as the surrogate country, pursuant to section 773(c)(4) of the Act. *See* Surrogate Country Memorandum at 5.

[3] The Department was unable to find world production data for subject merchandise and relied on export data as a substitute for overall production.

Fair Value Comparisons

To determine whether Xingda's sale of subject merchandise to the United States was made at a price below NV, we compared its U.S. price to NV, as described in the ''U.S. Price'' and ''Normal Value'' sections of this notice, below.

U.S. Price

In accordance with section 772(a) of the Act, we based U.S. price on the export price (''EP'') of the sale to the United States by Xingda because the first sale to an unaffiliated party was made before the date of importation and the use of constructed export price was not otherwise warranted. We calculated EP based on the free–on-board price to the first unaffiliated purchaser in the United States. For this EP sale, we deducted foreign inland freight and foreign brokerage and handling from the starting price (or gross unit price), in accordance with section 772(c) of the Act. For Xingda's U.S. sale, each of these services was either provided by an NME vendor or paid for using an NME currency. Thus, we based the deduction of these movement charges on surrogate values. We valued foreign inland freight with the surrogate value for truck freight, which we obtained from www.infreight.com. This source provides daily rates per truck load from six major points of origin to five different destinations in India. *See* Memorandum from Zev Primor, Sr. International Trade Compliance Analyst, through Mark Manning, Program Manager, to the File, ''12th New Shipper Review of Certain Preserved Mushroom from the People's Republic of China: Surrogate Values for the Preliminary Results'' (''Surrogate Values Memorandum'') at Exhibit 6. We valued foreign brokerage and handling with the publicly summarized brokerage and handling expense reported in the U.S. sales listing of Indian mushroom producer, Agro Dutch Industries, Ltd. (''Agro Dutch''), in the 2004–2005 administrative review of Certain Preserved Mushrooms from India. *Id.* at Exhibit 7.

Normal Value

1. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on FOPs because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part*, 70 FR 39744 (July 11, 2005), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2003–2004 Administrative Review and Partial Rescission of Review*, 71 FR 2517 (January 17, 2006).

We calculated NV by adding together the value of the FOPs, general expenses, profit, and packing costs. The FOPs for subject merchandise include: (1) quantities of raw materials employed; (2) hours of labor required; (3) amounts of energy and other utilities consumed; (4) representative capital and selling costs; and (5) packing materials. We used the FOPs reported by Xingda for materials, energy, labor, and packing, and valued those FOPs by multiplying the amount of the factor consumed in producing subject merchandise by the average unit surrogate value of the factor.

In accordance with 19 CFR 351.408(c)(1), when a producer sources an input from a market–economy country and pays for it in a market–economy currency, the Department will normally value the FOP using the actual price paid for the input. *See* 19 CFR 351.408(c)(1); *see also Lasko Metal Products v. United States*, 43 F.3d 1442, 1445–1446 (Fed. Cir. 1994) (affirming the Department's use of market–based prices to value certain FOPs). The Department has instituted a rebuttable

presumption that market economy input prices are the best available information for valuing an input when the total volume of the input purchased from all market economy sources during the period of investigation or review is 33 percent or greater of the total volume of the input purchased from all sources during the period. In these cases, unless case–specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted–average market economy purchase price to value the input. Alternatively, when the volume of an NME firm's purchases of an input from market economy suppliers during the period is below 33 percent of its total volume of purchases of the input during the period, but where these purchases are otherwise valid and there is no reason to disregard the prices, the Department will weight–average the weighted–average market economy purchase price with an appropriate surrogate value according to their respective shares of the total volume of purchases, unless case–specific facts provide adequate grounds to rebut the presumption. When an NME firm has made market economy input purchases that may have been dumped or subsidized, are not bona fide, or are otherwise not acceptable for use in a dumping calculation, the Department will exclude them from the total quantity of all market economy purchases to ensure a fair determination of whether valid market economy purchases meet the 33 percent threshold. *See Antidumping Methodologies: Market Economy Inputs, Expected Non–Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716 (October 19, 2006). In this case, Xingda reported that it did not purchase any inputs from market economy sources.

In addition, we added freight costs to the surrogate costs that we calculated for material inputs. We calculated freight costs by multiplying surrogate freight rates by the shorter of the reported distance from the domestic supplier to the factory that produced the subject merchandise or the distance from the nearest seaport to the factory that produced the subject merchandise, as appropriate. Where there were multiple domestic suppliers of a material input, we calculated a weighted–average distance after limiting each supplier's distance to no more than the distance from the nearest seaport to Xingda. This adjustment is in accordance with the decision by the Court of Appeals for the Federal Circuit in *Sigma Corp. v. United States*, 117 F.3d 1401, 1407–1408 (Fed. Cir. 1997). We increased the calculated costs of the FOPs for surrogate general expenses and profit. *See* Surrogate Values Memorandum.

2. Selection of Surrogate Values

In selecting surrogate values, we followed, to the extent practicable, the Department's practice of choosing public values which are non–export averages, representative of a range of prices in effect during the POR, or over a period as close as possible in time to the POR, product–specific, and tax–exclusive. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004). We also considered the quality of the source of surrogate information in selecting surrogate values. *See Manganese Metal From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 63 FR 12440 (March 13, 1998). Where we could only obtain surrogate values that were not contemporaneous with the POR, we inflated (or deflated) the surrogate values using, where appropriate, the Indian Wholesale Price Index as published in *International Financial Statistics* by the International Monetary Fund. *See* Surrogate Values Memorandum at Exhibit 1.

In calculating surrogate values from import statistics, in accordance with the Department's practice, we disregarded statistics for imports from NME countries and countries deemed to maintain broadly available, non–industry-specific subsidies which may benefit all exporters to all export markets *(e.g.*, Indonesia, South Korea, and Thailand). *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China*, 67 FR 6482 (February 12, 2002) and accompanying Issues and Decision Memorandum at Comment 1. *See also Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 68 FR 66800, 66808 (November 28, 2003), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004). Additionally, we excluded from our calculations imports that were labeled as originating from an unspecified country because we could not determine whether they were from an NME country.

We valued production material inputs (mushroom spawn, rice straw, and manure) using the fiscal year (''FY'') 2006–2007 (April 2006 through March 2007) financial statements of Agro Dutch or Flex Foods Ltd. (''Flex Foods''), Indian producers of mushrooms and vegetables, as follows. To value the input of mushroom spawn, we used data from the FY 2006–2007 financial statement of Agro Dutch because Agro Dutch's mushroom spawn value is specific to the species *Agaricus bisporous*, which is the species used to produce subject merchandise. To value the input of rice straw, we used the rice straw value from the FY 2006–2007 financial statement of Flex Foods because this value is specific to the input. Similarly, to value the input of manure, we used the manure value from the FY 2006–2007 financial statement of Flex Foods because this value is specific to the input. *See* Surrogate Values Memorandum at Exhibit 2.

We valued processing and canning material inputs (phosphate, calcium carbonate, rapeseed, mill cake, urea, gypsum powder, salt, citric acid, tin plate, copper wire, and sealing glue) using weighted–average Indian import values derived from the World Trade Atlas online (''WTA''), for the period February 2007 through July 2007. *See* Surrogate Values Memorandum at Exhibits 2 and 3. In addition, we valued packing material inputs (cartons, labels, tape, kraft paper and glue) with weighted–average Indian import values derived from the WTA for the period February 2007 through July 2007. *Id.* at Exhibit 5. The Indian import statistics obtained from the WTA were published by the Indian Directorate General of Commercial Intelligence and Statistics, Ministry of Commerce of India and are contemporaneous with the POR. As the Indian surrogate values were denominated in rupees, in accordance with section 773A(a) of the Act, they were converted to U.S. dollars using the official exchange rate for India recorded on the date of sale of subject merchandise in this case. *See* http://

www.ia.ita.doc.gov/exchange/index.html.

To value land rent, the Department used data from the 2001 Punjab State Development Report, administered by the Planning Commission of the Government of India. Since the value of land rent was not contemporaneous with the POR, the Department adjusted the value for inflation. See Surrogate Values Memorandum at Exhibit 2.

To value electricity, the Department used the 2000 electricity price in India reported in *Energy Prices & Taxes, Second Quarter 2003*, published by the International Energy Agency. *See* Surrogate Values Memorandum at Exhibit 4, containing information obtained from data.iea.org. Since the electricity rates were not contemporaneous with the POR, the Department adjusted the value for inflation. *See* Surrogate Values Memorandum at Exhibit 4.

To value natural gas, the Department used information from the Natural Gas Authority of India, from February 2005. Because the information was not contemporaneous with the POR, we adjusted the average cost of natural gas for inflation. *See* Surrogate Values Memorandum at Exhibit 4.

To value water, the Department used data from the Maharastra Industrial Development Corporation (www.midcindia.org) for June 2003, which we found to be the best available information since it includes a wide range of industrial water rates. Since the water rates were not contemporaneous with the POR, the Department adjusted the value for inflation. *See* Surrogate Values Memorandum at Exhibit 4.

To value inland freight expenses incurred for transporting raw materials and finished subject merchandise, we used data from www.infreight.com. This source provides daily rates per truck load from six major points of origin to five different destinations in India, for the period February through July 2005. Since these freight rates are not contemporaneous with the POR, the Department adjusted the value for inflation. *See* Surrogate Values Memorandum at Exhibit 6. 19 CFR 351.408(c)(3) requires the use of a regression–based wage rate. Therefore, to value labor, the Department used the regression–based wage rate for the PRC published on the Import Administration website. See the IA website:

http://ia.ita.doc.gov/wages/05wages/05wages–041608.html, and *see Corrected 2007 Calculation of Expected Non–Market Economy Wages*, 73 FR 27795 (May 14, 2008).

To value brokerage and handling, the Department used the publicly summarized average brokerage and handling expenses reported in the U.S. sales listings of Agro Dutch's May 24, 2005, submission in the sixth antidumping duty review of certain preserved mushrooms from India. *See* Surrogate Values Memorandum at Exhibit 7.

To value the surrogate financial ratios for factory overhead (''OH''), selling, general & administrative (''SG&A'') expenses, and profit, the Department used the 2006–2007 financial statements of Agro Dutch and Flex Foods.[4] The Department notes that Agro Dutch is a producer of mushrooms, and Flex Foods is a producer of mushrooms and vegetable products. Therefore, Agro Dutch's and Flex Foods' financial ratios for OH and SG&A are comparable to Xingda's financial ratios because Agro Dutch's and Flex Foods' production experience is comparable to Xingda's production experience by virtue of each company's production of subject merchandise. Additionally, the financial statements of these two companies are contemporaneous for two months of the POR. Moreover, an average of the financial statements of Agro Dutch and Flex Foods represents a broader spectrum of the Indian mushroom industry, than the financial statement of a single mushroom producer. *See* Surrogate Values Memorandum at Exhibit 8.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank. These exchange rates can be accessed at the website of Import Administration at http://ia.ita.doc.gov/exchange/index.html.

Combination Rate

In new shipper reviews, the Department may, pursuant to 19 CFR 351.107(b), establish a combination cash deposit rate for each combination of the exporter and its supplying producer(s). *See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 FR 72139 at 72140 (December 4, 2002), *Notice of Final Results of Antidumping Duty New Shipper Review: Certain In–Shell Raw Pistachios from Iran*, 68 FR 353 at 354 (January 3, 2003), and *Certain Forged Stainless Steel Flanges from India: Final Results of Antidumping Duty New Shipper Review*, 68 FR 351 (January 3, 2002). The Department has preliminarily determined that a combination rate is appropriate in this case, as Xingda is both the producer and exporter of the subject merchandise. Therefore, the Department will include in its cash deposit instructions to CBP appropriate language to enforce the final results of this review on the basis of a combination rate involving Xingda as both the producer and exporter of the subject merchandise.

Preliminary Results of Review

We preliminarily determine that the following margin exists during the period February 1, 2007, through July 31, 2007:

Exporter/Manufacturer	Weighted–Average Margin (Percentage)
Dujiangyan Xingda Foodstuff Co., Ltd.	0.00

Public Comment

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of publication of these preliminary results. Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs. Rebuttal briefs must be limited to issues raised in the case briefs. *See* 19 CFR 351.309(c)(1)(ii) and 19 CFR 351.309(d). Parties who submit arguments are requested to submit with the argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Further, the Department requests that parties submitting written comments provide the Department with a diskette containing the public version of those comments.

Any interested party may request a hearing within 30 days of publication of this notice. *See* 19 CFR 351.310(c). Interested parties who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. See 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in the briefs.

Unless the deadline is extended pursuant to section 751(a)(2)(B)(iv) of the Act, the Department will issue the

[4] Both Agro Dutch and Flex Foods have a fiscal year of April to March.

final results of this new shipper review, including the results of our analysis of the issues raised by the parties in their comments, within 90 days of publication of these preliminary results.

Assessment Rates

Upon issuing the final results of the review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer–specific assessment rate calculated in the final results of this review is above *de minimis*. However, the final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of these reviews and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements, when imposed, will be effective upon publication of the final results of this new shipper review for all shipments of subject merchandise exported by Xingda entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise manufactured and exported by Xingda, the cash–deposit rate will be that established in the final results of this review; (2) for subject merchandise exported by Xingda but not manufactured by Xingda, the cash deposit rate will continue to be the PRC–wide rate (*i.e.*, 198.63 percent); and (3) for subject merchandise manufactured by Xingda but exported by any party, the cash deposit rate will be the rate applicable to the exporter. If the cash deposit rate calculated for Xingda in the final results is zero or *de minimis*, a zero cash deposit will be required for entries of subject merchandise both produced and exported by Xingda. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This new shipper review and notice are in accordance with sections 751(a)(2)(B) and 777(i) of the Act and 19 CFR 351.214(h)(i).

Dated: May 19, 2008.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11620 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–549–502)

Circular Welded Carbon Steel Pipes and Tubes from Thailand: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On March 31, 2008, Saha Thai Steel Pipe (Public) Company, Ltd. (Saha Thai), a Thai manufacturer/exporter, requested that the U.S. Department of Commerce (the Department) conduct an administrative review of its sales during the POR. On April 25, 2008, the Department published a notice of initiation of an administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. The review covers one manufacturer/exporter, Saha Thai. The period of review (POR) is March 1, 2007 through February 29, 2008. Saha Thai withdrew its request on April 23, 2008.

EFFECTIVE DATE: May 23, 2008.

FOR FURTHER INFORMATION CONTACT: Jacqueline Arrowsmith or Myrna Lobo, AD/CVD Operations, Office 6, Import Administration, International Trade, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5255 or (202) 482–2371, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The products covered by this antidumping order are certain welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches. These products, which are commonly referred to in the industry as ''standard pipe'' or ''structural tubing'' are hereinafter designated as ''pipes and tubes.'' The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for the convenience and purposes of customs and border protection (CBP), our written description of the scope is dispositive.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Saha Thai's request was the sole basis for initiating this administrative review. Saha Thai withdrew its request in a timely fashion. Therefore, in response to Saha Thai's withdrawal of its request for an administrative review pursuant to 19 CFR 351.213(d)(1) of the Department's regulations, the Department hereby rescinds the administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of this rescission of administrative review.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective disorder is hereby requested. Failure to comply with the regulations and terms of APO is a sanctionable violation.

This notice is published in accordance with the sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: May 15, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–11625 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 080508641–8643–01]

Request for Technical Input—Standards in Trade Workshops

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Request for Workshop Recommendations.

SUMMARY: The National Institute of Standards and Technology (NIST) invites interested parties to submit recommendations for workshops covering specific sectors and targeted countries or regions of the world where training in the U.S. system of standards development, conformity assessment, and metrology may facilitate trade. Prospective workshops will be scheduled for a 3 to 5 day period. This notice is not an invitation for proposals to fund grants, contracts or cooperative agreements of any kind. NIST will offer a limited number of workshops, based upon the availability of resources. Recommenders are encouraged to consider Administration priorities outlined in the 2007 National Export Strategy. NIST will consider recommendations based upon which workshops would be most useful to intended audiences.

DATES: All recommendations must be submitted no later than 5 p.m., June 23, 2008.

ADDRESSES: All recommendations must be submitted to Ellen Emard via e-mail (*ellen.emard@nist.gov*) or by mail to 100 Bureau Drive, Mail Stop 2100, Gaithersburg, MD, 20899. The National Export Strategy is available at *http://www.ita.doc.gov/media/publications/abstract/nes2007desc.html.* Additional information about the NIST Standards in Trade Workshop is available at *http://ts.nist.gov/standards/global/sitdescr.cfm.*

FOR FURTHER INFORMATION CONTACT: Ellen Emard (301) 975–4038, *ellen.emard@nist.gov.*

SUPPLEMENTARY INFORMATION: The Standards in Trade Workshops are a major activity of the Global Standards and Information Group in the NIST Standards Services Division. The workshops are designed to provide timely information to foreign standards officials on U.S. practices in standards and conformity assessment. Participants are introduced to U.S. technology and principles in metrology, standards development and application, and conformity assessment systems and procedures. Each workshop offers an overview of the roles of the U.S. Government, private sector, and regional and international organizations engaged in standards development and conformity assessment practices. Specific workshop objectives are to: (1) Familiarize participants with U.S. technology and practices in metrology, standardization, and conformity assessment; (2) describe and provide an understanding of the roles of the U.S. Government and the private sector in developing and implementing standards; (3) convey the structure of the standards and conformity assessment systems in the invited country or countries and the role and responsibilities of organizations represented by the invitees; and (4) facilitate professional contacts as a basis for strengthening technical ties and enhancing trade.

Workshop recommendations (maximum 5 pages) must address at a minimum the following points, in the order noted and labeled accordingly:

1. *Name and Description of the Recommending Person or Organization*

Provide the primary mailing address, and the name, telephone number and email address of the primary point of contact.

2. *Industry Sector and Suggested Workshop Title which captures the essence of the recommendation*

Provide a title that considers the goals and potential benefits of the workshop.

3. *Proposed Workshop Objectives*

Describe the intended goals to be attained, why they are important, the specific workshop objectives, and U.S. and foreign stakeholders that are likely to participate.

4. *Calendar Dates Suggested for Workshop*

Provide three or more suggested start dates for the workshop. The first date should be no earlier than 8 months from the publication date of this announcement.

5. *Relevant NIST Organizational Link*

Workshop topics must be linked to NIST activities and/or research. The appropriate NIST organizational unit, laboratory or program must be identified by the recommender and the relevance of the activity to NIST must be demonstrated. If known, identify the specific NIST staff who could serve as the NIST internal point of contact.

6. *Principal Topics*

Provide a list of the suggested topics for the workshop.

7. *Related Site Visits and Events*

Workshops can include visits to relevant business sites or events. Provide a list of suggested site visit locations, events or other areas of interest and discuss the relevance of each to the overall purpose of the proposed workshop's goals.

8. *Expected Outcomes/Measures of Success*

Include in this section a description of:

a. The anticipated benefit of the workshop for trade and market access;

b. The anticipated economic impacts (in dollars);

c. The potential for future opportunities for collaboration and trade as a result of the workshop;

d. The measures of success; and

e. The desired results of the workshop and how the results will be measured.

All recommendations must address each of the above eight points and be submitted to Ellen Emard via e-mail (*ellen.emard@nist.gov*) or mail 100 Bureau Drive, Mail Stop 2100 Gaithersburg, MD 20899 no later than 5 p.m., June 23, 2008.

Dated: May 16, 2008.

Richard F. Kayser,

Chief Scientist.

[FR Doc. E8–11627 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 080515671–8672–01; I.D. GF001]

Coastal and Estuarine Land Conservation Program (CELCP)—FY 2009 Competition

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), the National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of funding availability.

SUMMARY: The purpose of this document is to advise eligible coastal states and territories (requirements described below) that OCRM is soliciting coastal and estuarine land conservation project proposals for competitive funding under the CELCP. States and territories must have submitted to NOAA a draft CELCP plan on or before May 1, 2008 in order to be eligible to participate in the FY2009 funding opportunity (see Final Guidelines for Coastal and Estuarine

Land Conservation Program for more information on CELCP plan requirements, available at *http://coastalmanagement.noaa.gov/land/media/CELCPfinal02Guidelines.pdf.* Funding is contingent upon the availability of FY 2009 Federal appropriations. It is anticipated that projects funded under this announcement will have a grant start date between March 1, 2009 and October 1, 2009. The program authority is 16 U.S.C. 1456d. Applicants must comply with all requirements contained in the full funding opportunity announcement (see **ADDRESSES**).

DATES: The deadline for receipt of proposals through Grants.gov or to the OCRM office is 11:59 p.m. EST July 23, 2008. Applications may be submitted electronically at *http://www.grants.gov* or by mail to the address listed in this announcement. Applicants are strongly recommended to allow sufficient time for delivery of materials, electronically or by mail, by the deadline.

ADDRESSES: The full funding opportunity announcement and application materials are available online at: *http://www.grants.gov* or NOAA's CELCP Web site under ''Funding Opportunities'' (*http://coastalmanagement.noaa.gov/land/celcp_fundingop.html*). They may also be requested by contacting the program official identified below.

To Request an Application Package or for Further Information Contact: Elaine Vaudreuil, Phone: (301) 713–3155 ext 103, E-mail: *Elaine.Vaudreuil@noaa.gov* or Elisabeth Morgan, Phone: (301) 713–3155 ext. 166, E-mail: *Elisabeth.Morgan@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Coastal and Estuarine Land Conservation Program (CELCP) was established ''for the purpose of protecting important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural or recreational state to other uses.'' This announcement solicits proposals for land acquisition projects (fee simple interest or conservation easements) that can be completed within 18 months from the start date of the award and that have the purpose of protecting important coastal and estuarine areas. NOAA may extend project grants up to an additional 18 months (for a total project period of 3 years maximum) if circumstances warrant. The state or territory's designated lead agency for implementing the CELCP may solicit project proposals from additional state/territorial agencies, local governments as defined at 15 CFR 24.3, or entities eligible for assistance under Section 306A(e) of the Coastal Zone Management Act (CZMA) (16 U.S.C. 1455a(e)), provided that each agency or entity has the authority to acquire and manage land for conservation purposes. Eligible coastal states and territories may select and submit up to three projects for this competition. The maximum amount that may be requested for the Federal share of each project is $3,000,000.

Project proposals should describe how the project supports the purpose of the CELCP (described above), and specifically, how the project fits into the state or territory's CELCP plan.

The proposals should also detail: How the project will be completed in a timely manner, the existing and proposed uses of the property, how the project site will be managed in the future for long-term conservation, the applicant's qualifications to acquire and manage property for long-term conservation, the basis for the requested funding amount, including land acquisition costs and other costs that directly support the project, as well as the source of the non-Federal matching share.

The CELCP Guidelines, which were published in the **Federal Register** on June 17, 2003 (68 Fed. Reg. 35860–35869), establish the eligibility, procedural and programmatic requirements for participation in the CELCP, including the criteria for financial assistance awards under the program. The Guidelines outline the criteria and process for eligible states and territories to develop a CELCP plan, nominate land conservation projects to a national competitive process, as well as the criteria and process for NOAA to select projects at the national level for funding. All applications submitted pursuant to this notice must be consistent with the CELCP Guidelines, except that, for this solicitation, the eligibility requirement that states and territories have an approved CELC plan will be expanded to include states and territories that have submitted a draft CELCP plan to NOAA by May 1, 2008, for review. The CELCP Guidelines can be found at *http://www.coastalmanagement.noaa.gov/land/media/celcpfinal02guidelines.pdf.*

Electronic Access: The full text of the full funding opportunity announcement for this program can be accessed via the Grants.gov Web site at *http://www.grants.gov.* The announcement will also be available at *http://coastalmanagement.noaa.gov/land/celcp_fundingop.html* or by contacting the program officials identified under **FOR FURTHER INFORMATION CONTACT**. Applicants must comply with all requirements contained in the full funding opportunity announcement.

Statutory Authority: Authority for the CELCP is 16 U.S.C. 1456d.

CFDA: 11.419, Coastal Zone Management Administration Awards.

Funding Availability: NOAA anticipates that approximately 20–60 projects may be included on a competitively-ranked list of projects that are ready and eligible for funding in FY 2009. Funding for projects selected for the prioritized list is contingent upon availability of Federal appropriations for fiscal year 2009. Applicants are hereby given notice that funds have not yet been appropriated for this program. The FY 2009 President's Request for the program is $15 million. Annual appropriated funding levels for the CELCP ranged from $8–$50 million in fiscal years 2002–2008. The maximum amount that may be requested for the Federal share of each project of each project is $3,000,000. The amount of funding per award in previous years has ranged from $380,000 to $3,000,000 for competitively-selected projects, depending on the amount requested, size, and type of project. There is no guarantee that sufficient funds will be available to make awards for all qualified projects. Publication of this notice does not oblige NOAA to award any specific project or to obligate any available funds.

Eligibility: Only states and territories with Coastal Zone Management Programs or National Estuarine Research Reserves approved under the CZMA that have submitted a draft CELCP plan to NOAA on or before May 1, 2008, are eligible to participate in this funding competition. The eligible states and territories are: Alabama, Alaska, American Samoa, California, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Northern Mariana Islands, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin. The designated lead agency for implementing the CELCP in each state or territory is eligible to submit project for funding under this competition. A list of state lead agency contacts for the CELCP can be found at: *http://www.coastalmanagement.noaa.gov/land/media/celcpstateleadcontacts.pdf.*

The state's lead agency may solicit, and include in their application, project proposals from additional state agencies, or local governments as

defined at 15 CFR 24.3, or entities eligible for assistance under section 306A(e) of the CZMA (16 U.S.C. 1455a(e)), provided that each has the authority to acquire and manage land for conservation purposes. Each state may submit up to three project proposals. The state will be responsible for ensuring that allocated funds are used for the purposes of and in a manner consistent with this program. Interested parties should contact the applicable state's CELCP lead contact for additional details about the state's project solicitation requirements.

Cost Sharing Requirements: Federal funds awarded under this program must be matched with non-federal funds at a ratio of 1:1, with the following exception. The 1:1 matching requirement is waived for any project under $200,000 for Insular Areas, defined as the jurisdictions of the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Non-federal matching funds may be derived from state, local, non-governmental or private sources in the form of cash or in-kind contributions. Cost-sharing requirements for the CELCP are specified in Section 2.7 of the CELCP Guidelines.

Evaluation and Selection Procedures: The general evaluation criteria and selection factors that apply to full applications to this funding opportunity are summarized below. The evaluation criteria for full applications will have different weights and details. Further information about the evaluation criteria and selection factors can be found in the full funding opportunity announcement.

Evaluation Criteria for Projects: 1. Importance and/or relevance of proposed project to the program goals (55 points out of 110). This evaluation factor seeks to determine whether there is intrinsic value in the proposed work and relevance to NOAA, Federal, regional, state/territorial, or local priorities. 2. Technical/Scientific Merit (25 points out of 110). This evaluation factor seeks to determine whether the proposed approach is technically sound and/or innovative, if the methods are appropriate, and whether there are clear project goals and objectives. 3. Overall Qualifications of Applicants (10 points out of 110). This evaluation factor seeks to determine whether the applicant possesses the necessary education, experience, training, facilities, and administrative resources to accomplish the project. 4. Project Costs (20 points out of 110). The budget is evaluated to determine if it is realistic and commensurate with the project needs and timeframe.

Review and Selection Process: Once a full application has been received, NOAA will conduct an initial administrative review to determine compliance with requirements, completeness of the application, and eligibility of proposed costs and uses of the property. All proposals will be evaluated and scored individually in accordance with the assigned weights of the above evaluation criteria by an independent peer mail review or by an independent peer panel review. Both Federal and non-Federal experts may be used in this process. If non-Federal experts are used in this process, no consensus advice will be given by either the peer mail reviewers or the independent peer panel.

Each proposal will be reviewed by at least three reviewers. Every project will be scored by the same number of reviewers. The scores will be presented to the program officers and averaged for a final score, which will be used to produce a rank order of the proposals. A final list will be ranked in order unless the proposal is justified to be selected out of rank order based upon the appropriate selection factors, listed below. The final ranked list may be made available prior to final appropriations or final selections. Subsequent grant administration procedures will be in accordance with current DOC and NOAA grant administration procedures.

Selection Factors for Projects: The selecting official may choose to recommend a proposal out of rank order based upon: Availability of funding; geographic distribution of projects and/or funds; program objectives and priorities; duplication with projects funded, or under consideration by, NOAA or other Federal agencies, the applicant's prior performance period, and/or adequacy of information necessary to make a NEPA determination and draft necessary documentation before recommendations are made to the Grants Officer.

Intergovernmental Review: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' A list of participating states and the clearinghouse points of contact can be found at *http://whitehouse.gov/omb/grants/spoc.html*.

Limitation of Liability: In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

National Environmental Policy Act (NEPA): NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals that are seeking NOAA federal funding opportunities. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA Web site: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216-6-TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm*. Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (*e.g.*, the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for not selecting an application. In some cases if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable NOAA to make an assessment on any impacts that a project may have on the environment.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696), are applicable to this solicitation.

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, and SF–LLL have been approved by OMB under the respective control

numbers 0348–0043, 0348–0044, 0348–0040, and 0348–0046.

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

Executive Order 12866: This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism): It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notice and opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comments are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: May 20, 2008.

John E. Potts,

Acting Associate Assistant Administrator for Management and CFO/CAO, NOS, National Oceanic and Atmospheric Administration.

[FR Doc. E8–11677 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH94

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permit

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

ACTION: Notification of a proposal to conduct exempted fishing; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that the subject exempted fishing permit (EFP) application, which would exempt Atlantic sea scallop (scallop) vessels participating in a modified scallop dredge twine top (twine top) study from minimum twine top mesh sizes, Closed Area I Access Area (CAI) and Closed Area II Access Area (CAII) closures, and fish possession restrictions, should be issued for public comment. The Assistant Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Atlantic Sea Scallop Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made.

DATES: Comments on this document must be received on or before June 9, 2008.

ADDRESSES: Comments may be submitted by e-mail. The mailbox address for providing e-mail comments is *scallop.efp@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: ''Comments on dredge twine top EFP.'' Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on dredge twine top EFP.'' Comments may also be sent via facsimile (fax) to (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Ryan Silva, Cooperative Research Program Specialist, phone: 978–281–9326, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION: Coonamessett Farm submitted this EFP application for research activities that would assess a modified scallop dredge twine top (twine top) designed to reduce finfish bycatch while improving the retention of scallops. The subject EFP would exempt vessels from the following regulations: Ten-inch (25.4–cm) minimum twine top mesh size specified at 50 CFR 648.51(b)(2); CAI and CAII scallop vessel trip restrictions specified at § 648.59(b)(5) and (c)(5), respectively; and temporary exemptions from scallop, Northeast multispecies, monkfish, summer flounder, black sea bass, scup, spiny dogfish, and skate possession restrictions specified throughout 50 CFR part 648.

The applicant states that previous twine top selectivity research found that the aft portion of the twine top is where most scallop escapement occurs and the forward portion of the twine top is where most finfish escapement occurs. The applicant postulates that by decreasing the mesh size to 6 in (15.2 cm) in the aft portion of the twine top while increasing the mesh size to 12 in (30.5 cm) in the forward portion of the twine top that both scallop retention and finfish escapement would increase. The experimental twine top would also have lower hanging ratio beyond that of a traditionally hung twine top, with the hypothesis that this may further reduce finfish bycatch.

The applicant states that to effectively test the modified twine top, field trials must occur in areas of high finfish bycatch such as those found in CAI and CAII. However, both CAI and CAII are closed to scallop fishing for the 2008 fishing year (March 1, 2008–February 28, 2009). The applicant requests they be allowed up to three 7-day trips between September and November of 2008, in CAI and/or CAII. On these trips, the applicant would compare identical dredge frames fitted with a standard twine top and a modified twine top. All scallops and finfish caught during these trips would be processed for morphological data and then returned to the sea as soon as possible. Yellowtail flounder, as part of a separate research experiment assessing yellowtail flounder mortality in the scallop dredge fishery, would be tagged and released.

In addition to testing the twine top in CAI and CAII, the applicant requests authorization to test the modified twine top on up to three fishing trips to the Nantucket Lightship Access Area (NLCA) and/or Elephant Trunk Access Area (ETAA). Both the NLCA and ETAA are open to scallop fishing in the 2008 fishing year. The applicant submitted a proposal to conduct this research with funding through the 2008 Atlantic Sea Scallop Research Set-Aside (RSA) Program. The 2008 Scallop RSA Program proposals are currently under review. If this project is funded through the 2008 Scallop RSA Program, the NLCA and ETAA trips that employed the modified twine top would be compensation fishing trips. If it is not funded, the NLCA and ETAA trips would be normal commercial scallop fishing trips. This preliminary determination to issue an EFP for this research in no way implies that the proposal submitted for funding through the 2008 Scallop RSA Program will be, or has been, favorably reviewed.

Exemption from scallop, Northeast multispecies, monkfish, summer flounder, black sea bass, scup, spiny dogfish, and skate possession restrictions would authorize project investigators to temporarily possess finfish for scientific data collection purposes prior to returning all finfish to the sea.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs. The applicant may place requests for minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and minimal so as not to change the scope or impact of the initially approved EFP request.

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

Dated: May 19, 2008.

Emily H. Menashes

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

[FR Doc. E8–11524 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH65

Incidental Takes of Marine Mammals During Specified Activities; Shallow Hazard and Site Clearance Surveys in the Chukchi Sea in 2008

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from ConocoPhillips Alaska, Inc. (CPAI) for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by harassment, incidental to conducting shallow hazard and site clearance surveys using acoustic equipment and small airguns in the Chukchi Sea between August and October 2008. Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposed IHA for these activities.

DATES: Comments and information must be received no later than June 23, 2008.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648–XH65@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext 137.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On April 30, 2008, NMFS received an application from CPAI for the taking, by Level B harassment, of several species of marine mammals incidental to conducting shallow hazard and site clearance surveys using acoustic equipment and small airguns in the Chukchi Sea for up to 30 - 45 days from approximately August 1, 2008 until October 31, 2008. The geographic region of the proposed activities includes two areas spaced about 60 km (37 mi) apart and a path for sampling conditions along a potential pipeline route. Each area is about 2,000 km2 (772.5 mi2) with dimensions about 72 km (45 mi) by 62 km (38.5 mi). The two areas are about 111 km (69 mi) off the Alaska coast, generally west from the village of Wainwright. The marine surveys will be performed from a seismic vessel.

Description of the Specified Activity

CPAI is planning to conduct site clearance and shallow hazard surveys of potential exploratory drilling sites in the Chukchi Sea during the 2008 open water season. Site clearance and shallow hazard surveys would begin in August, after completing mobilization in July. CPAI anticipates shooting approximately 5,300 linear km (3,294 mi). The operation will be active 24 hours per day and use a single vessel to collect the geophysical data.

Site clearance and shallow hazard surveys will be completed to confirm the seafloor has soil and surface characteristics that will support the safe set-down of a drill rig, and long term occupation of the site by a vessel. Acoustic instrumentation to be used for the proposed survey is designed to characterize the seabed topography, bathymetry, potential geohazards, and other seafloor features (e.g., boulders) using seafloor imaging, water depth measurements, and high-resolution

seismic profiling. The proposed site clearance and shallow hazard surveys will use the following methods: seafloor imaging, bathymetry, and high resolution seismic profiling.

Seafloor Imagery

Seafloor imagery would use a side-scan sonar, which is a sideward looking, two channel, narrow beam instrument that emits a sound pulse and listens for its return. The sound energy transmitted is in the shape of a cone that sweeps the sea floor resulting in a two dimensional image that produces a detailed representation of the seafloor and any features or objects on it. The sonar can either be hull mounted or towed behind the vessel. One of the following systems would be used in the proposed shallow hazard surveys:

(1) Marine Sonics Technology multi-frequency side-scan sonar: The frequency the side-scan sonar emits during operation can be varied from 150 - 1,200 kilohertz (kHz). It is expected that the frequency for this acquisition will be in the 150 kHz range. The pulse length is variable from 20 - 300 milliseconds (msec).

(2) EdgeTech 4200 dual-frequency side scan sonar: The side-scan sonar emits sound at frequency of 120 kHz during operation, occasionally reaching frequencies up to 410 kHz. The pulse length is up to 20 miliseconds (msec), and the source level is approximately 210 dB re 1 microPa-m (rms).

(3) Klein System 3000 dual-frequency digital side scan sonar: This side scan sonar would typically be run at the 132 kHz frequency band. However, the 445 kHz frequency may be used

periodically during exploratory testing. The transmission pulse is variable from 25 msec to 400 msec. The peak in the 132 kHz source level beam reaches 234 dB re 1 microPa-m. The peak in the 445 kHz source level beam reaches 242 dB re 1 microPa-m.

Bathymetry

Echo sounders for measuring water depth are generally mounted to the ship hull or on a side-mounted pole. Two different echo sounding systems will be used to provide bathymetric data during the proposed Chukchi Sea shallow hazard surveys.

(1) Odom Hydrotrac Digital Echo Sounder: This device is a single beam echo sounder, which emits a single pulse of sound directly below the ship along the vessel trackline and provides a continuous recording of water depth along the survey track. Generally these records require heave compensation to rectify the data point. The Hydrotrac sonar operates at a frequency of 200 kHz and emits approximately 15 pulses per sec. Each pulse phase is between 0.03 and 0.12 msec. The peak within the source beam level transmits from 202 to 215 dB re 1 microPa-m.

(2) Reson Seabat 8101 Multibeam Echo Sounder: This echo sounder consists of a transducer array that emits a swath of sound. The seafloor coverage swath of the multibeam sonar is water depth dependent, but is usually equal to two to four times the water depth. This sonar operates at a frequency of 240 kHz. It emits approximately 15 pulses per sec with each pulse duration lasting 21 msec to 225 msec for a swath that can cover up to 500 m (1,640 ft) in width. The peak in the source beam level for the Reson Seabat sonar transmits at 210 dB re 1 microPa-m. The multibeam system requires additional non-acoustic equipment including a motion sensor to measure heave, roll, and pitch, a gyrocompass, and a sound velocity probe. A TSSDMS–05 Dynamic Motion Sensor, Hemisphere VS–110 Global Positioning System (GPS)/ Heading System and a Seabird SBE–19 CTD or Odom Digibar Pro will provide these data. The resulting multibeam data will provide a three dimensional (3–D) view of the seafloor in the measured area.

High Resolution Seismic Profiling

An integral part of the shallow hazards and site clearance surveys is high-resolution seismic profiling using three different acoustic source systems. Seismic systems operate on the principal that an acoustic impulse will reflect part of its energy upon encountering a density interface. This will be accomplished through the use of a high-frequency subbottom profiler, an intermediate-frequency seismic profiling system, and a multichannel seismic system. The high-resolution profiling systems, which use smaller acoustic sources, will be utilized as opposed to low-resolution systems or deep exploration seismic systems. The planned surveys are geared toward providing detail of the surficial and shallow subsurface geology and not toward hydrocarbon exploration. The planned high-resolution profiles will provide the detailed information that is not resolved in the deep seismic profiles. The following equipment will be utilized for the high resolution seismic profiling portion of the marine surveys.

(1) High Resolution Subbottom Profiler

A subbottom profiler is a high-frequency seismic system that will be used to map geologic features in the proposed survey areas. Many of the modern subbottom profilers are ''chirp'' systems which are frequency or pulse-rate modulated. This allows the energy, amplitude, and phase characteristics of the acoustic pulse to be precisely controlled. The 500 Hz to 13 kHz frequency in conjunction with the 10–watt to 4–kilowatt (kW) power output generally achieves 25 to 250 msec, or approximately 20 to 200 m (65 to 656 ft) of bottom penetration, detailing the near-surface strata and density layers with a resolution of 6 to 20 cm (2 to 8 in). The two-way travel time of the acoustic signal, from firing to receiving, is recorded and travel time measurements are subsequently applied to water column velocity information, system delays, and appropriate tow depth corrections to calculate water depths and/or depths to subsurface events. The degree of ocean bottom penetration is variable depending on properties of the bottom and near-surface materials, the output power, and carrier frequency. The subbottom profiler is often used to supplement higher energy seismic systems or coring data to obtain accurate profiles of large areas. One of the following subbottom profiler systems or equivalent will be used in the proposed marine surveys:

(A) Knudsen 320 BR sub-bottom profiling system: The sub-bottom profiler will be used in the 3.5 to 12 kHz frequency range. The transmission pulse length is programmable sweeps or user defined pings. A typical pulse width is 28 - 36 msec. The pulse repetition rate is 4 pulses/sec - 12 pulses/sec.

(B) GeoAcoustics/GeoPulse sub-bottom profiling system: The subbottom profiler will be used in the 3.5 to 5 kHz frequency range. Pulse cycles range from 1 to 32 cycles of the selected frequency. During the survey, 3.5 kHz will likely be used, possibly up to 5 kHz, depending on the geology of the seafloor.

(C) GeoAcoustics GeoChirp II subbottom profiling system: The subbottom profiler has a frequency range of 0.5 to 13 kHz, which is programmable. The transmission pulse length is typically 32 msec programmable sweeps or user defined pings. The pulse repetition rate is 4 pulses/sec (at maximum) for a 32 msec chirp sweep or 10 pulses/sec for pinger waveforms.

All the subbottom profiler has a source level at approximately 214 dB re 1 microPa-m. The 160, 180, and 190 dB re microPa radii, in the beam below the transducer, would be 501 m (1,644 ft), 50 m (164 ft), and 16 m (52 ft), respectively, assuming spherical spreading.

The corresponding distances for an animal in the horizontal direction of these transducers would be much smaller due to the direct downward beam pattern of the subbottom profilers. Therefore, the horizontal received levels of 180 and 190 dB re 1 microPa (rms) would be within much smaller radii than 50 m (164 ft) and 16 m (52 ft) when using one of the GeoAcoustics subbottom profilers, which have the highest downward source level. In addition, the pulse duration of these subbottom profilers is extremely short, in the order of tens to hundreds of msec, and the survey is constantly moving. Therefore, for a marine mammal to receive prolonged exposure, the animal has to stay in a very small zone of ensonification and keep with the vessel's speed, which is very unlikely. Moreover, any effects would be less for baleen whales due to the frequency range of the profilers. Therefore, the potential effects from the sub-bottom profilers to marine mammals would be negligible.

(2) Intermediate Frequency Seismic Profiling System

One intermediate-frequency seismic system is referred to as a ''Boomer.'' The boomer transducer is a mechanical means of generating enough sound energy to penetrate the subsurface sediments. Signals are reflected from the various bedding planes (density/velocity interfaces) and received by a single-channel hydrophone streamer. The sound reflections are converted into electrical impulses, filtered, and sent to a graphic recorder. The Boomer can effectively detail the upper 40 to 600 m (131 to 1,969 ft) of subbottom, outlining the fine strata and density layers that represent foundation formations for seafloor-based structures. The depth of seismic penetration obtained with this system is determined by the sediment type and the amount of initial discharged energy. In many instances, the presence of organic gas will attenuate the signal and mask any deeper reflections. The boomer systems will consist of one of the following:

(A) An Applied Acoustics Squid 2000 mini sparker ''Boomer'': The maximum energy input ranges from 600 – 2,500 Joules (J) per shot with a maximum power input of 2,500 J per shot. The maximum energy will be determined once penetration has been assessed in the field. A pulse length range of 1 – 5 msec is typical. The peak in the source level beam reaches 222 dB re 1 microPa-m at 600 J with a frequency range of 0.5 to 300 kHz.

(B) An Applied Acoustics Model AA300 Boomer plate with housing. The maximum energy input is 350 J per shot with a maximum power input of 1,000 J per shot. The maximum energy that would be used for these surveys is 300 J. The pulse length ranges from 150 to 400 msec with a reverberation of less than 1/10 of the initial pulse. The peak in the source level beam reaches 218 dB re 1 microPa-m at 300 J with a frequency range of 0.5 to 300 kHz. A Datasonics Model SPR–1200 seismic profiling system also known as a ''bubble pulser.'' It has an electromagnetic source. The frequency of the system is 400 Hz in a narrow band. The peak in the source-level beam reaches 200 dB re 1 microPa-m.

(3) Multichannel Seismic System

The multichannel seismic system sources will consist of an:

(A) Geo-Spark 1600 Sparker: Much like the boomer, the sparker is a mechanical means of generating enough sound energy to penetrate the subsurface sediments. The sparker has eight electrode modules which are evenly spaced which make up an array with a physical dimension of 1.6 x 2 m (5.2 x 6.6 ft). The number of electrodes used is user defined, which gives the Geo-Spark 1600 the capability of operating at 6 - 16 Kj. It is expected that the sparker will be operated in a range of 10- 16 Kj. The sparker is towed behind the vessel approximately 75 ft (23 m) on a catamaran style floatation system. The towed unit is connected to a Geo-Spark 16 Kj power supply located on the deck which can emit power output of 4000 - 16000 J. Signals from the sparker are reflected from the various bedding planes (density/velocity interfaces) and received by a multi-channel hydrophone streamer. These signal data are then recorded on disc or tape. The sparker can effectively detail the upper 1 sec of sub bottom at a peak output of 212 dB re 1 microPa. The depth of seismic penetration obtained with this system is determined by the sediment type and the amount of discharged energy.

(B) Ultra Shallow Water (USW) array composed of a 40–in^3 seismic sound source with four 10–in^3 Input/Output (I/O) sleeve guns. If desired, the power can also be reduced to 20 in^3. The reflected energy will be received by a multi channel marine digital recording streamer system with 48 hydrophone channels located at intervals of 3.125 – 12.5 m (10 – 41 ft) along the length of the streamer. The sound source is expected to provide 1.5 to 3 sec of data, two-way travel time with a resolution of 10 msec. It operates at a frequency range of 20 to 200 Hz and a peak sound output of 196 dB re 1 microPa for all four guns combined. The frequency range that will be used in the proposed surveys will be between 20 Hz and 200 Hz, nominal. This tool is useful in finding shallow faults and amplitude anomalies.

Description of Marine Mammals in the Activity Area

In general, the marine mammal species under NMFS' management authority that occur in or near the proposed survey area within the Chukchi Sea are the bowhead (*Balaena mysticetus*), gray (*Eschrichtius robustus*), humpback (*Megaptera novaeangliae*), minke (*Balaenoptera acutorostrata*), beluga (*Delphinapterus leucas*), and killer whales (*Orcinus orca*); harbor porpoises (*Phocoena phocoena*); and the bearded (*Erignathus barbatus*), ringed (*Phoca hispida*), spotted (*P. largha*), and ribbon seals (*P. fasciata*). Among these species, the bowhead, humpback, and fin whales are listed as ''Endangered'' under the Endangered Species Act (ESA).

A detailed description of the biology, population estimates, and distribution and abundance of these species is provided in CPAI's IHA application. Additional information regarding the stock assessments of these species is in NMFS' Alaska Marine Mammal Stock Assessment Report (Angliss and Outlaw, 2007), and can also be assessed via the following URL link: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2006.pdf*.

ESA-listed species known to occur in the adjacent Bering Sea, include blue (*B. musculus*), North Pacific right (*Eubalaena japonica*), and sperm whales (*Physeter macrocephalus*); and Steller sea lion (*Eumetopias jubatus*). However, these species are considered to be extra-limital or rare in the Chukchi and Beaufort Seas. Fin whales have been recently reported in the Chukchi Sea in 2007 (Green *et al.*, 2007), but there is a very remote chance of interaction and potential impact. Therefore, these species (Steller sea lion, and sperm, fin, blue, and northern right whale) are not discussed further under this IHA application.

The most numerous marine mammal species seasonally occurring in the Chukchi Sea is the Pacific walrus (*Odobenus rosmarus divergens*). The polar bear (*Ursus maritimus*) is also found in the Chukchi Sea. However, these two marine mammal species fall under the management authority of the U.S. Fish and Wildlife Service (USFWS), and a separate application for an incidental take authorization for walrus and polar bears is being made to USFWS for the Chukchi Sea program.

Additional information on those species that are under NMFS' management authority within or near

the proposed survey areas is presented below.

Bowhead Whales

The only bowhead whale found in the proposed project areas is the Western Arctic stock bowhead whale, which is also known as the Bering-Chukchi-Beaufort stock or Bering Sea stock, and they are the only bowhead stock present in U.S. waters. The majority of these bowhead whales migrates annually from wintering (November through March) areas in the northern Bering Sea, through the Chukchi Sea in the Spring (March through June), to the Beaufort Sea where they spend much of the summer (mid-May through September) before returning again to Bering Sea in the fall (September through November) to overwinter (Braham *et al.*, 1980; Moore and Reeves, 1993). Most of the year, bowheads are associated with sea ice (Moore and reeves, 1993). The bowhead spring migration follows fractures in the sea ice around the coast of Alaska.

During the summer, most bowhead whales are in relatively ice-free waters of the Beaufort Sea. Although some bowheads are found in the Chukchi and Bering Seas in summer, these whales are thought to be a part of the expanding Western Arctic stock (Rugh *et al.*, 2003). In the Beaufort sea, distribution of bowhead whales is not uniform with respect to depth, and they are more often observed in continental slope (201 – 2,000 m, or 659 – 6,562 ft, water depth) than in inner shelf (<50 m or 164 ft water depth) habitat (Moore *et al.*, 2000).

In the fall, bowhead whales are distributed across the Beaufort and Chukchi seas, and are seen more often in inner and outer shelf waters than in slope and basin waters (Moore *et al.*, 2000). During the fall migration, bowheads select shelf waters in all but ''heavy ice'' conditions, when they select slope habitat (Moore, 2000).

The minimum population estimate of the Western Arctic stock of bowhead whales is 9,472 (Angliss and Outlaw, 2007). Raftery *et al.* (1995) reported that this bowhead stock increased at a rate of 3.1 percent from 1978 to 1993, during which time abundance increased from approximately 5,000 to 8,000 whales.

Gray Whales

Most of the Eastern North Pacific gray whales spend the summer feeding in the northern Bering and Chukchi Seas (Rice and Wolman, 1971; Berzin, 1984; Nerini, 1984). Moore *et al.* (2000) reported that within the Alaskan Arctic, gray whale summer distribution was concentrated in the northern Bering Sea, especially in the Chirikov Basin. In the Chukchi Sea, gray whale sightings were clustered along the shore, mostly between Cape Lisburne and Point Barrow (Moore *et al.*, 2000). Reflecting this pattern of distribution, gray whales are strongly associated with shallow (< 35 m, or 115 ft) coastal/shoal habitat in the Chukchi Sea and with the somewhat deeper (36 – 50 m, or 118 – 164 ft) Chirikov Basin shelf habitat in the northern Bering Sea (Moore *et al.*, 2000). During the summer surveys, gray whales were seen in ice conditions to 30 percent surface cover and, more often than expected, in 0 - 20 percent ice habitat (Moore *et al.*, 2000). Gray whales have also been reported feeding in the summer in waters off of Southeast Alaska, British Columbia, Washington, Oregon, and California (Rice and Wolman, 1871; Darling, 1984; Nerini, 1984; Rice *et al.*, 1984).

Each fall, gray whales migrate south along the coast of North America from Alaska to Baja California, in Mexico (Rice and Wolman, 1971), most of them starting in November or December (Rugh *et al.*, 2001). In the Alaskan Arctic in fall, gray whale distribution in the Chukchi Sea is clustered near shore at Pt. Hope and between Icy Cape and Pt. Barrow, and in offshore waters northwest of Pt. Barrow (Hanna Shoal) and southwest of Pt. Hope (Moore *et al.*, 2000). There are more sightings of gray whales in shelf/trough and coastal/shoal depth habitats than in shelf waters (Moore *et al.*, 2000). As in summer, gray whales are observed far more in open water/light (0 - 30%) ice cover (Moore *et al.*, 2000).

The Eastern North Pacific gray whales winter mainly along the west coast of Baja California, using certain shallow, nearly landlocked lagoons and bays, and calves are born from early January to mid-February (Rice *et al.*, 1981). The northbound migration generally begins in mid-February and continues through May (Rice *et al.*, 1981; 1984; Poole, 1984), with cows and newborn calves migrating northward primarily between March and June along the U.S. West Coast.

Although twice being hunted to the brink of extinction in the mid 1800s and again in the early 1900s, the eastern North Pacific gray whales population has since increased to a level that equals or exceeds pre-exploitation numbers (Jefferson *et al.*, 1993). Angliss and Outlaw (2007) reported the latest abundance estimate of this population is 18,178.

Humpback Whales

The humpback whale is distributed worldwide in all ocean basins, though in the North Pacific region it does not usually occur in Arctic waters. The historic feeding range of humpback whales in the North Pacific encompassed coastal and inland waters around the Pacific Rim from Point Conception, California, north to the Gulf of Alaska and the Bering Sea, and west along the Aleutian Islands to the Kamchatka Peninsula and into the Sea of Okhotsk (Nemoto, 1957; Tomlin, 1967; Johnson and Wolman, 1984). A vessel survey in the central Bering Sea in July of 1999 documented 17 humpback whale sightings, most of which were distributed along the eastern Aleutian Island chain and along the U.S.-Russia Convention Line south of St. Lawrence Island (Moore *et al.*, 2000). Humpback whales have been known to enter the Chukchi Sea (Johnson and Wolman, 1984), nonetheless, their occurrence inside the proposed project area is rare.

Aerial, vessel, and photo-identification surveys and genetic analyses indicate that there are at least two relatively separate populations that migrate between their respective summer/fall feeding areas to winter/spring calving and mating areas are found in offshore and coastal waters of Alaska during certain part of the year (Calambokidis *et al.*, 1997 Baker *et al.*, 1998): the central North Pacific stock and the western North Pacific stock. It is unknown whether the animals that were occasionally sighted off Alaskan Arctic belong to the central or western North Pacific stock of humpback whales. The population estimate of the western North Pacific humpback whale is 394 whales; and the population estimate of the central North Pacific humpback whale is 4,005.

Minke Whales

In the North Pacific, minke whales occur from the Bering and Chukchi seas south to near the Equator (Leatherwood *et al.*, 1982). In offshore and coastal waters off Alaska, the Alaska stock of minke whales are relatively common in the Bering and Chukchi seas and in the inshore waters of the Gulf of Alaska (Mizroch, 1992). Minke whales are known to penetrate loose ice during the summer, and some individuals venture north of the Bering Strait (Leatherwood *et al.*, 1982).

No estimates have been made for the number of the Alaska stock of minke whales in the entire North Pacific (Angliss and Outlaw, 2007), however, a visual survey conducted in 1999 and 2000 provided provisional abundance estimates of 810 and 1,003 minke whales in the central-eastern and

southeastern Bering Sea, respectively (Moore *et al.*, 2002).

Beluga Whales

Beluga whales are distributed throughout seasonally ice-covered Arctic and subarctic waters of the Northern Hemisphere (Gurevich, 1982), and are closely associated with open leads and polynyas in ice-covered regions (Hazard, 1988). Beluga whale seasonal distribution is affected by ice cover, tidal conditions, access to prey, temperature, and human interaction (Lowry, 1985).

Among five stocks of beluga whales that are recognized within U.S. waters, the eastern Chukchi Sea beluga whales occur within the proposed project area (Angliss and Outlaw, 2007).

In the Alaskan Arctic in summer beluga whales are seen more often in continental slope (201 - 2,000 m, or or 659 - 6,562 ft, water depth) than in inner shelf (< 50 m or 164 ft water depth) habitat (Moore *et al.*, 2000). Satellite tagging efforts directed at the eastern Chukchi stock of beluga whales showed that whales tagged in the eastern Chuckchi in summer traveled 1,100 km (684 mi) north of the Alaska coastline and to the Canadian Beaufort Sea within 3 months of tagging (Suydam *et al.*, 2001), indicting significant stock overlap with the Beaufort Sea stock of beluga whales.

During the winter, beluga whales occur in offshore waters associated with pack ice. In the spring, they migrate to warmer coastal estuaries, bays, and rivers for molting (Finley, 1982) and calving (Sergeant and Brodie, 1969). Annual migrations may cover thousands of kilometers (Reeves, 1990).

Although population surveys were conducted in 1998 and 2002, several technical issues prevented an acceptable estimation of the population size from these two surveys. As a result, the abundance estimated from the 1989–91 surveys is still considered to be the most reliable for the eastern Chukchi Sea beluga whale stock, with an estimated population of 3,710 whales (Angliss and Outlaw, 2007).

Killer Whales

Killer whales have been observed in all oceans and seas of the world (Leatherwood and Dahlheim, 1978). Along the west coast of North America, killer whales occur along the entire Alaskan coast, and seasonal and year-round occurrence has been noted for killer whales throughout Alaska (Braham and Dahlheim, 1982), including the Bering and southern Chukchi seas (Leatherwood *et al.*, 1986; Lowry *et al.*, 1987). However, little is known about the seasonal distribution of killer whales in the proposed project area in Chukchi Sea. George *et al.* (1994) cited that local hunters in Barrow, Alaska, have seen a few killer whales each year in the Point Barrow region during July and August. In addition, between 1985 and 1994, Eskimo hunters have related two instances of killer whales attacking and killing gray whales in the Chukchi Sea near Barrow (George *et al.*, 1994).

Studies of killer pods based on aspects of morphology, ecology, genetics, and behavior have provided evidence of the existence of ''resident,'' ''offshore,'' and ''transient'' killer whale ecotypes (Ford and fisher, 1982; Baird and Stacey, 1988; Baird *et al.*, 1992; Hoelzel *et al.*, 1998; 2002; Barrett-Lennard, 2000).

Off the waters of Alaska, six stocks of killer whales have been recognized: the Alaska resident; the northern resident; the Gulf of Alaska, Aleutian Islands, and Bering Sea transient; the AT1 transient; the West Coast transient; and the offshore stocks. It is not clear which stocks killer whales within the proposed project area belong to, however, mostly likely they are of the ''transient'' ecotype based on their marine mammal based diet (Ford *et al.*, 1998; Saulitis *et al.*, 2000; Herman *et al.*, 2005). The occurrence of killer whales in the vicinity of the proposed area is rare.

The population size of the Gulf of Alaska, Aleutian Islands, and Bering Sea stock of killer whales is estimated at 314 animals.

Harbor Porpoises

In the eastern North Pacific, the harbor porpoise ranges from Point Barrow, along the Alaska coast, and down the west coast of North America to Point Conception, California (Gaskin, 1984). Although it is difficult to determine the true stock structure of harbor porpoise populations in the northeast Pacific, from a management standpoint, it would be prudent to assume that regional populations exist and that they should be managed independently (Rosel *et al.*, 1995; Taylor *et al.*, 1996). Accordingly, three separate harbor porpoise stocks in Alaska are recommended based on management boundaries, with the Bering Sea stock occurring throughout the Aleutian Islands and all waters north of Unimak Pass, including the proposed project area (Angliss and Outlaw, 2007). Nonetheless, the occurrence of harbor porpoise within the proposed project area is not frequent.

The population size of this stock is estimated at 66,078 animals (Angliss and Outlaw, 2007).

Ringed Seals

Ringed seals are widely distributed throughout the Arctic basin, Hudson Bay and Strait, and the Bering and Baltic seas. Ringed seals inhabiting northern Alaska belong to the subspecies *P. h. hispida*, and they are year-round residents in the Beaufort Sea.

The seasonal distribution of ringed seals in the Beaufort Sea is affected by a number of factors but a consistent pattern of seal use has been documented since aerial survey monitoring began over 20 years ago. During late April through June, ringed seals are distributed throughout their range from the southern ice edge northward (Braham *et al.*, 1984). Recent studies indicate that ringed seals show a strong seasonal and habitat component to structure use (Williams *et al.*, 2006), and habitat, temporal, and weather factors all had significant effects on seal densities (Moulton *et al.*, 2005). The studies also showed that effects of oil and gas development on local distribution of seals and seal lairs are no more than slight, and are small relative to the effects of natural environmental factors (Moulton *et al.*, 2005; Williams *et al.*, 2006).

A reliable estimate for the entire Alaska stock of ringed seals is currently not available (Angliss and Outlaw, 2007). A minimum estimate for the eastern Chukchi and Beaufort Sea is 249,000 seals, including 18,000 for the Beaufort Sea (Angliss and Outlaw, 2007). The actual numbers of ringed seals are substantially higher, since the estimate did not include much of the geographic range of the stock, and the estimate for the Alaska Beaufort Sea has not been corrected for animals missed during the surveys used to derive the abundance estimate (Angliss and Outlaw, 2007). Estimates could be as high as or approach the past estimates of 1 - 3.6 million ringed seals in the Alaska stock (Frost, 1985; Frost *et al.*, 1988).

Bearded Seals

The bearded seal has a circumpolar distribution in the Arctic, and it is found in the Bering, Chukchi, and Beaufort seas (Jefferson *et al.*, 1993). Bearded seals are predominately benthic feeders, and prefer waters less than 200 m (656 ft) in depth. Bearded seals are generally associated with pack ice and only rarely use shorefast ice (Jefferson *et al.*, 1993). Bearded seals occasionally have been observed maintaining

breathing holes in annual ice and even hauling out from holes used by ringed seals (Mansfield, 1967; Stirling and Smith, 1977).

Seasonal movements of bearded seals are directly related to the advance and retreat of sea ice and to water depth (Kelly, 1988). During winter they are most common in broken pack ice and in some areas also inhabit shorefast ice (Smith and Hammill, 1981). In Alaska waters, bearded seals are distributed over the continental shelf of the Bering, Chukchi, and Beaufort seas, but are more concentrated in the northern part of the Bering Sea from January to April (Burns, 1981). Recent spring surveys along the Alaskan coast indicate that bearded seals tend to prefer areas of between 70 and 90 percent sea ice coverage, and are typically more abundant greater than 20 nm (37 km) off shore, with the exception of high concentrations nearshore to the south of Kivalina in the Chukchi Sea (Bengtson *et al.*, 2000; Simpkins *et al.*, 2003).

There are no recent reliable population estimates for bearded seals in the Beaufort Sea or in the proposed project area (Angliss and Outlaw, 2007). Aerial surveys conducted by MMS in fall 2000 and 2001 sighted a total of 46 bearded seals during survey flights conducted between September and October (Treacy, 2002a; 2002b). Bearded seal numbers are considerably higher in the Bering and Chukchi seas, particularly during winter and early spring. Early estimates of bearded seals in the Bering and Chukchi seas range from 250,000 to 300,000 (Popov, 1976; Burns, 1981). There is no evidence that this stock has suffered significant decline over the years.

Spotted Seals

Spotted seals occur in the Beaufort, Chukchi, Bering, and Okhotsk seas, and south to the northern Yellow Sea and western Sea of Japan (Shaughnessy and Fay, 1977). Based on satellite tagging studies, spotted seals migrate south from the Chukchi Sea in October and pass through the Bering Strait in November and overwinter in the Bering Sea along the ice edge (Lowry *et al.*, 1998). In summer, the majority of spotted seals are found in the Bering and Chukchi seas, but do range into the Beaufort Sea (Rugh *et al.*, 1997; Lowry *et al.*, 1998) from July until September. The seals are most commonly seen in bays, lagoons, and estuaries and are typically not associated with pack ice at this time of the year.

A small number of spotted seal haul-outs are documented in the central Beaufort Sea near the deltas of the Colville and Sagavanirktok rivers (Johnson *et al.*, 1999). Previous studies from 1996 to 2001 indicate that few spotted seals (a few tens) utilize the central Alaska Beaufort Sea (Moulton and Lawson, 2002; Treacy, 2002a; 2002b). In total, there are probably no more than a few tens of spotted seals along the coast of central Alaska Beaufort Sea.

A reliable abundance estimate for spotted seal is not currently available (Angliss and Outlaw, 2005), however, early estimates of the size of the world population of spotted seals was 335,000 to 450,000 animals and the size of the Bering Sea population, including animals in Russian waters, was estimated to be 200,000 to 250,000 animals (Burns, 1973). The total number of spotted seals in Alaskan waters is not known (Angliss and Outlaw, 2007), but the estimate is most likely between several thousand and several tens of thousands (Rugh *et al.*, 1997).

Ribbon Seals

Ribbon seals inhabit the North Pacific Ocean and adjacent parts of the Arctic Ocean. In Alaska waters, ribbon seals are found in the open sea, on the pack ice and only rarely on shorefast ice (Kelly, 1988). They range northward from Bristol Bay in the Bering Sea into the Chukchi and western Beaufort seas. From March to early May, ribbon seals inhabit the Bering Sea ice front (Burns, 1970; 1981; Braham *et al.*, 1984). They are most abundant in the northern part of the ice front in the central and western part of the Bering Sea (Burns, 1970; Burns *et al.*, 1981). As the ice recedes in May to mid-July, the seals move farther to the north in the Bering Sea, where they haul out on the receding ice edge and remnant ice (Burns, 1970; 1981; Burns *et al.*, 1981). There is little information on the range of ribbon seals during the rest of the year. Recent sightings and a review of the literature suggest that many ribbon seals migrate into the Chukchi Sea for the summer (Kelly, 1988).

A recent reliable abundance estimate for the Alaska stock of ribbon seals is currently not available. Burns (1981) estimated the worldwide population of ribbon seals at 240,000 in the mid–1970s, with an estimate for the Bering Sea at 90,000 - 100,000.

Potential Effects on Marine Mammals

Operating a variety of acoustic equipment such as side-scan sonars, echo-sounders, bottom profiling systems, and airguns for seafloor imagery, bathymetry, and seismic profiling has the potential for adverse affects on marine mammals.

Potential Effects of Airgun Sounds on Marine Mammals

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and, at least in theory, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.*, 1995)

The potential effects of airguns discussed below are presented without consideration of the mitigation measures that CPAI has presented and that will be required by NMFS. When these measures are taken into account, it is unlikely that this project would result in temporary, or especially, permanent hearing impairment or any significant non-auditory physical or physiological effects.

(1) Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Studies have also shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response (tolerance). That is often true even in cases when the pulsed sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times mammals of all three types have shown no overt reactions. In general, pinnipeds, and small odontocetes seem to be more tolerant of exposure to airgun pulses than are baleen whales.

(2) Masking

Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited, although there are very few specific data of relevance. Some whales are known to continue calling in the presence of seismic pulses. Their calls can be heard between the seismic pulses (e.g., Richardson *et al.*, 1986; McDonald *et al.*, 1995; Greene *et al.*, 1999; Nieukirk *et al.*, 2004). Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.*, 1994), a more recent study reports that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.*, 2002). That has also been shown during recent

work in the Gulf of Mexico (Tyack *et al.*, 2003; Smultea *et al.*, 2004). Masking effects of seismic pulses are expected to be negligible in the case of the smaller odontocete cetaceans, given the intermittent nature of seismic pulses. Dolphins and porpoises commonly are heard calling while airguns are operating (e.g., Gordon *et al.*, 2004; Smultea *et al.*, 2004; Holst *et al.*, 2005a; 2005b). Also, the sounds important to small odontocetes are predominantly at much higher frequencies than are airgun sounds.

(3) Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement.

Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors. If a marine mammal does react briefly to an underwater sound by slightly changing its behavior or moving a small distance, the impacts of the change are unlikely to be biologically significant to the individual, let alone the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on the animals could be significant.

(4) Hearing Impairment and Other Physical Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds, but there has been no specific documentation of this for marine mammals exposed to sequences of airgun pulses. NMFS advises against exposing cetaceans and pinnipeds to impulsive sounds above 180 and 190 dB re 1 microPa (rms), respectively (NMFS, 2000). Those thresholds have been used in defining the safety (shut down) radii planned for the proposed seismic surveys. Although those thresholds were established before there were any data on the minimum received levels of sounds necessary to cause temporary auditory impairment in marine mammals, they are considered to be conservative.

Several aspects of the planned monitoring and mitigation measures for this project are designed to detect marine mammals occurring near the airguns to avoid exposing them to sound pulses that might, at least in theory, cause hearing impairment (see Mitigation and Monitoring section below). In addition, many cetaceans are likely to show some avoidance of the area with high received levels of airgun sound. In those cases, the avoidance responses of the animals themselves will reduce or (most likely) avoid any possibility of hearing impairment.

Non-auditory physical effects may also occur in marine mammals exposed to strong underwater pulsed sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns. It is unlikely that any effects of these types would occur during the proposed project given the brief duration of exposure of any given mammal, and the planned monitoring and mitigation measures (see below).

(5) Strandings and Mortality

Marine mammals close to underwater detonations of high explosive can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.*, 1993; Ketten, 1995). Airgun pulses are less energetic and have slower rise times, and there is no evidence that they can cause serious injury, death, or stranding even in the case of large airgun arrays.

Nonetheless, the airgun array proposed to be used in the proposed site clearance surveys in Chukchi Sea is small in volume (40 cu inches) and the source level is expected at 196 dB re 1 mircoPa (peak), which is approximately 190 dB re 1 microPa (rms). The 160, 170, and 180 dB re 1 microPa (rms) radii, in the beam below the transducer, would be 32 m (104 ft), 10 m (33 ft), and 3.2 m (10 ft), respectively, for the 40–cu-inch airgun array, assuming spherical spreading.

Possible Effects of Signals from Sonar Equipment

While the sonar equipment proposed to be used for this project generates high sound energy, the equipment operates at frequencies (>100 kHz) beyond the effective hearing range of most marine mammals likely be encountered (Richardson *et al.*, 1995). However, the equipment proposed for the seismic profiling operate at a frequency range and sound level that could affect marine mammal behavior if they occur within a relatively close distance to the sound source (Richardson *et al.*, 1995). In addition, given the direct downward beam pattern of these sonar systems coupled with the high-frequency characteristics of the signals, the horizontal received levels of 180 and 190 dB re 1 microPa (rms) would be much smaller when compared to those from the low-frequency airguns with similar source levels. Therefore, NMFS believes that effects of signals from sonar equipment to marine mammals are negligible.

Numbers of Marine Mammals Estimated to be Taken

All anticipated takes would be takes by Level B harassment, involving temporary changes in behavior. The proposed mitigation measures to be applied would prevent the possibility of injurious takes.

Take was calculated for the two areas of the study area using vessel-based density estimates. Few bowheads and no belugas were observed during the vessel surveys conducted in the Chukchi Sea by LGL *et al.* (2008), although the surveys used multiple vessels achieving substantial effort and coverage from early July to mid November. This result is generally consistent with the historic information, which shows that bowheads generally migrated through the Chukchi Sea to the Beaufort Sea by mid-late June, and don't return until about late October and November, probably reaching the region of the project area no earlier than late October (LGL *et al.*, 2008). Similarly, most belugas migrate to the northern Chukchi Sea and westward into the Beaufort Sea by mid to late July and return to the region of the project area in late October and November (Suydam *et al.*, 2005). Although LGL *et al.*, (2008) did not observe belugas offshore in 2006 or 2007, they did encounter belugas along the coast in decreasing numbers from July to October/November during aerial surveys. LGL *et al.* (2008) also observed bowheads in the fall near Barrow during nearshore aerial surveys, suggesting the whales had not moved very far into Chukchi Sea at that time. While these data and the historic information suggest the take calculations are reasonable for belugas and bowheads, the take numbers have been adjusted to 10 animals for each species to account for the possible occurrence of more animals than estimated in the project area during operations due to an early freeze-up or other unanticipated changes in the environment. This adjustment is generally consistent with estimates based on less current densities used in past IHAs for bowhead (0.0011/km^2) and beluga (0.0034/km^2) whales for late fall.

The vessel-based density estimates for ringed and spotted seals were reported in the LGL *et al.* (2008) study as a combined estimate for the two species, since observers were not able to distinguish the two species in the open water. However, since typically ringed seals comprise almost 95 percent of the combined ringed/spotted seal sightings recorded during surveys in offshore waters of the Chukchi Sea during 1989 - 1991 were ringed seals (Brueggeman *et al.*, 1990; 1991; 1992), the LGL *et al.* (2008) ringed/spotted seal data were corrected by applying 95 percent of the sightings as ringed, and 5 percent as spotted seals, respectively.

JASCO modeled the sound levels of different configurations of seismic profilers (10 kj and 16 kj sparkers, 10 in^3 and 20 in^3 2–gun arrays, 40 cu^3 single gun, and 10 in^3 4–gun array) and found the 4–gun array produced the highest sound levels. Therefore, all take estimates of marine mammals are calculated for the 4–gun array in this proposed activity, which reaches the 160 dB re 1 microPa sound level at 1.665 km (1.03 mi) from the source, the 180 dB re 1 microPa level at 115 m (377 ft), and the 190 dB level at 20 m (66 ft).

The average estimates of ''take'' were calculated by multiplying the expected average animal densities by the area of ensonification for the 160 dB re 1 microPa (rms). The area of ensonification was determined by multiplying the total proposed trackline of 5,300 km (3,294 mi)(2,120 km, or 1,318 mi, in August; 2,120 km, or 1,318 mi, in September; and 1,060 km, or 659 mi, in October) times 2 (both sides of the trackline) times the distance to the 160–dB isopleth. The distance to the 160–dB isopleth was estimated as approximately 1,665 m (5,463 ft) with a corresponding area of ensonification of 17,649 km2 (6,817 mi2).

Based on the calculation, it is estimated that up to approximately 10 bowhead, 37 gray, and 4 minke whales, 42 harbor porpoises, 1,379 ringed, 72 spotted, and 376 bearded seals would be affected by Level B behavioral harassment as a result of the proposed shallow hazard and site clearance surveys. These take numbers represent 0.09, 0.19, 0.06, 0.66, and 0.15 percent of the western Arctic stock of bowhead, eastern North Pacific stock of gray whales, Bering Sea stock of harbor porpoise, and Alaska stocks of ringed and bearded seals in the Chukchi Sea region, respectively. Since no accurate current population estimates of minke whales and spotted seals are available, a specific estimate of the percentage of Level B harassment of this species is undetermined. Nonetheless, it is very low relative to the affected species or stocks in the proposed project area because: (1) for the minke whales, the Chukchi Sea is not their typical habitat (visual surveys in 1999 and 2000 counted 810 and 1,003 minke whales in the central-eastern and southeastern Bering Sea, respectively, not including animals missed on the trackline, and animals submerged when the ship passed (Moore *et al.*, 2002), therefore, the take estimate of 4 minke whale is small even in relation to these visual counts); and (2) for the spotted seal, the early population estimate of this species ranged from 335,000 - 450,000 seals (Burns, 1973), and there is no reason to believe that the population of this species has declined significantly.

In addition, a number of beluga, humpback, and killer whales, and ribbon seals could also be affected by Level B behavioral harassment as a result of the proposed marine surveys in the Chukchi Sea. However, since the occurrence of these marine mammals is very rare within the proposed project area during the late summer and fall in the Chukchi Sea, take numbers cannot be estimated. However, for the same reason, NMFS believes their take numbers would be much lower (including as a percentage of the affected species or stock) as compared to those marine mammals whose take numbers were calculated.

Potential Impacts to Subsistence Harvest of Marine Mammals

Subsistence hunting and fishing is historically, and continues to be, an essential aspect of Native life, especially in rural coastal villages. The Inupiat participate in subsistence hunting and fishing activities in and around the Chukchi Sea.

Alaska Natives, including the Inupiat, legally hunt several species of marine mammals. Communities that participate in subsistence activities potentially affected by seismic surveys within the proposed survey areas are Point Hope, Point Lay, Wainwright, and Barrow. Marine animals used for subsistence in the proposed area include: bowhead whales, beluga whales, ringed seals, spotted seals, bearded seals, Pacific walrus, and polar bears. In each village, there are key subsistence species. Hunts for these animals occur during different seasons throughout the year. Depending upon the village's success of the hunt for a certain species, another species may become a priority in order to provide enough nourishment to sustain the village.

Point Hope residents subsistence hunt for bowhead and beluga whales, polar bears and walrus. Bowhead and beluga whales are hunted in the spring and early summer along the ice edge. Beluga whales may also be hunted later in the summer along the shore. Walrus are harvested in late spring and early summer, and polar bear are hunted from October to April (MMS, 2007). Seals are available from October through June, but are harvested primarily during the winter months, from November through March, due to the availability of other resources during the other periods of the year (MMS, 2007).

With Point Lay situated near Kasegaluk Lagoon, the community's main subsistence focus is on beluga whales. Seals are available year-round, and polar bears and walruses are normally hunted in the winter. Hunters typically travel to Barrow, Wainwright, or Point Hope to participate in bowhead whale harvest, but there is interest in reestablishing a local Point Lay harvest.

Wainwright residents subsist on both beluga and bowhead whales in the spring and early summer. During these two seasons the chances of landing a whale are higher than during other seasons. Seals are hunted by this community year-round and polar bears are hunted in the winter.

Barrow residents' main subsistence focus is concentrated on biannual bowhead whale hunts. They hunt these whales during the spring and fall. Other animals, such as seals, walruses, and polar bears are hunted outside of the whaling season, but they are not the primary source of the subsistence harvest (URS Corporation, 2005).

The potential impact of the noise produced by the proposed survey on subsistence could be substantial. If bowhead or beluga whales are permanently deflected away from their migration path, there could be significant repercussions to the subsistence use villages. However, mitigation efforts will be put into action to minimize or avoid completely any adverse affects on all marine mammals.

As a mitigation measure to minimize or avoid any adverse effects to subsistence harvest, CPAI will meet with key native organizations responsible for managing marine mammals in the Arctic. In accordance with 50 CFR 126.104(a)(12), CPAI will meet with the Alaska Eskimo Whaling Commission (AEWC) in the planning for the 2008 site clearance and shallow hazard survey and develop a Plan of Cooperation (POC). In addition, CPAI will consult subsistence committees and commissions as required by its OCS 193 Leases, and meet with the North Slope Borough (NSB) as necessary. Meetings with other stakeholders will provide information on the time, location, and

features of the seismic survey/operations, opportunities for involvement by local people, potential impacts to marine mammals, and mitigation measures to avoid or minimize impacts.

A number of actions will be taken by CPAI during the surveys to minimize any adverse effect on the availability of marine mammals for subsistence, which have been proposed in the CPAI application. They include the following:

(1) Site clearance and shallow hazard surveys will occur in areas considerably away from the villages during the hunting periods;

(2) Site clearance and shallow hazard surveys will follow procedures of changing vessel course, powering down, and shutting down acoustic equipment to minimize effects on the behavior of marine mammals and, therefore, effects on opportunities for harvest by local communities; and

(3) In the unlikely event that a hunter is encountered, operations will be managed to stay beyond any hunter encountered within 5 km (3.1 mi) of the vessel when shooting airguns.

The combination of the low volume air guns, timing, location, mitigation measures, and input from local communities and organization is expected to mitigate any adverse effect of the seismic surveys on availability of marine mammals for subsistence uses.

Potential Impacts on Habitat

The proposed site clearance surveys would not result in any permanent impact on habitats used by marine mammals, or to the food sources they use. The main impact issue associated with the proposed activity would be temporarily elevated noise levels and the associated direct effects on marine mammals, as discussed above.

Proposed Monitoring and Mitigation Measures

Monitoring

In order to reduce and minimize the potential impacts to marine mammals from the proposed site clearance surveys, NMFS proposes the following monitoring measures to be implemented for the proposed project in Chukchi Sea.

Marine mammal monitoring during the site clearance surveys would be conducted by qualified, NMFS-approved marine mammal observers (MMOs). Vessel-based MMOs would be on board the seismic source vessel to ensure that no marine mammals would enter the relevant safety radii while noise-generating equipment is operating.

MMOs will alternate at 4–hour shifts to avoid fatigue. The vessel crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of a geophysical survey the crew will be given additional instruction on how to do so.

During daytime hours, the MMO(s) will scan the area around the vessel systematically with reticule binoculars (e.g., 7 50 Bushnell or equivalent) and with the naked eye. Laser range finders (Laser Tech laser rangefinder or equivalent) will also be available to assist with distance estimation. During darkness, NVDs (Night Vision Device) will be available (ATN NVG–7 or equivalent).

Mitigation

Proposed mitigation measures include (1) vessel speed or course alteration, provided that doing so will not compromise operational safety requirements, (2) acoustic equipment shut down, and (3) acoustic source ramp up.

(1) Speed or Course Alteration

If a marine mammal is detected outside the relevant safety zone but appears likely to enter it based on relative movement of the vessel and the animal, then if safety and survey objectives allow, the vessel speed and/or course would be adjusted to minimize the likelihood of the animal entering the safety zone.

(2) Shut down Procedures

If a marine mammal is detected within, or appears likely to enter, the relevant safety zone of the array in use, and if vessel course and/or speed changes are impractical or will not be effective to prevent the animal from entering the safety zone, then the acoustic sources that relate to the seismic surveys would be shut down.

Following a shut down, acoustic equipment would not be turned on until the marine mammal is outside the safety zone. The animal would be considered to have cleared the safety zone if it (1) is visually observed to have left the 115–m (377–ft) or 20–m (66–ft) safety zone, for a cetacean or a pinniped species, respectively; or (2) has not been seen within the relevant safety zone for 15 min in the case of odontocetes or pinnipeds and 30 min in the case of mysticetes. These safety zones correspond to areas where the received SPLs are 180 and 190 dB re 1 microPa (rms), respectively.

Following a shut down and subsequent animal departure as above, the acoustic sources may be turned on to resume operations following ramp-up procedures described below.

(3) Ramp-up Procedures

A ramp-up procedure will be followed when the acoustic sources begin operating after a specified period without operations. It is proposed that, for the present survey, this period would be 30 min. Ramp up would begin with the power on of the smallest acoustic equipment for the survey at its lowest power output. The power output would be gradually turned up and other acoustic sources would be added in a way such that the source level would increase in steps not exceeding 6 dB per 5–min period. During ramp-up, the MMOs would monitor the safety zone, and if marine mammals are sighted, decisions about course/speed changes and/or shutdown would be implemented as though the acoustic equipment is operating at full power.

Data Collection and Reporting

MMOs would record data to estimate the numbers of marine mammals present and to document apparent disturbance reactions or lack thereof. Data would be used to estimate numbers of animals potentially ''taken'' by harassment. They would also provide information needed to order a shut down of acoustic equipment when marine mammals are within or entering the safety zone.

When a sighting is made, the following information about the sighting would be recorded:

(1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, and apparent reaction to the acoustic sources or vessel.

(2) Time, location relative to the acoustic sources, heading, speed, activity of the vessel (including whether and the level at which acoustic sources are operating), sea state, visibility, and sun glare.

The data listed under (2) would also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

A final report will be submitted to NMFS within 90 days after the end of the shallow hazard and site clearance surveys. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report also will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The report will summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations,

activities, associated seismic survey activities), and the amount and nature of potential take of marine mammals by harassment or in other ways.

Endangered Species Act

Under section 7 of the ESA, the MMS has begun consultation on the proposed seismic survey activities in the Chukchi Sea during 2008. NMFS will also consult on the issuance of the IHA under section 101(a)(5)(D) of the MMPA to CPAI for this activity. Consultation will be concluded prior to NMFS making a determination on the issuance of an IHA.

National Environmental Policy Act (NEPA)

In 2006, the MMS prepared Draft and Final Programmatic Environmental Assessments (PEAs) for seismic surveys in the Beaufort and Chukchi Seas. NMFS was a cooperating agency in the preparation of the MMS PEA. On November 17, 2006, NMFS and MMS announced that they were jointly preparing a Draft Programmatic Environmental Impact Statement (PEIS) to assess the impacts of MMS' annual authorizations under the Outer Continental Shelf (OCS) Lands Act to the U.S. oil and gas industry to conduct offshore geophysical seismic surveys in the Chukchi and Beaufort seas off Alaska, and NMFS' authorizations under the MMPA to incidentally harass marine mammals while conducting those surveys. On March 30, 2007, the Environmental Protection Agency (EPA) noted the availability for comment of the NMFS/MMS Draft PEIS. A Final PEIS has not been completed. Therefore, NMFS determined it will update the 2006 PEA in order to meet its NEPA requirements in the interim. This approach is warranted because the five proposed Arctic seismic survey IHAs for 2008 fall within the scope of the effects analysis in the 2006 PEA. To update the 2006 Final PEA, NMFS is currently preparing a Supplemental EA which incorporates by reference the 2006 Final PEA and other related documents.

Preliminary Determination

Based on the preceding information, and provided that the proposed mitigation and monitoring are incorporated, NMFS has preliminarily determined that the impact of conducting the shallow hazard and site clearance surveys in Chukchi Sea may result, at worst, in a temporary modification in behavior of small numbers of certain species of marine mammals. While behavioral and avoidance reactions may be made by these species in response to the resultant noise from the airguns, side-scan sonars, seismic profilers, and other acoustic equipment, these behavioral changes are expected to have a negligible impact on the affected species and stocks of marine mammals, and no unmitigable adverse impact on their availability for subsistence.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the area of site clearance operations, the number of potential harassment takings is estimated to be relatively small in light of the population size. NMFS anticipates the actual take of individuals to be lower than the numbers presented in the analysis because those numbers do not reflect either the implementation of the mitigation measures or the fact that some animals will avoid the sound at levels lower than those expected to result in harassment.

In addition, no take by death and/or injury is anticipated, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the required mitigation measures described in this document. This determination is supported by (1) the likelihood that, given sufficient notice through slow ship speed and ramp-up of the acoustic equipment, marine mammals are expected to move away from a noise source that it is annoying prior to its becoming potentially injurious; (2) TTS is unlikely to occur, especially in odontocetes, until levels above 180 dB re 1 microPa (rms) are reached; and (3) the fact that injurious levels of sound are only likely very close to the vessel.

Proposed Authorization

NMFS proposes to issue an IHA to CPAI for shallow hazard and site clearance surveys in Chukchi Sea between August and October 2008, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 16, 2008.

Helen Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–11537 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XI08

Mid-Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council), its Squid, Mackerel, Butterfish Committee; its Demersal Committee; its Law Enforcement Committee; Surfclam/Ocean Quahog Committee; its Science and Statistical Committee; its Executive Committee; its Bycatch/LAPP Committee; and, its Joint Spiny Dogfish Committee, will hold public meetings.

DATES: The meetings will be held on Monday, June 9, 2008 through Thursday, June 12, 2008. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held at the Sheraton Convention Center Hotel, Two Miss America Way, Atlantic City, NJ 08401; telephone: (609) 344–3535.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New St., Room 2115, Dover, DE 19904; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 674–2331 ext. 19.

SUPPLEMENTARY INFORMATION: On Monday, June 9, the Squid, Mackerel, Butterfish Committee with Advisors will meet from 10 a.m. until 5 p.m. There will be a concurrent session of the Demersal Committee from 2 p.m. until 5 p.m. A Squid, Mackerel, Butterfish public hearing on Amendment 10 to the Squid, Mackerel, Butterfish Fishery Management Plan will be held from 7 p.m. until 8:30 p.m.

On Tuesday, June 10, the Squid, Mackerel, Butterfish Committee with Advisors will meet from 8 a.m. until 11 a.m. The Law Enforcement Committee will meet from 11 a.m. until 12:30 p.m. The Surfclam, Ocean Quahog and Tilefish Committee with Advisors will meet from 1:30 p.m. until 3:30 p.m. A tour of a local clam dock facility and operations thereof will be held from 3:30 p.m. until 5:30 p.m. The New England Fishery Management Council will hold an Atlantic Herring Fishery Management Plan scoping meeting on

Amendment 4 to the FMP from 6 p.m. until 7:30 p.m.

On Wednesday, June 11, the Scientific and Statistical and Research Set-Aside Committees will meet jointly from 8 a.m. until 12 p.m. The Council will convene at 1 p.m. until 3 p.m. to conduct its Business Session and receive Organizational, Liaison, Executive Director and Status of Fishery Management Plan reports. From 3 p.m. until 5:30 p.m. the Council will develop and adopt specifications regarding the 2009 fishing year for Squid, Mackerel, and Butterfish.

On Thursday, June 12, the Executive Committee will meet from 8 a.m. until 9 a.m. The Bycatch/LAPP Committee will meet from 9 a.m. until 10 a.m. The Joint Spiny Dogfish Committee will meet from 10 a.m. until 11:30 a.m. The Council will convene at 12:30 p.m. to adopt any changes to the Surfclam and Ocean Quahog specifications for 2009 and 2010 fishing years; receive a presentation regarding the integration of National Environmental Policy Act requirements into the Magnuson-Stevens Act; receive Committee reports; and, conduct continuing and new business.

Agenda items by day for the Council's Committees and the Council itself are:

MONDAY, JUNE 9 - the Squid, Mackerel, and Butterfish Committee with Advisors will address Amendment 11 (mackerel limited entry system) and Annual Catch Limits (ACL) and Accountability Measures (AM). The Demersal Committee will review measures to be included in Amendment 15 and address accommodation of ACL/AM. There will be an evening public hearing regarding Amendment 10 to the Squid, Mackerel, and Butterfish Fishery Management Plan (FMP).

TUESDAY, JUNE 10 - The Squid, Mackerel, and Butterfish Committee with Advisors will meet to review the Monitoring Committee's recommendations and Science and Statistical Committee advice for 2009 quota levels and associated management measures and then develop 2009 quota specifications and associated management measures for Council consideration and action. The Law Enforcement Committee will discuss issues regarding the enforceability of slot limits in the recreational sector, review the USCG's Proposed Rule on Vessel Safety/Stability, and discuss issues regarding the enforceability of possession limits for multiple day trips. The Surfclam, Ocean Quahog and Tilefish Committee with Advisors will review staff recommendations for changes to the 2009–10 quota specifications and associated management measures for surfclams and ocean quahogs, and discuss issues to be addressed in Amendment 14 including accommodation of ACL/AM. A tour of a local clam boat and associated dock facility will then be provided.

Beginning at 6 p.m. the New England Fishery Management Council will conduct a scoping meeting for development of Amendment 4 to the Herring Fishery Management Plan. Amendment 4 will focus on issues related to catch monitoring (landings and discards); Magnuson-Stevens Reauthorization Act requirements such as Annual Catch Limits and Accountability Measures; and, sector allocations and/or other Limited Access Privilege Programs. The Council is seeking comments on the scope of issues to be addressed in Amendment 4 and the kinds of management measures that should be considered.

WEDNESDAY, JUNE 11 - the Scientific and Statistical Committee will meet with the Research Set-Aside Committee to establish multi-year research priorities for the 2009–13 time period, and review and discuss outcomes from the Special Science and Statistical Committee Working Group meeting. The Council will then convene to receive various reports, and review, develop, and adopt the Squid, Mackerel, and Butterfish Committee's recommendations regarding quota specifications and associated management measures for the 2009 fishing year.

THURSDAY, JUNE 12 - the Executive Committee will review highlights of the Coordinating Council meeting and revise the Council's Statement of Organization Practices and Procedures (SOPP) relative to ''deeming'' requirements. The Bycatch/LAPP Committee will review the first draft of the Council's bycatch pamphlet concerning catch and release practices, and discuss Standardized Bycatch Reporting Methodology Observer Coverage Priorities for 2008. The Joint Spiny Dogfish Committee will review proposed measures in Framework 2 to the Spiny Dogfish FMP. The Council will convene to review and adopt the Surfclam and Ocean Quahog Committee's recommendations for necessary changes to 2009 and 2010 quota specifications and associated management measures (years 2 and 3 of the existing 2008–10 multi-year quota specifications). The Council will then receive a presentation by a National Marine Fisheries Service Official regarding the Agency's Proposed Rule to Integrate National Environment Policy Act (NEPA) requirements into Magnuson-Stevens Act (MSA). The Council will then receive Committee Reports, and consider any continuing or new business.

Although non-emergency issues not contained in this agenda may come before the Council for discussion, these issues may not be the subject of formal Council action during these meetings. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address such emergencies.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Bryan, (302) 674–2331, ext 18 at least 5 days prior to the meeting date.

Dated: May 19, 2008.

Emily Menashes,

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

[FR Doc. E8–11579 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XI09

Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council (Council) and its advisory entities will hold public meetings.

DATES: The Council and its advisory entities will meet June 6–13, 2008. The Council meeting will begin on Sunday, June 8, at 8 a.m., reconvening each day through Friday, June 13. All meetings are open to the public, except a closed session will be held from 8 a.m. to 9 a.m. on Sunday, June 8 to address litigation and personnel matters. The Council will meet as late as necessary each day to complete its scheduled business.

ADDRESSES: The meetings will be held at the Crowne Plaza Hotel, 1221 Chess

Drive, Foster City, CA 94404; telephone: (650) 570–5700.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Dr. Donald O. McIsaac, Executive Director; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The following items are on the Council agenda, but not necessarily in this order:

A. Call to Order

1. Opening Remarks and Introductions

2. Roll Call

3. Executive Director's Report

4. Approve Agenda

B. Open Public Comment

Comments on Non-Agenda Items

C. Administrative Matters

1. Future Council Meeting Agenda and Workload Planning

2. Magnuson-Stevens Act Reauthorization Implementation

3. Update and Communication of Research and Data Needs

4. Fiscal Matters

5. Membership Appointments and Council Operating Procedures

D. Highly Migratory Species Management

1. Changes to Routine Management Measures for 2009–10 Seasons

2. Council Recommendations to Regional Fishery Management Organizations

E. Salmon Management

1. Klamath River Fall Chinook Overfishing Concern

F. Groundfish Management

1. NMFS Report

2. Stock Assessment Planning for 2011–12 Groundfish Fishery Decision Making

3. Preliminary Review of Exempted Fishing Permits for 2009

4. Tentative Adoption of 2009–10 Groundfish Harvest Specifications, Management Measures, and Rebuilding Plan Revisions

5. Consideration of Inseason Adjustments

6. Amendment 20: Trawl Rationalization Alternatives

7. Council Clarification of Tentatively Adopted 2009–10 Groundfish Harvest Specifications, Management Measures, and Rebuilding Plan Revisions (if Needed)

8. Final Consideration of Inseason Adjustments (if Needed)

9. Final Adoption of 2009–10 Groundfish Harvest Specifications, Management Measures, and Rebuilding Plan Revisions

G. Coastal Pelagic Species Management

1. Pacific Mackerel Stock Management for 2007–08

H. Habitat

Current Habitat Issues

I. Marine Protected Areas

Review of Rationale for Marine Protected Areas in the Monterey Bay National Marine Sanctuary

SCHEDULE OF ANCILLARY MEETINGS

Friday, June 6, 2008	.
Groundfish Management Team	1 p.m..
Saturday, June 7, 2008	.
Groundfish Management Team	8 a.m..
Scientific and Statistical Committee	1 p.m..
Budget Committee	2 p.m..
Sunday, June 8, 2008	.
Council Secretariat	7 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Scientific and Statistical Committee	8 a.m..
Enforcement Consultants	1:30 p.m..
Monday, June 9, 2008	.
Council Secretariat	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Enforcement Consultants	8 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Scientific and Statistical Committee	8 a.m..
Habitat Committee	8:30 a.m..
Tuesday, June 10, 2008	.
Council Secretariat	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Enforcement Consultants	8 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Wednesday, June 11, 2008	.
Council Secretariat	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Enforcement Consultants	8 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Thursday, June 12, 2008	.
Council Secretariat	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..

SCHEDULE OF ANCILLARY MEETINGS—Continued

Enforcement Consultants	As necessary.
Friday, June 13, 2008	.
Council Secretariat	7 a.m..
California State Delegation	7 a.m..
Oregon State Delegation	7 a.m..
Washington State Delegation	7 a.m..
Groundfish Advisory Subpanel	8 a.m..
Groundfish Management Team	8 a.m..
Enforcement Consultants	As necessary.

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: May 19, 2008.

Emily Menashes,

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

[FR Doc. E8–11580 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG64

Small Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Seismic Survey in the Northeast Pacific Ocean, June–July 2008

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from University of Texas, Institute of Geophysics (UTIG) for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to conducting a low-energy marine seismic survey in the Northeast Pacific Ocean during June-July, 2008. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to UTIG to incidentally take, by Level B harassment only, several species of marine mammals during the aforementioned activity.

DATES: Comments and information must be received no later than June 23, 2008.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648XB70@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Ken Hollingshead, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (I) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either approve or deny the authorization.

Summary of Request

On March 4, 2008, NMFS received an application from UTIG for the taking, by Level B harassment only, of several

species of marine mammals incidental to conducting, with research funding from the National Science Foundation (NSF), a bathymetric and seismic survey program approximately 100 km (approximately 62 mi) off the Oregon coast in the Northeast Pacific Ocean during June-July, 2008. The purpose of the research program is to investigate the methane vent systems that exist offshore Oregon. These systems release methane by active venting at the seafloor. They can also form relatively high concentrations of methane hydrate in the sub seafloor, up to 150 m (492 ft) below the sea bottom. The goal is to image these systems in detail to understand how vent structure directs methane from the subsurface to be vented into the oceans, or potentially stored in the subsurface as methane hydrate. Methane is a significant greenhouse gas, and methane release from vents or from hydrate has a significant potential to affect the Earth's climate. Hydrates are also a potentially significant source of energy. Also included in the research is the use of a multibeam echosounder and sub-bottom profiler.

Description of the Proposed Activity

The seismic survey will involve one vessel, the *R/V Thomas G. Thompson* (*Thompson*), which is scheduled to depart from Seattle, Washington on June 30, 2008 and return on July 19, 2008. The exact dates of the activities may vary by a few days because of weather conditions, scheduling, repositioning, streamer operations and adjustments, GI airguns deployment, or the need to repeat some lines if data quality is substandard. The proposed ultra-high resolution 3–dimensional (3–D) seismic surveys around the methane vent systems of Hydrate Ridge, will take place off the Oregon coast in the northeastern Pacific Ocean. The overall area within which the seismic surveys will occur is located between approximately 44° and 45° N. and 124.5° and 126° W (Figure 1 in the application). The surveys will occur approximately 100 km (approximately 62 mi) offshore from Oregon in water depths between approximately 650 and 1,200 m (2,132 and 3,936 ft), entirely within the Exclusive Economic Zone (EEZ) of the U.S.

The seismic survey will image the subsurface structures that control venting. The vent systems control whether the methane is directly released into the ocean and atmosphere or stored in methane hydrate. Methane hydrate storage has the potential for rapid dissociation and release into the ocean or atmosphere. The subsurface structure that will be imaged will determine the mechanisms involved in methane venting. The results will be applicable to the numerous vent systems that exist on continental margins worldwide. The data will also be used to design observatories that can monitor and assess the methane fluxes and mechanisms of methane release that operate on Hydrate Ridge.

The *Thompson* will deploy two low-energy Generator-Injector (GI) airguns (guns) as an energy source (with a discharge volume of 40–60 in^3 for each gun or a total of 80–120 in^3) , and a P-Cable system. The 12 m (39.5 ft) long P-Cable system is supplied by Northampton Oceanographic Center in the U.K. The towed system will consist of at least 12 streamers (and possibly up to 24) spaced approximately 12.5 m (41 ft) apart and each containing 11 hydrophones, all summed to a single channel. The energy to the GI guns is compressed air supplied by compressors on board the source vessel. As the GI guns are towed along the survey lines, the P-Cable system will receive the returning acoustic signals.

The seismic program will consist of three survey grids: two of the surveys each cover a 15 km2 area and the third covers a 25 km^2 (see Figure 1 in UTIG's application). The line spacing within the three survey grids will either be 75 m (246 ft) (if 12 streamers are used) or 150 m (492 ft) (if 24 streamers are used). The total line km to be surveyed in the grids at the 75 m spacing is 975 km (605.8 mi), including turns. Water depths at the seismic survey locations range from 650 to 1,200 m (2132 to 3936 ft). Most (92 percent) of the survey will take place over intermediate (100–1,000 m) water depths; the remaining 8 percent will be in water deeper than 1,000 m. If time permits, an additional 300 line km will be surveyed along the outside edges of the three grids. The GI guns are expected to operate for a total of approximately 150 hours during the cruise. There will be additional seismic operations associated with equipment testing, start-up, and repeat coverage of any areas where initial data quality is sub-standard.

In addition to the operations of the two GI guns and P-cable system, a Simrad EM300 30 kHz multibeam echosounder, and a Knudsen 12 kHz 320BR sub-bottom profiler will be used during the proposed cruise.

Vessel Specifications

The *Thompson* has a length of 83.5 m (274 ft), a beam of 16 m (52.5 ft), and a maximum draft of 5.8 m (19 ft). The ship is powered by twin 360°-azimuth stern thrusters a single 3,000–hp DC motor and a water-jet bow thruster powered by a 1,600–hp motor. The motors are driven by up to three 1,500–kW and three 715–kW generators; normal operations use two 1,500–kW and one 750–kW generator, but this changes with ship speed, sea state, and other variables. An operation speed of 6.5 km/h (3.5 knots) will be used during seismic acquisition. When not towing seismic survey gear, the *Thompson* cruises at 22.2 km/h (12 knots) and has a maximum speed of 26.9 km/h (14.5 knots). It has a normal operating range of approximately 24,400 km (8,264 mi).

Acoustic Source Specifications

Seismic Airguns

The vessel *Thompson* will tow two GI guns and a P-Cable system of 12 to 24, 12 m long streamers containing hydrophones along predetermined survey grids. Seismic pulses will be emitted at intervals of 3.5 s, which corresponds to a shot interval of approximately 6.3 m (20.7 ft) at a speed of 3.5 knots (6.5 km/h). The generator chamber of a GI gun, the one responsible for introducing the sound pulse into the ocean, is 40–60 in3. The second injector chamber (40–60 in3) injects air into the previously-generated bubble to maintain its shape and does not introduce more sound into the water. The two 40–60 in3 GI guns will be towed 29 m (95.1 ft) behind the *Thompson*, at a depth of 1.5–3 m (4.9–9.8 ft). The dominant frequency components are 0–188 Hz.

The sound pressure field of two 105 in^3 GI guns has been modeled by the Lamont-Doherty Earth Observatory (L-DEO) of Columbia University in relation to distance and direction from the GI guns. The model does not allow for bottom interactions and is most directly applicable to close distances and/or deep water. Because the L-DEO model is for a pair of larger GI guns with a total discharge of up to 210 in^3, the values overestimate the distances for two GI guns with a discharge of up to 120 in3, as planned for use during the proposed study. This source, which is directed downward, was found to have an output (0–peak) of 237 dB re 1 µPam.

The root mean square (rms) received levels that are used as impact criteria for marine mammals are not directly comparable to the peak or peak to peak values normally used to characterize source levels of airgun arrays. The measurement units used to describe airgun sources, peak or peak-to-peak decibels, are always higher than the rms decibels referred to in biological literature. A measured received level of 160 dB rms in the far field would

typically correspond to a peak measurement of approximately 170 to 172 dB, and to a peak-to-peak measurement of approximately 176 to 178 dB, as measured for the same pulse received at the same location (Greene, 1997; McCauley *et al.*, 1998, 2000). The precise difference between rms and peak or peak-to-peak values depends on the frequency content and duration of the pulse, among other factors. However, the rms level is always lower than the peak or peak-to-peak level for an airgun-type source.

Sub-bottom Profiler

The *Thompson* will utilize a Simrad EM300 30–kHz Multibeam Echosounder (MBES) as the primary bottom-mapping echosounder during the cruise. The Simrad EM300 transducer is hull-mounted within a transducer pod that is located midship. The system's normal operating frequency is approximately 30 kHz. The transmit fan-beam is split into either three or nine narrower beam sectors with independent active steering to correct for vessel yaw. Angular coverage is 36 degrees (in Extra Deep Mode, for use in water depths 3,000 to 6,000 m) or 150 degrees (in shallower water). The total angular coverage of 36 or 150 degrees consists of the 3 or 9 beams transmitted at slightly different frequencies. The sectors are frequency coded between 30 and 34 kHz and they are transmitted sequentially at each ping. Except in very deep water where the total beam is 36 x 1, the composite fan beam will overlap slightly if the vessel yaw is less than the fore-aft width of the beam (1,2, or 4, respectively). Achievable swath width on a flat bottom will normally be approximately 5x the water depth. The maximum source level is 237 dB re 1 µPa•m (rms) (Hammerstand, 2005). In deep water (500–3,000 m) a pulse length of 5 ms is normally used. At intermediate depths (100–1,000 m), a pulse length of 2 ms is used, and in shallow water (<300 m), a pulse length of 0.7 ms is used. The ping rate is mainly limited by the round trip travel time in the water up to a ping rate of 10 pings/s in shallow water.

The *Thompson* will also utilize the Knudsen Engineering Model 320BR sub-bottom profiler, which is a dual-frequency echosounder designed to operate at 3.5 and/or 12 kHz. It is used to provide data about the sedimentary features that occur below the sea floor. The energy from the sub-bottom profiler is directed downward (in an 80–degree cone) via a 12 kHz transducer (EDO 323B) or a 3.5 kHz array of 16 ORE 137D transducers in a 4 x 4 arrangement. The maximum power output of the 320BR is 10 kilowatts for the 3.5 kHz section and 2 kilowatts for the 12 kHz section.

The pulse length for the 3.5 kHz section of the 320BR is 0.8–24 ms, controlled by the system operator in regards to water depth and reflectivity of the bottom sediments, and will usually be 12 or 24 ms in this survey. The system produces one sound pulse and then waits for its return before transmitting again. Thus, the pulse interval is directly dependent upon water depth, and in this survey the interval is estimated to be every 4.5–8 sec. Using the Sonar Equations and assuming 100 percent efficiency in the system (impractical in real world applications), the source level for the 320BR is calculated to be 211 dB re 1 µPa-m. In practice, the system is rarely operated above 80 percent power level.

Safety Radii

NMFS has determined that for acoustic effects, using acoustic thresholds in combination with corresponding safety radii is the most effective way to consistently apply measures to avoid or minimize the impacts of an action, and to quantitatively estimate the effects of an action. Thresholds are used in two ways: (1) to establish a mitigation shut-down or power down zone, i.e., if an animal enters an area calculated to be ensonified above the level of an established threshold, a sound source is powered down or shut down; and (2) to calculate take, in that a model may be used to calculate the area around the sound source that will be ensonified to that level or above, then, based on the estimated density of animals and the distance that the sound source moves, NMFS can estimate the number of marine mammals that may be ''taken''. NMFS believes that to avoid permanent physiological damage (Level A Harassment), cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 µPa (rms). NMFS also assumes that cetaceans or pinnipeds exposed to levels exceeding 160 dB re 1 µPa (rms) may experience Level B Harassment.

Received sound levels have been modeled by L-DEO for a number of airgun configurations, including one 45–in^3 GI gun, in relation to distance and direction from the airgun(s). The model does not allow for bottom interactions and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the GI gun where sound levels of 190, 180, and 160 dB re 1 µPa (rms) are predicted to be received in deep (>1000–m, 3280–ft) water are 8, 23, and 220 m (26.2, 75.5, and 721.8 ft), respectively and 12, 35, and 330 m (39.4, 115, and 1,082.7 ft), respectively for intermediate water depths (100–1000m, 328–3,280 ft). Because the model results are for a 2.5–m (8.2–ft) tow depth, the above distances slightly underestimate the distances for the 45–in^3 GI gun towed at 4–m (13–ft) depth.

Empirical data concerning the 180– and 160– dB distances have been acquired based on measurements during the acoustic verification study conducted by L-DEO in the northern Gulf of Mexico from 27 May to 3 June 2003 (Tolstoy *et al.* 2004). Although the results are limited, the data showed that radii around the airguns where the received level would be 180 dB re 1 µPa (rms) vary with water depth. Similar depth-related variation is likely in the 190 dB distances applicable to pinnipeds. Correction factors were developed for water depths 100–1,000 m (328–3,280 ft) and <100 m (328 ft). The proposed survey will occur in depths 650–1,200 m (2,132–3,936 ft), so the correction factors for the latter are not relevant here.

The empirical data indicate that, for deep water (>1,000 m, 3,280 ft), the L-DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.*, 2004). However, to be precautionary pending acquisition of additional empirical data, it is proposed that safety radii during airgun operations in deep water will be the values predicted by L-DEO's model (above). Therefore, the assumed 180– and 190–dB radii are 69 m and 20 m (226.3 and 65.6 ft), respectively.

Empirical measurements were not conducted for intermediate depths (100–1,000 m, 328–3,280 ft). On the expectation that results will be intermediate between those from shallow and deep water, a 1.5x correction factor is applied to the estimates provided by the model for deep water situations. This is the same factor that was applied to the model estimates during L-DEO cruises in 2003. The assumed 180- and 190–dB radii in intermediate-depth water are 104 m and 30 m (341.1 and 98.4 ft), respectively.

The GI guns will be shut down immediately when cetaceans or pinnipeds are detected within or about to enter the measured 180–dB (rms) or 190–dB (rms) radius, respectively.

Description of Marine Mammals in the Activity Area

Thirty-two marine mammal species, including 19 odontocete (dolphins and small and large toothed whales) species, seven mysticete (baleen whales) species, five pinniped species, and the sea otter,

may occur or have been documented to occur in the marine waters off Oregon and Washington, excluding extralimital sightings or strandings (Table 1 here). Six of the species that may occur in the project area are listed under the U.S. Endangered Species Act (ESA) as endangered, including sperm, humpback, blue, fin, sei, and North Pacific right whales. In addition, the southern resident killer whale stock is also listed as endangered, but is unlikely to be seen in offshore waters of Oregon. The threatened Steller sea lion could also occur in the project area. However, the threatened northern sea otter is only known to occur in coastal waters and is not expected in the project area (the sea otter is under the jurisdiction of the U.S. Fish and Wildlife Service.

Gray whales are also not expected in the project area because their occurrence off Oregon is limited to very shallow, coastal waters. The California sea lion, Steller sea lion, and harbor seal are also mainly coastal and are not expected at the survey locations. Information on habitat and abundance of the species that may occur in the study area are given in Table 1 below. Vagrant ringed seals, hooded seals, and ribbon seals have been sighted or stranded on the coast of California (see Mead, 1981; Reeves *et al.*, 2002) and presumably passed through Oregon waters. A vagrant beluga was seen off the coast of Washington (Reeves *et al.*, 2002).

The six species of marine mammals expected to be most common in the deep pelagic or slope waters of the project area, where most of the survey sites are located, include the Pacific white-sided dolphin, northern right whale dolphin, Risso's dolphin, short-beaked common dolphin, Dall's porpoise, and northern fur seal (Green *et al.*, 1992, 1993; Buchanan *et al.*, 2001; Barlow, 2003; Carretta *et al.*, 2006).

The sperm, pygmy sperm, mesoplodont species, Baird's beaked, and Cuvier's beaked whales and the northern elephant seal are considered pelagic species, but are generally uncommon in the waters near the survey area. Additional information regarding the distribution of these species expected to be found in the project area and how the estimated densities were calculated may be found in UTIG's application.

Species	Habitat	Abundance[1]	Rqstd Take
Mysticetes			
North Pacific right whale (*Eubalaena japonica*) *	Inshore, occasionally offshore	N.A.[2]	0
Humpback whale (*Megaptera novaeangliae*) *	Mainly nearshore waters and banks	1391	1
Minke whale (*Balaenoptera acutorostrata*)	Pelagic and coastal	1015	1
Sei whale (*Balaenoptera borealis*) *	Primarily offshore, pelagic	56	0
Fin whale (*Balaenoptera physalus*) *	Continental slope, mostly pelagic	3279	1
Blue whale (*Balaenoptera musculus*) *	Pelagic and coastal	1744	0
Odontocetes			
Sperm whale (*Physeter macrocephalus*) *	Usually pelagic and deep seas	1233	2
Pygmy sperm whale (*Kogia breviceps*)	Deep waters off the shelf	247	2
Dwarf sperm whale (*Kogia sima*)	Deep waters off the shelf	N.A.	0
Cuvier's beaked whale (*Ziphius cavirostris*)	Pelagic	1884	0
Baird's beaked whale (*Berardius bairdii*)	Pelagic	228	1
Blainville's beaked whale (*Mesoplodon densirostris*)	Slope, offshore	1247 [3]	0
Hubb's beaked whale (*Mesoplodon carlhubbsi*)	Slope, offshore	1247 [3]	0
Stejneger's beaked whale (*Mesoplodon stejnegeri*)	Slope, offshore	1247 [3]	0
Mesoplodon sp. (*Unidentified*)	Slope, offshore	1247	1
Offshore bottlenose dolphin (*Tursiops truncatus*)	Offshore, slope	5,065	0
Striped dolphin (*Stenella coeruleoalba*)	Off continental shelf	13,934	0
Short-beaked common dolphin (*Delphinus delphis*)	Shelf and pelagic, seamounts	449,846	7
Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)	Offshore, slope	59,274	6
Northern right whale dolphin (*Lissodelphis borealis*)	Slope, offshore waters	20,362	5
Risso's dolphin (*Grampus griseus*)	Shelf, slope, seamounts	16,066	3
False killer whale (*Pseudorca crassidens*)	Pelagic, occasionally inshore	N.A.	0
Killer whale (*Orcinus orca*)	Widely distributed	466 (Offshore)	1

Species	Habitat	Abundance[1]	Rqstd Take
Short-finned pilot whale (*Globicephala macrorhynchus*)	Mostly pelagic, high-relief topography	304	0
Harbor porpoise (*Phocoena phocoena*)	Coastal and inland waters	39,586 (OR/WA)	0
Dall's porpoise (*Phocoenoides dalli*)	Shelf, slope, offshore	99,517	47
Pinnipeds			
Northern fur seal (*Callorhinus ursinus*)	Pelagic, offshore	688,028 [2]	19
California sea lion (*Zalophus californianus californianus*)	Coastal, shelf	237,000-244,000	NA
Northern elephant seal (*Mirounga angustirostris*)	Coastal, pelagic when migrating	101,000 (CA)	2

Table 1. Species expected to be encountered (and potentially harassed) during UTIG's NE Pacific Ocean cruise.
N.A. B Data not available or species status was not assessed.
* Species are listed as threatened or endangered under the Endangered Species Act.
[1] Abundance given for U.S., Eastern North Pacific, or California/Oregon/Washington Stock, whichever is included in the 2005 U.S. Pacific Marine Mammal Stock Assessments (Carretta *et al.* 2006), unless otherwise stated.
[2] Angliss and Outlaw (2005).
[3] All mesoplodont whales

Potential Effects of Airguns

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory physical or physiological effects (Richardson *et al.*, 1995; Gordon *et al.*, 2004). Given the small size of the GI guns planned for the proposed project, effects are anticipated to be considerably less than would be the case with a large array of airguns. It is very unlikely that there would be any cases of temporary or, especially, permanent hearing impairment or any significant non-auditory physical or physiological effects. Also, behavioral disturbance is expected to be limited to relatively short distances.

Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. For a summary of the characteristics of airgun pulses, see Appendix A of UTIG's application. However, it should be noted that most of the measurements of airgun sounds that have been reported concerned sounds from larger arrays of airguns, whose sounds would be detectable considerably farther away than the two GI guns planned for use in the proposed project.

Numerous other studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response (see Appendix A (e) of UTIG's application). That is often true even in cases when the pulsed sounds appear to be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times mammals of all three types have shown no overt reactions. In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to airgun pulses than are baleen whales. Given the relatively small, low-energy airgun source planned for use in this project, NMFS expects mammals to tolerate being closer to this source than for a larger airgun source typical of most seismic surveys. Mysticetes, odontocetes, pinnipeds and sea otters have all been seen commonly by observers aboard vessels conducting small-source seismic surveys, indicating some degree of tolerance of sounds from small airgun sources (e.g., Calambokidis *et al.*, 2002; Haley and Koski, 2004; Holst *et al.*, 2005a; Ireland *et al.*, 2005; MacLean and Koski, 2005; see also ''site survey'' portions of Stone, 2003 and Stone and Tasker, 2006).

Masking

Obscuring of sounds of interest by interfering sounds, generally at similar frequencies, is known as masking. Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited, although there are very few specific data on this matter. Some whales are known to continue calling in the presence of seismic pulses. Their calls can be heard between the seismic pulses (e.g., Richardson *et al.*, 1986; McDonald *et al.*, 1995; Greene *et al.*, 1999; Nieukirk *et al.*, 2004; Smultea *et al.*, 2004). Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.*, 1994), a recent study reports that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.*, 2002c). Similar reactions have also been shown during recent work in the Gulf of Mexico (Tyack *et al.*, 2003; Smultea *et al.*, 2004). Given the small source planned for use here, there is even less potential for masking of baleen or sperm whale calls during the present study than in most seismic surveys. Masking effects of seismic pulses are expected to be negligible in the case of the smaller odontocete cetaceans, given the intermittent nature of seismic pulses and the relatively low source level of the airgun to be used here. Dolphins and porpoises are commonly heard calling while airguns are operating (Gordon *et al.*, 2004; Smultea *et al.*, 2004; Holst *et al.*, 2005a,b). Also, the sounds important to small odontocetes are predominantly at much higher frequencies than are airgun sounds. Masking effects, in general, are discussed further in Appendix A (d) of UTIG's application.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.*, 1995; Wartzok *et al.*, 2004; Southall *et al.*, 2007). If a marine mammal responds to an underwater sound by changing its behavior or moving a small

distance, the response may or may not rise to the level of harassment, let alone affect the stock or the species as a whole. Alternatively, if a sound source displaces marine mammals from an important feeding or breeding area, effects on the stock or species could potentially be more than negligible. Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many mammals are likely to be present within a particular distance of industrial activities, or exposed to a particular level of industrial sound. This practice potentially overestimates the numbers of marine mammals that are affected in some biologically-important manner.

The sound criteria used to estimate how many marine mammals might be disturbed to some biologically-important degree by a seismic program are based on behavioral observations during studies of several species. However, information is lacking for many species. Detailed studies have been done on humpback, gray, and bowhead whales and ringed seals. Less detailed data are available for some other species of baleen whales, sperm whales, and small toothed whales. Most of those studies have focused on the impacts resulting from the use of much larger airgun sources than those planned for use in the present project. Thus, effects are expected to be limited to considerably smaller distances and shorter periods of exposure in the present project than in most of the previous work concerning marine mammal reactions to airguns.

Baleen Whales - Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances. However, as reviewed in Appendix A (e) of UTIG's application, baleen whales exposed to strong noise pulses from airguns often react by deviating from their normal migration route and/or interrupting their feeding activities and moving away from the sound source. In the case of the migrating gray and bowhead whales, the observed changes in behavior appeared to be of little or no biological consequence to the animals. They simply avoided the sound source by displacing their migration route to varying degrees, but within the natural boundaries of the migration corridors.

Studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 μPa (rms) range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed. In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 4.5–14.5 km (2.8–9 mi) from the source. A substantial proportion of the baleen whales within those distances may show avoidance or other strong disturbance reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and recent studies, reviewed in Appendix A (e) of UTIG's application, have shown that some species of baleen whales, notably bowheads and humpbacks, at times show strong avoidance at received levels lower than 160–170 dB re 1 μPa (rms). Reaction distances would be considerably smaller during the present project, in which the 160–dB radius is predicted to be approximately 0.22 or 0.33 km (0.14 or 0.21 mi), as compared with several kilometers when a large array of airguns is operating.

Responses of humpback whales to seismic surveys have been studied during migration and on the summer feeding grounds, and there has also been discussion of effects on the Brazilian wintering grounds. McCauley *et al.* (1998, 2000) studied the responses of humpback whales off Western Australia to a full-scale seismic survey with a 16–airgun, 2,678–in^3 array, and to a single 20–in^3 airgun with a source level of 227 dB re 1 μPa m. McCauley *et al.* (1998) documented that avoidance reactions began at 5–8 km (3.1–5 mi) from the array, and that those reactions kept most pods approximately 3–4 km (1.9–2.5 mi) from the operating seismic boat. McCauley *et al.* (2000) noted localized displacement during migration of 4–5 km (2.5–3.1 mi) by traveling pods and 7–12 km (4.3–7.5 mi) by cow-calf pairs. Avoidance distances with respect to the single airgun were smaller but consistent with the results from the full array in terms of received sound levels. Mean avoidance distance from the airgun corresponded to a received sound level of 140 dB re 1 μPa (rms); that was the level at which humpbacks started to show avoidance reactions to an approaching airgun. The standoff range, i.e., the closest point of approach of the whales to the airgun, corresponded to a received level of 143 dB re 1 μPa (rms). The initial avoidance response generally occurred at distances of 5–8 km (3.1–5 mi) from the airgun array and 2 km (1.2 mi) from the single airgun. However, some individual humpback whales, especially males, approached within distances of 100–400 m (328–1,312 ft), where the maximum received level was 179 dB re 1 μPa (rms).

Humpback whales on their summer feeding grounds in southeast Alaska did not exhibit persistent avoidance when exposed to seismic pulses from a 1.64–L (100 in^3) airgun (Malme *et al.*, 1985). Some humpbacks seemed ''startled'' at received levels of 150–169 dB re 1 μPa on an approximate rms basis. Malme *et al.* (1985) conclude that there was no clear evidence of avoidance, despite the possibility of subtle effects, at received levels up to 172 re 1 μPa (approximately rms).

It has been suggested that South Atlantic humpback whales wintering off Brazil may be displaced or even strand upon exposure to seismic surveys (Engel *et al.*, 2004). The evidence for this was circumstantial, subject to alternative explanations (IAGC 2004), and not consistent with results from direct studies of humpbacks exposed to seismic surveys in other areas and seasons. After allowance for data from subsequent years, there was ''no observable direct correlation'' between strandings and seismic surveys (IWC 2007:236).

Results from bowhead whales show that responsiveness of baleen whales to seismic surveys can be quite variable depending on the activity (migrating vs. feeding) of the whales. Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive, with substantial avoidance occurring out to distances of 20 30 km (12.4–18.6 mi) from a medium-sized airgun source, where received sound levels were on the order of 130 dB re 1 μPa (rms) (Miller *et al.*, 1999; Richardson *et al.*, 1999). However, more recent research on bowhead whales (Miller *et al.*, 2005a) corroborates earlier evidence that, during the summer feeding season, bowheads are not as sensitive to seismic sources. In summer, bowheads typically begin to show avoidance reactions at a received level of about 160–170 dB re 1 μPa (rms) (Richardson *et al.*, 1986; Ljungblad *et al.*, 1988; Miller *et al.*, 1999). There are no data on the reactions of wintering bowhead whales to seismic surveys. See Appendix A (e) of UTIG's application for more information regarding bowhead whale reactions to airguns.

Reactions of migrating and feeding (but not wintering) gray whales to seismic surveys have been studied. Malme *et al.* (1986, 1988) studied the responses of feeding Eastern Pacific gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the

northern Bering Sea. Malme *et al.* (1986, 1988) estimated, based on small sample sizes, that 50 percent of feeding gray whales ceased feeding at an average received pressure level of 173 dB re 1 µPa on an (approximate) rms basis, and that 10 percent of feeding whales interrupted feeding at received levels of 163 dB. Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast and on observations of Western Pacific gray whales feeding off Sakhalin Island, Russia (Johnson *et al.*, 2007).

Various species of *Balaenoptera* (blue, fin, sei, and minke whales) have occasionally been reported in areas ensonified by airgun pulses. Sightings by observers on seismic vessels off the U.K. from 1997 to 2000 suggest that, at times of good sightability, numbers of rorquals seen are similar when airguns are shooting and not shooting (Stone, 2003). Although individual species did not show any significant displacement in relation to seismic activity, all baleen whales combined were found to remain significantly further from the airguns during shooting compared with periods without shooting (Stone, 2003; Stone and Tasker, 2006). In a study off Nova Scotia, Moulton and Miller (2005) found little or no difference in sighting rates and initial sighting distances of balaenopterid whales when airguns were operating vs. silent. However, there were indications that these whales were more likely to be moving away when seen during airgun operations.

Data on short-term reactions (or lack of reactions) of cetaceans to impulsive noises do not necessarily provide information about long-term effects. It is not known whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales continued to migrate annually along the west coast of North America despite intermittent seismic exploration and much ship traffic in that area for decades (Appendix A in Malme *et al.*, 1984). Bowhead whales continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.*, 1987). In any event, the brief exposures to sound pulses from the present small airgun source are highly unlikely to result in prolonged effects.

Toothed Whales – Little systematic information is available about reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, a systematic study on sperm whales has been done (Jochens and Biggs, 2003; Tyack *et al.*, 2003; Miller *et al.*, 2006), and there is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (Stone, 2003; Smultea *et al.*, 2004; Bain and Williams, 2006; Holst *et al.*, 2006; Stone and Tasker, 2006; Moulton and Miller, 2005).

Seismic operators and marine mammal observers sometimes see dolphins and other small toothed whales near operating airgun arrays, but in general there seems to be a tendency for most delphinids to show some limited avoidance of seismic vessels operating large airgun systems. However, some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing. Nonetheless, there have been indications that small toothed whales sometimes tend to head away, or to maintain a somewhat greater distance from the vessel, when a large array of airguns is operating than when it is silent (Goold, 1996; Calambokidis and Osmek, 1998; Stone, 2003). In most cases, the avoidance radii for delphinids appear to be small, on the order of 1 km (0.62 mi) or less.

The beluga may be a species that (at least at times) shows long-distance avoidance of seismic vessels. Aerial surveys during seismic operations in the southeastern Beaufort Sea recorded much lower sighting rates of beluga whales within 10–20 km (6.2–12.4 mi) of an active seismic vessel. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 10–20 km (6.2–12.4 mi) (Miller *et al.*, 2005a). Similarly, captive bottlenose dolphins and beluga whales exhibit changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.*, 2000, 2002, 2005; Finneran and Schlundt, 2004). However, the animals tolerated high received levels of sound (pk-pk level >200 dB re 1 µPa) before exhibiting aversive behaviors.

Results for porpoises depend on species. Dall's porpoises seem relatively tolerant of airgun operations (MacLean and Koski, 2005; Bain and Williams, 2006), whereas the limited available data suggest that harbor porpoises show stronger avoidance (Stone, 2003; Bain and Williams, 2006; Stone and Tasker, 2006). This apparent difference in responsiveness of these two porpoise species is consistent with their relative responsiveness to boat traffic in general (Richardson *et al.*, 1995; Southall *et al.*, 2007).

Most studies of sperm whales exposed to airgun sounds indicate that this species shows considerable tolerance of airgun pulses. In most cases, the whales do not show strong avoidance, and they continue to call (see Appendix A of UTIG's application for review). However, controlled exposure experiments in the Gulf of Mexico indicate that foraging effort is apparently somewhat reduced upon exposure to airgun pulses from a seismic vessel operating in the area, and there may be a delay in diving to foraging depth.

There are no specific data on the behavioral reactions of beaked whales to seismic surveys. Most beaked whales tend to avoid approaching vessels of other types (Wursig *et al.*, 1998). They may also dive for an extended period when approached by a vessel (Kasuya, 1986). It is likely that these beaked whales would normally show strong avoidance of an approaching seismic vessel, but this has not been documented explicitly.Odontocete reactions to large arrays of airguns are variable and, at least for delphinids and some porpoises, seem to be confined to a smaller radius than has been observed for mysticetes (see Appendix A of UTIG's application for more information). Behavioral reactions of most odontocetes to the small GI gun source to be used here are expected to be very localized.

Pinnipeds – Pinnipeds are not likely to show a strong avoidance reaction to the two GI guns that will be used. Visual monitoring from seismic vessels, usually employing larger sources, has shown only slight (if any) avoidance of airguns by pinnipeds, and only slight (if any) changes in behavior (see Appendix A (e) of UTIG's application). Ringed seals frequently do not avoid the area within a few hundred meters of operating airgun arrays (Harris *et al.*, 2001; Moulton and Lawson, 2002; Miller *et al.*, 2005a). However, initial telemetry work suggests that avoidance and other behavioral reactions by two other species of seals to small airgun sources may at times be stronger than evident to date from visual studies of pinniped reactions to airguns (*Thompson et al.*, 1998). Even if reactions of any pinnipeds that might be encountered in the present study area are as strong as those evident in the telemetry study, reactions are expected to be confined to relatively small distances and durations, with no long-

term effects on pinniped individuals or populations.

Additional details on the behavioral reactions (or the lack thereof) by all types of marine mammals to seismic vessels can be found in Appendix A (e) of UTIG's application.

Hearing Impairment and Other Physical Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds, but there has been no specific documentation of this for marine mammals exposed to sequences of airgun pulses. Current NMFS policy regarding exposure of marine mammals to high-level sounds is that cetaceans and pinnipeds should not be exposed to impulsive sounds of 180 and 190 dB re 1 µPa (rms), respectively (NMFS, 2000). Those criteria have been used in defining the safety (shut-down) radii planned for the proposed seismic survey. The precautionary nature of these criteria is discussed in Appendix A (f) of UTIG's application, including the fact that the minimum sound level necessary to cause permanent hearing impairment is higher, by a variable and generally unknown amount, than the level that induces barely-detectable temporary threshold shift (TTS) (which NMFS' criteria are based on) and the level associated with the onset of TTS is often considered to be a level below which there is no danger of permanent damage. NMFS is presently developing new noise exposure criteria for marine mammals that take account of the now-available scientific data on TTS, the expected offset between the TTS and permanent threshold shift (PTS) thresholds, differences in the acoustic frequencies to which different marine mammal groups are sensitive, and other relevant factors.

Because of the small size of the airgun source in this project (two 40–60 in^3 GI gun), alongwith the planned monitoring and mitigation measures, there is little likelihood that any marine mammals will be exposed to sounds sufficiently strong to cause hearing impairment. Several aspects of the planned monitoring and mitigation measures for this project are designed to detect marine mammals occurring near the GI guns (and multibeam echosounder and sub-bottom profiler), and to avoid exposing them to sound pulses that might, at least in theory, cause hearing impairment. In addition, many cetaceans are likely to show some avoidance of the area with high received levels of airgun sound (see above). In those cases, the avoidance responses of the animals themselves will reduce or (most likely) avoid any possibility of hearing impairment.

Non-auditory physical effects may also occur in marine mammals exposed to strong underwater pulsed sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage. It is possible that some marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed below, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns. It is especially unlikely that any effects of these types would occur during the present project given the small size of the source, the brief duration of exposure of any given mammal, and the planned monitoring and mitigation measures (see below). The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift (TTS) – TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

For toothed whales exposed to single short pulses, the TTS threshold appears to be, to a first approximation, a function of the energy content of the pulse (Finneran *et al.* 2002, 2005). Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2 \bullet s$ (i.e., 186 dB SEL or approximately 221–226 dB pk-pk) in order to produce brief, mild TTS. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. The distances from the *Thompson*'s GI guns at which the received energy level (per pulse) would be expected to be ≥175–180 dB SEL are the distances shown in the 190 dB re 1 µPa (rms) column in Table 1 of UTIG's application (given that the rms level is approximately 10–15 dB higher than the SEL value for the same pulse). Seismic pulses with received energy levels ≥175–180 dB SEL (190 dB re 1 µPa (rms)) are expected to be restricted to radii no more than 69–104 m (226.3–341.1 ft) around the two GI guns. The specific radius depends on the depth of the water. For an odontocete closer to the surface, the maximum radius with ≥175–180 dB SEL or ≥190 dB re 1 µPa (rms) would be smaller. Such levels would be limited to distances within tens of meters of the small GI guns source to be used in this project.

For baleen whales, direct or indirect data do not exist on levels or properties of sound thatare required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales. In any event, no cases of TTS are expected given three considerations: (1) the low abundance of baleen whales expected in the planned study areas; (2) the strong likelihood that baleen whales would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS; and (3) the mitigation measures that are proposed to be implemented.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggests that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.*, 1999, 2005; Ketten *et al.*, 2001; cf. Au *et al.*, 2000). The TTS threshold for pulsed sounds has been indirectly estimated as being an SEL of about 171 dB re $\mu Pa^2 \bullet s$ (Southall *et al.*, 2007), which would be equivalent to about 181–186 dB re 1 µPa (rms). Corresponding values for California sea lions and northern elephant seals are likely to be higher (Kastak *et al.*, 2005).

To avoid injury, NMFS has determined that cetaceans and pinnipeds should not be exposed to

pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 µPa (rms). Those sound levels were not considered to be the levels above which TTS might occur. Rather, they were the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes (and probably mysticetes as well) are exposed to airgun pulses stronger than 180 dB re 1 µPa (rms).

Permanent Threshold Shift (PTS) – When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, while in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the possibility that mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time (see Appendix A (f) of UTIG's application). The specific difference between the PTS and TTS thresholds has not been measured for marine mammals exposed to any sound type. However, based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably more than 6 dB.

On an SEL basis, Southall *et al.* (2007) estimate that received levels would need to exceed the TTS threshold by at least 15 dB for there to be risk of PTS. Thus, for cetaceans they estimate that the PTS threshold might be an SEL of about 198 dB re 1 $\mu Pa^2.s$. Additional assumptions had to be made to derive a corresponding estimate for pinnipeds. Southall *et al.* (2007) estimate that the PTS threshold could be an SEL of about 186 dB re 1 $\mu Pa^2 \bullet s$ in the harbor seal; for the California sea lion and northern elephant seal the PTS threshold would probably be higher. Southall *et al.* (2007) also not that, regardless of the SEL, there is concern about the possibility of PTS if a cetacean or pinniped received one or more pulses with peak pressure exceeding 230 or 218 dB 1 µPa (peak).

In the proposed project employing two 40 to 60–in^3 GI guns, marine mammals are highly unlikely to be exposed to received levels of seismic pulses strong enough to cause TTS, as they would probably need to be within a few tens of meters of the GI guns for that to occur. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, even the levels immediately adjacent to the GI guns may not be sufficient to induce PTS, especially since a mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the GI guns for a period longer than the inter-pulse interval. Baleen whales generally avoid the immediate area around operating seismic vessels, as do some other marine mammals and sea turtles. The planned monitoring and mitigation measures, including visual monitoring and shut downs of the GI guns when mammals are seen within or about to enter the ''safety radii'' or exclusion zone (EZ), will minimize the already-minimal probability of exposure of marine mammals to sounds strong enough to induce PTS.

Non-auditory Physiological Effects – Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage. However, studies examining such effects are limited. If any such effects do occur, they would probably be limited to unusual situations when animals might be exposed at close range for unusually long periods, when the sound is strongly channeled with less-than-normal propagation loss, or when dispersal of the animals is constrained by shorelines, shallows, etc. Airgun pulses, because of their brevity and intermittence, are less likely to trigger resonance or bubble formation than are more prolonged sounds. It is doubtful that any single marine mammal would be exposed to strong seismic sounds for time periods long enough to induce physiological stress.

Until recently, it was assumed that diving marine mammals are not subject to the bends or air embolism. This possibility was first explored at a workshop (Gentry [ed.], 2002) held to discuss whether the stranding of beaked whales in the Bahamas in 2000 (Balcomb and Claridge, 2001; NOAA and USN, 2001) might have been related to bubble formation in tissues caused by exposure to noise from naval sonar. However, this link could not be confirmed. Jepson *et al.* (2003) first suggested a possible link between mid-frequency sonar activity and acute chronic tissue damage that results from the formation in vivo of gas bubbles, based on the beaked whale stranding in the Canary Islands in 2002 during naval exercises. Fernandez *et al.* (2005a) showed those beaked whales did indeed have gas bubble-associated lesions, as well as fat embolisms. Fernandez *et al.* (2005b) also found evidence of fat embolism in three beaked whales that stranded 100 km (62 mi) north of the Canaries in 2004 during naval exercises. Examinations of several other stranded species have also revealed evidence of gas and fat embolisms (Arbelo *et al.*, 2005; Jepson *et al.*, 2005a; Mendez *et al.*, 2005). Most of the afflicted species were deep divers. There is speculation that gas and fat embolisms may occur if cetaceans ascend unusually quickly when exposed to aversive sounds, or if sound in the environment causes the destablization of existing bubble nuclei (Potter, 2004; Arbelo *et al.*, 2005; Fernandez *et al.*, 2005a; Jepson *et al.*, 2005b; Cox *et al.*, 2006). Even if gas and fat embolisms can occur during exposure to mid-frequency sonar, there is no evidence that that type of effect occurs in response to airgun sounds.

In general, little is known about the potential for seismic survey sounds to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would be limited to short distances and probably to projects involving large arrays of airguns. However, the available data do not allow for meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes, and some pinnipeds, are especially unlikely to incur auditory impairment or other physical effects. Also, the planned mitigation measures, including shut downs of the GI guns, will reduce any such effects that might otherwise occur.

Strandings and Mortality

Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and their auditory organs are especially susceptible to injury (Ketten *et al.*, 1993; Ketten, 1995). Airgun pulses are less energetic and have slower rise times, and there is no proof that they can cause serious injury, death, or stranding even in the case of large airgun arrays. However, the association of mass strandings of beaked whales with naval exercises and, in one case, an L-DEO seismic survey, has raised the possibility that beaked whales exposed to strong pulsed sounds may be especially susceptible to injury and/or behavioral reactions that can lead to stranding. Appendix A of UTIG's application provides additional details.

Seismic pulses and mid-frequency sonar pulses are quite different. Sounds produced by airgun arrays are broadband with most of the energy below 1 kHz. Typical military mid-frequency sonars operate at frequencies of 2–10 kHz, generally with a relatively narrow bandwidth at any one time. Thus, it is not appropriate to assume that there is a direct connection between the effects of military sonar and seismic surveys on marine mammals. However, evidence that sonar pulses can, in special circumstances, lead to physical damage and mortality (Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.*, 2003; Fernandez *et al.*, 2004, 2005a; Cox *et al.*, 2006), even if only indirectly, suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity pulsed sound.

There is no conclusive evidence of cetacean strandings as a result of exposure to seismic surveys. Speculation concerning a possible link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.*, 2004) was not well founded based on available data (IAGC, 2004; IWC, 2006). In September 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L-DEO research vessel *Maurice Ewing* was operating a 20–gun, 8,490–in^3 array in the general area. The link between the stranding and the seismic survey was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the preceding example plus the incidents involving beaked whale strandings near naval exercises suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales. No injuries of beaked whales are anticipated during the proposed study because of the proposed monitoring and mitigation measures.

The proposed project will involve a much smaller sound source than used in typical seismic surveys. That, along with the monitoring and mitigation measures that are planned, are expected to minimize any possibility for strandings and mortality.

Potential Effects of Other Acoustic Devices

Multibeam Echosounder Signals

A Simrad EM300 30–kHz MBES will be operated from the source vessel during approximately two days of the proposed study. Sounds from the MBES are very short pulses occurring for 2–5 ms, at a ping rate of up to 10 pings/s depending on depth. Given the minimum water depth in the study area (650 m; 2–way travel time ≥0.9 s), the pulse repetition rate is not likely to exceed 1 ping/s. Most of the energy in the sound pulses emitted by the MBES is at freqencies near 30 kHz within the audible range for odontocetes and at least some pinnipeds, but probably not for baleen whales (Southall *et al.*, 2007). The beam is narrow (1–4°) in fore-aft extent and wide (150°) in the cross-track extent. Each ping consists of nine beams transmitted at slightly different frequencies. Any given mammal at depth near the trackline would be in the main beam for only one or two of the nine segments. Also, marine mammals that encounter the Simrad EM300 are unlikely to be subjected to repeated pulses because of the narrow fore-aft width of the beam and will receive only limited amounts of pulse energy because of the short pulses. Animals close to the ship (where the beam is narrowest) are especially unlikely to be ensonified for more than one 5 ms pulse (or two pulses if in the overlap area). Similarly, Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when MBES emits a pulse is small due to the narrow beam being emitted. The animal would have to pass the transducer at close range and be swimming at speeds similar to the vessel in order to be subjected to sound levels that could cause TTS. Burkhardt *et al.* (2007) concluded that immediate direct injury was possible only if a cetacean dived under the vessel into the immediate vicinity of the transducer.

Navy sonars that have been linked to avoidance reactions and stranding of cetaceans (1) generally have a longer pulse duration than the Simrad EM300, and (2) are often directed close to horizontally vs. more downward for the MBES. The area of possible influence of the MBES is much smaller a narrow band below the source vessel. The duration of exposure for a given marine mammal can be much longer for a navy sonar. Possible effects of an MBES on marine mammals are outlined below.

Marine mammal communications will not be masked appreciably by the MBES signals given its low duty cycle and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of baleen whales, the signals (30 kHz) do not overlap with the frequencies in the calls or with the functional hearing range, which would avoid any possibility of masking.

Behavioral reactions of free ranging marine mammals to echosounders and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.*, 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously-mentioned beachings by beaked whales. During exposure to a 21–25 kHz whale-finding sonar with a source level of 215 dB re 1 μPam, gray whales showed slight avoidance (~200 m or 656 ft) behavior (Frankel, 2005). However, all of those observations are of limited relevance to the present situation. Pulse durations from those sonars were much longer than those of the MBES, and a given mammal would have received many pulses from the naval sonars. During UTIG's operations, the individual pulses will be very short, and a given mammal would not receive many of the downward-directed pulses as the vessel passes by. In the case of baleen whales, the MBES will operate at too high a frequency to have any effect.

Captive bottlenose dolphins and a beluga whale exhibited changes in behavior when exposed to 1 s pulsed sounds at frequencies similar to those that will be emitted by the MBES used by UTIG, and to shorter broadband pulsed signals. Behavioral changes typically involved what appeared to be deliberate attempts to avoid the sound exposure (Schlundt *et al.*, 2000; Finneran *et al.*, 2002; Finneran and Schlundt, 2004). The relevance of those data to free-ranging odontocetes is uncertain, and in any case the test sounds were quite different in either duration or bandwidth as compared with those from an MBES.

During a previous low-energy seismic survey from the *Thompson*, the EM300 MBES was in operation most of the time. Many cetaceans and small numbers of fur seals were seen by marine mammal visual observers (MMVOs) aboard the ship, but no

specific information about MBES effects (if any) on mammals was obtained (Ireland *et al.*, 2005). These responses (if any) could not be distinguished from responses to the airgun (when operating) and to the ship itself.

Given recent stranding events that have been associated with the operations of naval sonar, there is concern that mid-frequency sonar sounds can cause serious impacts to marine mammals (see above). However, the MBES proposed for use by UTIG is quite different than sonars used for navy operations. Pulse duration of the MBES is very short relative to naval sonars. Also, at any given location, an individual marine mammals would be in the beam of the MBES for much less time given the generally downward orientation of the beam and its narrow fore-aft beamwidth; navy sonars often use near horizontally directed sound. Those factors would all reduce the sound energy received from the MBES rather drastically relative to that from the sonars used by the navy.

Although the source level of the Simrad EM300 is not available, the maximum source level of a relatively powerful MBES (Simrad EM120) is 242 dB re 1 μPa_{rms}. At that source level, the received level for an animals within the MBES beam 100 m below the ship would be ~202 dB re 1 µPa (rms), assuming 40 dB of spreading loss over 100 m (circular spreading). Given the narrow beam, only one pulse is likely to be received by a given animal. The received energy from a single pulse of duration 5 ms would be about 179 dB 1 µPa•s, i.e., 202 dB+10 log (0.005 s). That would be below the TTS thresholds for an odontocete or pinniped exposed to a single non-impulsive sonar transmission (195 and ≥183 dB re 1 µPa•s, respectively) and even further below the anticipated PTS threshold (215 and ≥203 dB re 1 µPa•s, respectively) (Southall *et al.*, 2007). In contrast, an animal that was only 10 m below the MBES when a ping is emitted would be expected to receive a level 20 dB higher, i.e., 199 dB re 1 Pa s in the case of the EM120. That animal might incur some TTS (which would be fully recoverable), but the exposure would still be below the anticipated PTS threshold for both cetaceans and pinnipeds.

Chirp Echosounder Signals

A chirp echosounder or sub-bottom profiler will be operated from the source vessel at all times during the proposed study. Sounds from the sub-bottom profiler are very short pulses, occurring for up to 24 ms once every few seconds. Most of the energy in the sound pulses emitted by this sub-bottom profiler is at 12 kHz, and the beam is directed downward. The source level of the chirp is expected to be lower than that of the MBES. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area exposure when an echosounder emits a pulse is small, and if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS.

Marine mammal communications will not be masked appreciably by the sub-bottom profiler signals given their directionality and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of most odontocetes, the sonar signals do not overlap with the predominant frequencies in the calls, which would avoid significant masking.

Marine mammal behavioral reactions to other pulsed sound sources are discussed above, and responses to the sub-bottom profiler are likely to be similar to those for other pulsed sources if received at the same levels. However, the pulsed signals from the chirp are somewhat weaker than those from the MBES. Therefore, behavioral responses are not expected unless marine mammals are very close to the source.

Source levels of the chirp are much lower than those of the airguns and the MBES, which are discussed above. Thus, it is unlikely that the chirp produces pulse levels strong enough to cause hearing impairment or other physical injuries even in an animal that is (briefly) in a position near the source. The chirp is often operated simultaneously with other higher-power acoustic sources. Many marine mammals will move away in response to the approaching higher-power sources or the vessel itself before the mammals would be close enough for there to be any possibility of effects from the less intense sounds from the chirp. In the case of mammals that do not avoid the approaching vessel and its various sound sources, mitigation measures that would be applied to minimized effects of the higher-power sources would further reduce or eliminate any minor effects of the chirp.

Estimated Take by Incidental Harassment

All anticipated takes would be ''takes by harassment'', involving temporary changes in behavior. The proposed mitigation measures are expected to minimize the possibility of injurious takes. (However, as noted earlier, there is no specific information demonstrating that injurious ''takes'' would occur even in the absence of the planned mitigation measures.) In the sections below, we describe methods to estimate ''take by harassment'', and present estimates of the numbers of marine mammals that might be affected during the proposed seismic survey in the northeast Pacific Ocean. The estimates are based on data concerning marine mammal densities (numbers per unit area) obtained during surveys off Oregon and Washington during 1996 and 2001 by NMFS Southwest Fisheries Science Center (SWFSC) and estimates of the size of the area where effects potentially could occur.

The following estimates are based on a consideration of the number of marine mammals that might be disturbed appreciably by operations with the two GI guns to be used during approximately 1275 line-km of surveys off the coast of Oregon in the northeastern Pacific Ocean. The anticipated radii of influence of the echosounders are less than those for the GI guns. It is assumed that, during simultaneous operations of the GI guns and echosounders, any marine mammals close enough to be affected by the echosounders would already be affected by the airgun. However, whether or not the GI guns are operating simultaneously with the echosounders, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the echosounders, given their characteristics (e.g., narrow downward-directed beam) and other considerations described previously. Therefore, no additional allowance is included for animals that might be affected by the echosounders.

Extensive systematic aircraft- and ship-based surveys have been conducted for marine mammals offshore of Oregon and Washington (Bonnell *et al.*, 1992; Green *et al.*, 1992, 1993; Barlow, 1997, 2003; Barlow and Taylor, 2001; Calambokidis and Barlow, 2004; Barlow and Forney, 2007). The most comprehensive and recent density data available for cetacean species off slope and offshore waters of Oregon are from the 1996 and 2001 NMFS/SWFSC ''ORCAWALE'' or ''CSCAPE'' ship surveys as synthesized by Barlow and Forney (2007). The surveys were conducted up to approximately 550 km (342 mi) offshore from June or July to early November or December. Systematic, offshore, at-sea survey data for pinnipeds are more limited. The most comprehensive studies are reported by Bonnell *et al.* (1992) and Green *et al.* (1993) based on systematic aerial surveys conducted in 1989 1990 and 1992, primarily from coastal to

slope waters with some offshore effort as well.

Oceanographic conditions, including occasional El Nino and La Nina events, influence the distribution and numbers of marine mammals present in the northeastern Pacific Ocean, including Oregon, resulting in considerable year-to-year variation in the distribution and abundance of many marine mammal species (Forney and Barlow, 1998; Buchanan *et al.*, 2001; Escorza-Trevino, 2002; Ferrero *et al.,* 2002; Philbrick *et al.*, 2003). Thus, for some species the densities derived from recent surveys may not be representative of the densities that will be encountered during the proposed seismic survey.

Table 3 in UTIG's application gives the average and maximum densities for each species or species group of marine mammals reported off Oregon and Washington (and used to calculate the take estimates in Table 1 here), corrected for effort, based on the densities reported for the 1996, 2001, and 2005 surveys (Barlow, 2003). The densities from these studies had been corrected, by the original authors, for both detectability bias and availability bias. Detectability bias is associated with diminishing sightability with increasing lateral distance from the trackline [f(0)]. Availability bias refers to the fact that there is less-than–100 percent probability of sighting an animal that is present along the survey trackline, and it is measured by g(0). Table 3 also includes mean density information for three of the five pinnipeds species that occur off Oregon and Washington and mean and maximum densities for one of those species, from Bonnell *et al.* (1992). Densities were not calculated for the other two species because of the small number of sightings on systematic transect surveys.

It should be noted that the following estimates of ''takes by harassment'' assume that the seismic surveys will be undertaken and completed; in fact, the planned number of line-kms has been increased by 25 percent to accommodate lines that may need to be repeated, equipment testing, etc. As is typical on offshore ship surveys, inclement weather, and equipment malfunctions may cause delays and may limit the number of useful line-kms of seismic operations that can be undertaken. Furthermore, any marine mammal sightings within or near the designated safety zones will result in the shut down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to 160 dB sounds are precautionary, and probably overestimate the actual numbers of marine mammals that might be involved. These estimates assume that there will be no weather, equipment, or mitigation delays, which is unlikely.

There is some uncertainty about the representativeness of the data and the assumptions used in the take calculations. However, the approach used here is believed to be the best available approach. Also, to provide some allowance for the uncertainties, ''maximum estimates'' as well as ''best estimates'' of the numbers potentially affected have been derived. Best and maximum estimates are based on the average and maximum estimates of densities reported by Barlow and Forney (2007) and Bonnel *et al.* (1992) described above. The estimated numbers of potential individuals exposed are based on the 160–dB re 1 μPa rms criterion for all cetaceans and pinnipeds, and also based on the 170–dB criterion for delphinids and pinnipeds only. It is assumed that marine mammals exposed to airgun sounds this strong might change their behavior sufficiently to be considered ''take by harassment''. UTIG has requested authorization for the take of the maximum estimates and NMFS has analyzed the maximum estimate for it's effect on the species or stock.

The number of different individuals that may be exposed to GI-gun sounds with received levels ≥160 dB re 1 μPa (rms) on one or more occasions can be estimated by considering the total marine area that would be within the 160 dB radius around the operating GI guns on at least one occasion. The proposed seismic lines do not run parallel to each other in close proximity, which minimizes the number of times an individual mammal may be exposed during the survey. However, it is unlikely that a particular animal would stay in the area during the entire survey. The best estimates in this section are based on the average of the densities from the 1996, 2001, and 2005 NMFS surveys, and maximum estimates are based on the higher estimate. Table 4 in UTIG's application (and used to calculate the take estimates in Table 1 here) shows the best and maximum estimates of the number of marine mammals that could potentially be affected during the seismic survey.

The number of different individuals potentially exposed to received levels ≥160 dB re 1 μPa (rms) was calculated by multiplying:

- The expected species density, either ''mean'' (i.e., best estimate) or ''maximum, '' times
- The anticipated minimum area to be ensonified to that level during the GI guns operations including overlap (exposures), or
- The anticipated minimum area to be ensonified to that level during GI gun operations excluding overlap (individuals).

The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo Geographic Information System (GIS), using the GIS to identify the relevant areas by ''drawing'' the applicable 160 dB or 170 dB buffer around each seismic line and then calculating the total area within the buffers. Areas where overlap occurred (because of intersecting lines) were included only once to determine the minimum area expected to be ensonified.

Applying the approach described above, approximately 189 km² would be within the 160 dB isopleth on one or more occasions during the survey, whereas approximately 1,391 km² is the area ensonified when overlap is included. Because this approach does not allow for turnover in the mammal populations in the study area during the course of the survey, the actual number of individuals exposed may be underestimated. However, this will be offset to some degree by the fact that the 160 dB (and other) distances assumed here actually apply to a pair of slightly larger GI guns to be used in the project. In addition, the approach assumes that no cetaceans will move away or toward the trackline as the *Thompson* approaches in response to increasing sound levels prior to the time the levels reach 160 dB. Another way of interpreting the estimates that follow is that they represent the number of individuals that are expected (in the absence of a seismic program) to occur in the waters that will be exposed to ≥160 dB re 1 μPa (rms).

The ''best estimate'' of the number of individual cetaceans that might be exposed to seismic sounds with received levels ≥160 dB re 1 μPa (rms) during the surveys is 42 (Table 4 in UTIG's application). The total does not include any endangered or beaked whales. Dall's porpoise is estimated to be the most common species exposed; the best estimates for those species are 28 (Table 4 in UTIG application). The best estimate of the number of exposures of cetaceans to seismic sounds with received levels ≥160 dB re 1 μPa (rms) during the survey is 536, including 1 humpback whale, 1 fin whale, and 2 sperm whales. Dall's porpoise was exposed most frequently, with a best estimate of 209 exposures.

The ''maximum estimate'' column in Table 4 of UTIG's application shows an estimated total of 85 cetaceans that

might be exposed to seismic sounds ≥160 dB during the surveys. In most cases, those estimates are based on survey data, as described above. For endangered species, the 'maximum estimate' is the mean group size (from Barlow and Forney, in press) in cases where the calculated maximum number of individuals exposed was between 0.05 and the mean group size (humpback, fin, blue, and sperm whales). The numbers for which take authorization is requested, given in the far right column of Table 4 in UTIG's application are the maximum estimates. Based on the abundance numbers given in UTIG's application and Table 1 here for non-listed cetacean species, NMFS believes that the estimated take numbers are small relative to the stock sizes for these species (i.e., no more than 0.4 percent of any species).

The best and maximum estimates of the numbers of exposures to ≥170 dB for all delphinids during the surveys are 9 and 13, respectively. Corresponding estimates for Dall's porpoise are 17 and 29. The estimates are based on the predicted 170 dB radii around the GI guns to be used during the study and are considered to be more realistic estimates of the number of individual delphinids and Dall's porpoises that may be affected.

Only two of the five pinniped species discussed in Section III of UTIG's application the northern fur seal and the northern elephant seal are likely to occur in the offshore and slope waters; the other three species of pinnipeds known to occur regularly off Oregon and Washington the California sea lion, Steller sea lion, and harbor seal are infrequent there. This conclusion is based on results of extensive aerial surveys conducted from the coast to offshore waters of Oregon and Washington (Bonnell *et al.*, 1992; Green *et al.*, 1993; Buchanan *et al.*, 2001; Carretta *et al.*, 2007). However, the available density data are probably not truly representative of densities that could be encountered during surveys, as the data were averaged over a number of months and over coastal, shelf, slope, and offshore waters. These factors strongly influence the densities of these pinnipeds at sea, as all pinnipeds off Oregon and Washington exhibit seasonal and/or inshore offshore movements largely related to breeding and feeding (Bonnell *et al.*, 1992; Buchanan *et al.*, 2001; Carretta *et al.*, 2007).

Most pinnipeds, like delphinids, seem to be less sensitive to airgun sounds than are mysticetes. Thus, the numbers of pinnipeds likely to be exposed to received levels ≥170 dB re 1 μPa (rms) were also calculated, based on the estimated 170–dB radii in Table 1 of UTIG's application. For operations in deep water, the estimated 160 and 170 dB radii are very likely over-estimates of the actual 160- and 170–dB distances (Tolstoy *et al.*, 2004a,b). Thus, the resulting estimates of the numbers of pinnipeds exposed to such levels may be overestimated.

The methods described previously for cetaceans were also used to calculate exposure numbers for the one pinniped species likely to be in the survey area and whose densities were estimated by Bonnell *et al.* (1992). Based on the ''best'' densities, two northern fur seals are considered likely to be exposed to GI gun sounds ≥160 dB re 1 μPa (rms). The ''Maxim Estimate'' column in Table 4 of UTIG's application shows an estimated 19 northern fur seals that could be exposed to GI airgun sounds ≥160–dB or ≥170dB re 1 μPa (rms), respectively, during the survey. Also included are low maximum estimates for the northern elephant seals, a species that likely would be present but whose density was not calculated because of the small number of sightings on systematic transect surveys. The numbers of which ''take authorization'' is requested, given in the far right column of Table 4 of UTIG's application, are based on the maximum 160 dB estimates.

The proposed UTIG seismic survey in the northeastern Pacific Ocean involves towing two GI guns that introduce pulsed sounds into the ocean, as well as echosounder operations. A towed P-Cable system will be deployed to receive and record the returning signals. Routine vessel operations, other than the proposed GI gun operations, are conventionally assumed not to affect marine mammals sufficiently to constitute ''taking.'' No ''taking'' of marine mammals is expected in association with operations of the echosounders given the considerations discussed in section IV(1)(b) of UTIGS's application, i.e., sounds are beamed downward, the beam is narrow, and the pulses are extremely short.

Strong avoidance reactions by several species of mysticetes to seismic vessels have been observed at ranges up to 6–8 km (3.7–5 mi) and occasionally as far as 20–30 km (12.4–18.6 mi) from the source vessel when much larger airgun arrays have been used. However, reactions at the longer distances appear to be atypical of most species and situations and in any case apply to larger airgun systems than will be used in this project. If mysticetes are encountered, the numbers estimated to occur within the 160 dB isopleth in the survey area are expected to be very low. In addition, the estimated numbers presented in Table 4 of UTIG's application are considered overestimates of actual numbers because the estimated 160 and 170 dB radii used here are probably overestimates of the actual 160 and 170 dB radii at deep-water locations such as the present study areas (Tolstoy *et al.*, 2004a,b). In addition, the radii were based on a larger airgun source than the one proposed for use during the present survey.

Odontocete reactions to seismic pulses, or at least the reactions of delphinids and Dall's porpoises are expected to extend to lesser distances than are those of mysticetes. Odontocete low-frequency hearing is less sensitive than that of mysticetes, and delphinids and Dall's porpoises are often seen from seismic vessels. In fact, there are documented instances of dolphins and Dall's porpoises approaching active seismic vessels. However, delphinids and porpoises (along with other cetaceans) sometimes show avoidance responses and/or other changes in behavior when near operating seismic vessels.

Taking into account the mitigation measures that are proposed in UTIG's application, effects on cetaceans are generally expected to be limited to avoidance of the area around the seismic operation and short-term changes in behavior, falling within the MMPA definition of ''Level B harassment.'' Furthermore, the estimated numbers of animals potentially exposed to sound levels sufficient to cause appreciable disturbance are very low percentages of the regional population sizes. The best estimates of the numbers of individual cetaceans (33 for all species combined) that would be exposed to sounds ≥160 dB re 1 μPa (rms) during the proposed survey represent, on a species-by-species basis, no more than 0.11 pertcent of the regional populations (see Table 4 of UTIG's application). Dall's porpoise is the cetacean species with the highest estimated number of individuals exposed to ≥160 dB.

Varying estimates of the numbers of marine mammals that might be exposed to the GI guns sounds during the proposed summer 2008 seismic survey in the northeastern Pacific Ocean have been presented, depending on the specific exposure criterion (≥160 or ≥170 dB) and density criterion used (best or maximum). The request ''take authorization'' for each species is based on the estimated maximum number of individuals that might be exposed to ≥160 re 1 μPa (rms). That figure likely

overestimates (in most cases by a large margin) the actual number of animals that will be exposed to and will react to the seismic sounds. The reasons for that conclusion are outlined above. The relatively short-term exposures are unlikely to result in any long-term negative consequences for the individuals or their populations.

The many cases of apparent tolerance by cetaceans of seismic exploration, vessel traffic, and some other human activities show that co-existence is possible. Mitigation measures such as controlled speed, course alteration, look outs, non-pursuit, and shut downs when marine mammals are seen within defined ranges should further reduce short-term reactions, and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence.

Only two of the five pinniped species discussed in Section III of UTIG's application, the northern fur seal and northern elephant seal, are likely to occur in the offshore and slope waters of the study area. A best estimate of a single northern fur seal could be exposed to airgun sounds with received levels ≥160 dB re 1 μPa (rms). The numbers for which ''take authorization'' is requested are given in the far right column of Table 4 of UTIG's application. As for cetaceans, the estimated numbers of pinnipeds that may be exposed to received levels ≥160 dB are probably overestimates of the actual numbers that will be affected, and are very small proportions of the respective population sizes.

Potential Effects on Habitat

The proposed seismic surveys will not result in any permanent impact on habitats used by marine mammals or to the food sources they use. The main impact issue associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, as discussed above.

One of the reasons for the adoption of airguns as the standard energy source for marine seismic surveys was that, unlike explosives, they have not been associated with any appreciable fish kills. However, the existing body of information relating to the impacts of seismic surveys on marine fish (see Appendix B of UTIG's application) and invertebrate species is very limited. The various types of potential effects of exposure to seismic on fish and invertebrates can be considered in three categories: (1) pathological, (2) physiological, and (3) behavioral. Pathological effects include lethal and temporary or permanent sub-lethal damage to the animals, physiological effects include temporary and permanent primary and secondary stress responses, such as changes in levels of enzymes and proteins. Behavioral effects refer to temporary and categories are interrelated in complex ways. For example, it is possible that certain physiological and behavioral changes could potentially lead to the ultimate pathological effect on individual animals (i.e., mortality).

The specific received levels at which permanent adverse effects to fish potentially could occur are little studies and largely unknown. Furthermore, available information on the impacts of seismic surveys on marine fish and invertebrates is from studies of individuals or portions of a population; there have been no studies at the population scale. Thus, available information provides limited insight on possible real world effects at the ocean or population scale. This makes drawing conclusions about impacts on fish problematic because ultimately, the most important aspect of potential impacts relates to how exposure to seismic survey sound affects marine fish populations and their viability, including their availability to fisheries.

The following sections provide an general overview of the available information that exists on the effects of exposure to seismic surveys and other anthropogenic sound as relevant to fish and invertebrates. The information comprises results from scientific studies of varying degrees of soundness and some anecdotal information.

Pathological Effects – The potential for pathological damage to hearing structures in fish depends on the energy level of the received sound and the physiology and hearing capability of the species in question (see Appendix B of UTIG's application). For a given sound to result in hearing loss, the sound must exceed, by some specific amount, the hearing threshold of the fish for that sound (Popper, 2005). The consequences of temporary or permanent hearing loss in individual fish on a fish population is unknown; however, it likely depends on the number of individuals affected and whether critical behaviors involving sound (e.g., predator avoidance, prey capture, orientation and navigation, reproduction, etc.) are adversely affected.

Little is known about the mechanisms and characteristics of damage to fish that may be inflicted by exposure to seismic survey sounds. Few data have been presented in the peer-reviewed scientific literature. There are two valid papers with proper experimental methods, controls, and careful pathological investigation implicating sounds produced by actual seismic survey airguns with adverse anatomical effects. One such study indicated anatomical damage and the second indicated TTS in fish hearing. McCauley *et al.* (2003) found that exposure to airgun sound caused observable anatomical damage to the auditory maculae of ''pink snapper'' (*Pagrus auratus*). This damage in the ears had not been repaired in fish sacrificed and examined almost two months after exposure. On the other hand, Popper *et al.* (2005) documented only TTS (as determined by auditory brainstem response) in two of three fishes from the Mackenzie River Delta. This study found that broad whitefish (*Coreogonus nasus*) that received a sound exposure level of 177 dB re 1 $\mu Pa^2 \bullet s$ showed no hearing loss. During both studies, the repetitive exposure to sound was greater than would have occurred during a typical seismic survey. However, the substantial low-frequency energy produced by the airgun arrays [less than approximately 400 Hz in the study by McCauley *et al.* (2003) and less than approximately 200 Hz in Popper *et al.* (2005)] likely did not propagate to the fish because the water in the study areas was very shallow (approximately 9 m, 29.5 ft, in the former case and <2 m, 6.6 ft, in the latter). Water depth sets a lower limit on the lowest sound frequency that will propagate (the ''cutoff frequency'') at about one-quarter wavelength (Urick, 1983; Rogers and Cox, 1988).

In water, acute injury and death of organisms exposed to seismic energy depends primarily on two features of the sound source: (1) the received peak pressure, and (2) the time required for the pressure to rise and decay (Hubbs and Rechnitzer, 1952; Wardle *et al.*, 2001). Generally, the higher the received pressure and the less time it takes for the pressure to rise and decay, the greater the chance of acute pathological effects. Considering the peak pressure and rise/decay time characteristics of seismic airgun arrays used today, the pathological zone for fish and invertebrates would be expected to be within a few meters of the seismic source (Buchanan *et al.*, 2004). For the proposed survey, any injurious effects on fish would be limited to very short distances, especially considering the small source planned for use in this project (two 40–60–in^3 GI guns). Numerous other studies provide examples of no fish mortality upon exposure to seismic sources (Falk and

Lawrence, 1973; Holliday *et al.*, 1987; La Bella *et al.*, 1996; Santulli *et al.*, 1999; McCauley *et al.*, 2000a, 2000b, 2003; Bjarti, 2002; Hassel *et al.*, 2003; Popper *et al.*, 2005).

Except for these two studies, at least with airgun-generated sound treatments, most contributions rely on rather subjective assays such as fish ''alarm'' or ''startle response'' or changes in catch rates by fishers. These observations are important in that they attempt to use the levels of exposures that are likely to be encountered by most free-ranging fish in actual survey areas. However, the associated sound stimuli are often poorly described, and the biological assays are varied (Hastings and Popper, 2005).

Some studies have reported that mortality of fish, fish eggs, or larvae can occur close to seismic sources (Kostyuchenko, 1973; Dalen and Knutsen, 1986; Booman *et al.*, 1996; Dalen *et al.*, 1996). Some of the reports claimed seismic effects from treatments quite different from actual seismic survey sounds or even reasonable surrogates. Saetre and Ona (1996) applied a ''worst-case scenario'' mathematical model to investigate the effects of seismic energy on fish eggs and larvae and concluded that mortality rates caused by exposure to seismic are so low compared to natural mortality that the impact of seismic surveying on recruitment to a fish stock must be regarded as insignificant.Some studies have reported, some equivocally, that mortality of fish, fish eggs, or larvae can occur close to seismic sources (Kostyuchenko, 1973; Dalen and Knutsen, 1986; Booman *et al.*, 1996; Dalen *et al*., 1996). Some of the reports claimed seismic effects from treatments quite different from actual seismic survey sounds or even reasonable surrogates suggested that seismic survey sound has a limited pathological impact on early developmental stages of crustaceans (Pearson *et al.*, 1994; Christian *et al.*, 2003; DFO, 2004). However, the impacts appear to be either temporary or insignificant compared to what occurs under natural conditions. Controlled field experiments on adult crustaceans (Christian *et al.*, 2003, 2004; DFO, 2004) and adult cephalopods (McCauley *et al.*, 2000a,b) exposed to seismic survey sound have not resulted in any significant pathological impacts on the animals. It has been suggested that exposure to commercial seismic survey activities has injured giant squid (Guerra *et al.*, 2004), but there is no evidence to support such claims.

Physiological Effects – Physiological effects refer to cellular and/or biochemical responses of fish to acoustic stress. Such stress potentially could affect fish populations by increasing mortality or reducing reproductive success. Primary and secondary stress responses of fish after exposure to seismic survey sound appear to be temporary in all studies done to date (Sverdrup *et al.*, 1994; McCauley *et al.*, 2000a, 2000b). The periods necessary for the biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus (see Appendix B of UTIG's application for more information on the effects of airgun sounds on marine fish). Such stress could potentially affect animal populations by reducing reproductive capacity and adult abundance and increasing mortality.

Behavioral Effects – Behavioral effects include changes in the distribution, migration, mating, and catchability of fish populations. Studies investigating the possible effects of sound (including seismic sound) on fish behavior have been conducted on both uncaged and caged individuals (e.g., Chapman and Hawkings, 1969; Pearson *et al.*, 1992; Santulli *et al.*, 1999, Wardle *et al.*, 2001, Hassel *et al.*, 2003). Typically, in these studies fish exhibited sharp ''startle'' response at the onset of a sound followed by habituation and a return to normal behavior after the sound ceased.

There is general concern about potential adverse effects of seismic operations on fisheries, namely a reduction in the ''catchability'' of fish involved in fisheries. Although reduced catch rates have been observed in some marine fisheries during seismic testing, in a number of cases the findings are confounded by other sources of disturbance (Dalen and Raknes, 1985; Dalen and Knutsen, 1986; L kkeborg, 1991; Skalski *et al.*, 1992; Engas *et al.*, 1996). In other airgun experiments, there was no change in CPUE of fish when airgun pulses were emitted, particularly in the immediate vicinity of the seismic survey (Pickett *et al.*, 1994; La Bella *et al.*, 1996). For some species, reductions in catch may have resulted from a change in behavior of the fish, e.g., a change in vertical or horizontal distribution, as reported in the Slotte *et al.* (2004).

Summary of Physical (Pathological and Physiological) Effects – As indicated in the preceding general discussion, there is a relative lack of knowledge about the potential physical (pathological and physiological) effects of seismic energy on marine fish and invertebrates. Available data suggest that there may be physical impacts on egg, larval, juvenile, and adult stages at very close range. Considering typical source levels associated with commercial seismic arrays, close proximity to the source would result in exposure to very high energy levels. Again, this study will employ a sound source that will generate low energy levels. Whereas egg and larval stages are not able to escape such exposures, juveniles and adults most likely would avoid it. In the case of eggs and larvae, it is likely that the numbers adversely affected by such exposure would not be that different from those succumbing to natural mortality. Limited data regarding physiological impacts on fish and invertebrates indicate that these impacts are short term and are most apparent after exposure at close range.

The proposed seismic program for 2008 is predicted to have negligible to low physical effects on the various life stages of fish and invertebrates for its relatively short duration (approximately 150 total hours at each of the three sites off the coast of Oregon) and approximately 975 km (606 mi) extent. Therefore, physical effects of the proposed program on the fish and invertebrates would be not significant.

Behavioral Effects – Because of the apparent lack of serious pathological and physiological effects of seismic energy on marine fish and invertebrates, most concern now centers on the possible effects of exposure to seismic surveys on the distribution, migration patterns, mating, and catchability of fish. There is a need for more information on exactly what effects such sound sources might have on the detailed behavior patterns of fish and invertebrates at different ranges.

Studies investigating the possible effects of seismic energy on fish and invertebrate behavior have been conducted on both uncaged and caged animals (Chapman and Hawkins, 1969; Pearson *et al.*, 1992; Santulli *et al.*, 1999; Wardle *et al.*, 2001; Hassel *et al.*, 2003). Typically, in these studies fish exhibited a sharp ''startle'' response at the onset of a sound followed by habituation and a return to normal behavior after the sound ceased.

There is general concern about potential adverse effects of seismic operations on fisheries, namely a potential reduction in the ''catchability'' of fish involved in fisheries. Although reduced catch rates have been observed in some marine fisheries during seismic testing, in a number of cases the findings are confounded by other sources of disturbance (Dalen and Raknes, 1985; Dalen and Knutsen, 1986; L kkeborg, 1991; Skalski *et al.*, 1992; Engas *et al.*, 1996). In other airgun experiments, there was no change in

catch per unit effort of fish when airgun pulses were emitted, particularly in the immediate vicinity of the seismic survey (Pickett *et al.*, 1994; La Bella *et al.*, 1996). For some species, reductions in catch may have resulted from a change in behavior of the fish (e.g., a change in vertical or horizontal distribution) as reported in Slotte *et al.* (2004).

In general, any adverse effects on fish behavior or fisheries attributable to seismic testing may depend on the species in question and the nature of the fishery (season, duration, fishing method). They may also depend on the age of the fish, its motivational state, its size, and numerous other factors that are difficult, if not impossible, to quantify at this point, given such limited data on effects of airguns on fish, particularly under realistic at-sea conditions.

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Effects on Invertebrates

The existing body of information on the impacts of seismic survey sound on marine invertebrates is very limited. However, there is some unpublished and very limited evidence of the potential for adverse effects on invertebrates, thereby justifying further discussion and analysis of this issue. Th three types of potential effects of exposure to seismic surveys on marine invertebrates are pathological, physiological, and behavioral. Based on the physical structure of their sensory organs, marine invertebrates appear to be specialized to respond to particle displacement components of an impinging sound field and not to the pressure component (Popper *et al.* 2001; see also Appendix C of UTIG's application).

The only information available on the impacts of seismic surveys on marine invertebrates involves studies of individuals; there have been no studies at the population scale. Thus, available information provides limited insight on possible real world effects at the regional or ocean scale. The most important aspect of potential impacts concerns how exposure to seismic survey sound ultimately affects invertebrate populations and their viability, including availability to fisheries.

The following sections provide a synopsis of available information on the effects of exposure to seismic survey sound on species of decapod crustaceans and cephalopods, the two taxonomic groups of invertebrates on which most such studies have been conducted. The available information is from studies with variable degrees of scientific soundness and from anecdotal information.

Pathological Effects – In water, lethal and sub-lethal injury to organisms exposed to seismic survey sound could depend on at least two features of the sound source: (1) the received peak pressure, and (2) the time required for the pressure to rise and decay. Generally as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. For the two GI guns planned for the proposed program, the pathological (mortality) zone for crustaceans and cephalopods is expected to be within a few metes of the seismic source; however, very few specific data are available on levels of seismic signals that might damage these animals. This premise is based on the peak pressure and rise/decay time characteristics of seismic airgun arrays currently in use around the world.

Some studies have suggested that seismic survey sound has a limited pathological impact on early developmental stage of crustaceans (Pearson *et al.*, 1994; Christian *et al.*, 2003; DFO, 2004). However, the impacts appear to be either temporary or insignificant compared to what occurs under natural conditions. Controlled field experiments on adult crustaceans (Christian *et al.*, 2003, 2004; DFO 2004) and adult cephalopods (McCauley *et al.*, 2000a,b) exposed to seismic survey sound have not resulted in any significant pathological impacts on animals. It has been suggested that exposure to commercial seismic survey activities has injured giant squid (Guerra *et al.*, 2003), but there is no evidence to support such claims.

Physiological Effects – Physiological effects refer mainly to biochemical responses by marine invertebrates to acoustic stress. Such stress potentially cold affect invertebrate populations by increasing mortality or reducing reproductive success. Any primary and secondary stress responses (i.e. changes in haemolymph levels of enzymes, proteins, etc.) of crustaceans after exposure seismic survey sounds appear to be temporary (hours to days) in studies done to date (Payne *et al.*, 2007). The periods necessary for these biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus.

Behavioral Effects – There is increasing interest in assessing the possible direct and indirect effects of seismic and other sounds on invertebrate behavior, particularly in relation to the consequences for fisheries. Changes in behavior could potentially affect such aspects as reproductive success, distribution, susceptibility to predation, and catchability by fisheries. Studies investigating the possible behavioral effects of exposure to seismic survey sound on crustaceans and cephalopods have been conducted on both uncaged and caged animals. In some cases, invertebrates exhibited startle responses (e.g., squid in McCauley *et al.*, 2000a,b). In other cases, no behavioral impacts were noted (e.g., crustaceans in Christian *et al.*, 2003, 2004; DFO, 2004). Ther have been anecdotal reports of reduced catch rates of shrimp shortly after exposure to seismic survey; however, other studies have not observed any significant changes in shrimp catch rate (Andriguetto-Filho *et al.*, 2005). Any adverse effects on crustacean and cephalopod behavior or fisheries attributable to seismic survey sound depend on the species in question and the nature of the fishery (season, duration, fishing method).

During the proposed study, only a small fraction of the available habitat would be ensonified at any given time, and fish and invertebrate species would return to their pre-disturbance behavior once the seismic activity ceased. The proposed seismic program is predicted to have negligible to low behavioral effects on the various life stages of the fish and invertebrates during its duration (total of approximately 150 hours) and 975 km (606 mi) extent.

Because of the reasons noted above and the nature of the proposed activities (small airgun and limited duration), the proposed operations are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations or stocks. Similarly, any effects to food sources are expected to be negligible.

The effects of the proposed activity on marine mammal habitats and food resources are expected to be negligible, as described above. A small minority of the marine mammals that are present near the proposed activity may be temporarily displaced as much as a few kilometers by the planned activity. During the proposed survey, marine mammals will be distributed according to their habitat preferences, in shelf, slope, and pelagic waters.

Concentrations of marine mammals and/or marine mammal prey species are not expected to occur in or near the proposed study area, and that area does not appear to constitute an area of localized or critical feeding, breeding, or migration for any marine mammal species. The proposed activity is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations, because operations at the various sites will be limited in duration.

Proposed Monitoring

Vessel-based marine mammal visual observers (MMVOs) will be aboard the seismic source vessel and will watch for marine mammals near the vessel during all daytime GI gun operations and during start-ups of the gun at night. MMVOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of GI gun operations after an extended shut down. When feasible, MMVOs will also make observations during daytime periods when the seismic system is not operating for comparison of sighting rates and behavior with vs. without GI guns operations. Based on MMVO observations, the GI guns will be shut down when marine mammals are observed within or about to enter a designated exclusion zone (EZ; safety radius). The EZ is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

MMVOs will be appointed by the academic institution conducting the research cruise, with NMFS Office of Protected Resources concurrence. A total of three MMVOs are planned to be aboard the source vessel. At least one MMVO will monitor the EZ during daytime GI guns operations and any night-time startups. MMVOs will normally work in daytime shifts of 4 hours duration or less. The vessel crew will also be instructed to assist in detecting marine mammals.

The *Thompson* will serve as the platform from which MMVOs will watch for marine mammals before and during the GI guns operations. Two locations are likely as observation stations onboard the *Thompson*. At one station on the bridge, the eye level will be approximately 13.8 m (45.3 ft) above sea level and the location will offer a good view around the vessel (approximately 310 degrees for one observer and a full 360 degrees when two observers are stationed at different vantage points). A second observation station is the 03 deck where the observer's eye level will be approximately 10.8 m (35.4 ft) above sea level. The 03 deck offers a view of 330° for two observers.

Standard equipment for MMVOs will be 7 x 50 reticle binoculars and optical range finders. At night, night-vision devices (NVDs) will be available. Vessel lights and/or NVDs are useful in sighting some marine mammals at the surface within a short distance from the ship (within the EZ for the two GI guns). The observers will be in wireless communication with ship's officers on the bridge and scientists in the vessel's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or GI guns shut down.

MMVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document any apparent disturbance reactions. Data will be used to estimate the numbers of mammals potentially ''taken'' by harassment (as defined in the MMPA). They will also provide the information needed to order a shutdown of the two GI guns when a marine mammal is within or near the EZ. When a mammal sighting is made, the following information about the sighting will be recorded:

(1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the GI gun or seismic vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

(2) Time, location, heading, speed, activity of the vessel (shooting or not), sea state, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch and during a watch, whenever there is a change in one or more of the variables.

All marine mammal observations and information regarding airgun operations will be recorded in a standardized format. Data accuracy will be verified by the MMVOs at sea, and preliminary reports will be prepared during the field program and summaries forwarded to the operating institution's shore facility and to NSF weekly or more frequently. MMVO observations will provide the following information:

(1) The basis for decisions about shutting down the GI guns.

(2) Information needed to estimate the number of marine mammals potentially ''taken by harassment.'' These data will be reported to NMFS and/or USFWS per terms of MMPA authorizations..

(3) Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

(4) Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

Mitigation

Mitigation and monitoring measures proposed to be implemented for the proposed seismic survey have been developed and refined during previous SIO and L-DEO seismic studies and associated EAs, IHA applications, and IHAs. The mitigation and monitoring measures described herein represent a combination of the procedures required by past IHAs for other SIO and L-DEO projects. The measures are described in detail below.

Mitigation measures that are proposed to be implemented include (1) vessel speed or course alteration, provided that doing so will not compromise operational safety requirements, (2) GI guns ramp up and shut down, and (3) minimizing approach to slopes and submarine canyons, if possible, because of sensitivity of beaked whales. Two other standard mitigation measures airgun array power down are not possible because only two, low-volume GI guns will be used for the surveys.

Speed or Course Alteration – If a marine mammal is detected outside the EZ but is likely to enter it based on relative movement of the vessel and the animal, then if safety requirements allow, the vessel speed and/or direct course will be adjusted to minimize the likelihood of the animal entering the EZ. Major course and speed adjustments are often impractical when towing long seismic streamers and large source arrays, but are possible in this case because only two GI guns and a short P-Cable system with streamers will be used. If the animal appears likely to enter the EZ, further mitigative actions will be taken, i.e. either further course alterations or shut down of the airgun.

Ramp-up Procedures – A ''ramp-up'' procedure will be followed when the airguns begin operating after a period without airgun operations. The two GI guns will be added in sequence 5 minutes apart. During ramp-up procedures, the safety radius for the two GI guns will be maintained.

Shut-down Procedures – If a marine mammal is within or about to enter the EZ for the two GI guns, it will be shut down immediately. Following a shut down, the GI guns activity will not resume until the marine mammal is outside the EZ for the full array. The animal will be considered to have cleared the EZ if it: (1) is visually observed to have left the EZ; (2) has not

been seen within the EZ for 10 minutes in the case of small odontocetes and pinnipeds; or (3) has not been seen within the EZ for 15 minutes in the case of mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, and beaked whales.

The 10– and 15–min periods specified in (2) and (3), above, are shorter than would be used in a large-source project given the small 180 and 190 dB (rms) radii for the two GI guns. GI gun operations will be able to resume following a shut-down during either the day or night, as the relatively small exclusion zone(s) will normally be visible even at night (see section VIII of UTIG's application).

Minimize Approach to Slopes and Submarine Canyons – Although sensitivity of beaked whales to airguns is not specifically known, they appear to be sensitive to other sound sources (e.g., mid-frequency sonar; see section IV of UTIG's application). Beaked whales tend to concentrate in continental slope areas, and in areas where there are submarine canyons. Avoidance of airgun operations over or near submarine canyons where practicable has become a standard mitigation measure, but there are no submarine canyons within or near the study area. Also, airgun operations are not planned over slope sites during the proposed survey.

Reporting

A report will be submitted to NMFS within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of the marine mammals that were detected near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all monitoring. The 90–day report will summarize the dates and locations of seismic operations, all marine mammal and turtle sightings (dates, times, locations, activities, associated seismic survey activities). The report will also include estimates of the amount and nature of potential ''take'' of marine mammals by harassment or in other ways.

ESA

Under section 7 of the ESA, the NSF has begun informal consultation on this proposed seismic survey. NMFS will also consult informally on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of the IHA.

National Environmental Policy Act (NEPA)

NSF prepared an Environmental Assessment (EA) of a Planned Low-Energy Marine Seismic Survey by the Scripps Institution of Oceanography in the Northeast Pacific Ocean, September 2007. NMFS adopted NSF's 2007 EA and will conducted a separate NEPA analysis and prepare a Supplemental EA, prior to making a determination on the issuance of the IHA.

Preliminary Determinations

NMFS has preliminarily determined that the impact of conducting the seismic survey in the northeast Pacific Ocean may result, at worst, in a temporary modification in behavior (Level B Harassment) of small numbers of ten species of marine mammals. Further, this activity is expected to result in a negligible impact on the affected species or stocks. The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses does not apply to this proposed action as there are no subsistence users within the geographic area of the proposed project.

For reasons stated previously in this document, this determination is supported by: (1) the likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious; (2) the fact that marine mammals would have to be closer than either 104 m (341.1 ft) in intermediate depths or 69 m (226.3 ft) in deep water from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing TTS; and (3) the likelihood that marine mammal detection ability by trained observers is high at that short distance from the vessel. As a result, no take by injury or death is anticipated and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the proposed mitigation measures.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, less than a few percent of any of the estimated population sizes, and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to UTIG for conducting a low-energy seismic survey in the northeastern Pacific Ocean during June-July, 2008, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 16, 2008.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–11546 Filed 5–22–08; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Energy Markets Advisory Committee Meeting

This is to give notice that the Commodity Futures Trading Commission's Energy Markets Advisory Committee will conduct a public meeting on Tuesday, June 10, 2008. The meeting will take place in the first floor hearing room of the Commission's Washington, DC headquarters, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581 from 1 p.m. to 4:30 p.m. The purpose of the meeting is to discuss energy market issues. The meeting will be chaired by Walter L. Lukken, who is Acting Chairman of the Commission and Chairman of the Energy Markets Advisory Committee.

The agenda will consist of the following:

(1) Call to Order and Introduction;

(2) Current Market and Regulatory Developments;

(3) Market Transparency;

(4) Energy Market Best Practices;

(5) Discussion of Future Meetings and Topics;

(6) Adjournment.

The meeting is open to the public. Any member of the public who wishes to file a written statement with the committee should mail a copy of the statement to the attention of: Energy Markets Advisory Committee, c/o Acting Chairman Walter L. Lukken, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, before the meeting. Members of the public who wish to make oral statements should inform Acting Chairman Lukken in writing at the foregoing address at least three business days before the meeting. Reasonable provision will be made, if time permits, for oral presentations of no more than five minutes each in duration.

For further information concerning this meeting, please contact Erin Shaw at 202–418–5078.

Issued by the Commission in Washington, DC on May 19, 2008.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E8–11668 Filed 5–22–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Availability of the Final Environmental Impact Statement (FEIS) for the Proposed Potash Corporation of Saskatchewan Phosphate Mine Continuation Near Aurora, in Beaufort County, NC

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers (COE), Wilmington District, Regulatory Division has been reviewing the request for Department of the Army authorization, pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbor Act, from Potash Corporation of Saskatchewan Phosphate Division (PCS) for the continuation of its phosphate mining operation near Aurora, Beaufort County, NC. PCS proposes to undertake an approximately 11,909 acre mine expansion into an approximately 15,100 acre project area surrounding its current mining operation. This expansion would occur over a 37 year period and would impact approximately 4,135 acres of waters of the United States including wetlands adjacent to The Pamlico River, South Creek and Durham Creek. The Notice of Availability of the Draft Environmental Impact Statement (DEIS) for this action was published in the **Federal Register** on Friday, October 20, 2006 (71 FR 61962). The Notice of Availability of Supplement I of the DEIS (SDEIS) was published in the **Federal Register** on Tuesday, November 6, 2007 (72 FR 62634).

DATES: Written comments on the Final EIS will be received until July 9, 2008.

ADDRESSES: Comments and questions regarding the Draft EIS may be addressed to: U.S. Army Corps of Engineers, Wilmington District, Regulatory Division. *ATTN:* File Number 2001–10096, Post Office Box 1890, Wilmington, NC 28402–1890. Copies of the Final EIS, the DEIS and the SDEIS can be reviewed on the Wilmington District Regulatory homepage at, *http://www.saw.usace.army.mil/wetlands/regtour.htm,* or contact Ms. Thelma Hemingway (910) 251–4789, to receive written or CD copies.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and FEIS can be directed to Mr. Tom Walker, Project Manager, Regulatory Division, telephone: (828) 271–7980, extension 222.

SUPPLEMENTARY INFORMATION:

1. Project Description. The PCS Aurora facility includes an open pit mining operation that supplies phosphate ore to its onsite manufacturing facilities producing sulfuric acid, phosphoric acid, purified acid, liquid fertilizer, superphosphoric acid, diammonium phosphate, defluorinated phosphate, animal feed and solid fertilizers. Phosphate mining activities began at this site in 1965. On August 27, 1997, PCS was issued a Department of the Army permit to impact 1,268 acres of waters and wetlands to continue its mining operation into the current mine area. This action is more fully described in the August, 1996 Final Environmental Impact Statement for the Texasgulf Inc. Mine Continuation. PCS is nearing the end of the current mining area and is seeking to continue its mining operation into its adjacent property.

2. Proposed Action. On November 2, 2000, PCS applied for Department of the Army authorization pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act to continue its phosphate mining operation into an adjacent tract on the Hickory Point peninsula (the NCPC Tract) adjacent the Pamlico River and South Creek once reserves are depleted under the existing permitted area. The applicant's stated purpose and need for this project is to continue mining its phosphate reserve in an economically viable fashion. More specifically, the applicant's stated purpose and need is to implement a long-term systematic and cost-effective mine advance within the project area for the ongoing PCS mine operation at Aurora, NC.

The Corps circulated a Public Notice describing this application on January 2, 2001 (Action ID No. 200110096). PCS elected to further reduce proposed impacts to waters of the U.S. in response to comments on this Public Notice and submitted a revised permit application on August 13, 2001, for a 15-year mine continuation within the NCPC Tract. The Corps circulated a second Public Notice on October 4, 2001, describing the revised application. The Corps, in considering reasonable alternatives and potential cumulative impacts, determined that the applicant would need to develop alternatives that include mining in areas other than the NCPC Tract and/or mining in multiple locations. On September 8, 2005, the applicant presented the Corps with an applicant preferred holistic plan for mining the entire project area. This plan, and a range of holistic alternatives were fully described in the DEIS and SDEIS.

By letter dated April 25, 2008, the applicant requested that its application be modified to request a permit for an approximately 11,909-acre mine advance through 15,100 acre project area that would impact approximately 4,135 acres of waters of the U.S. including wetlands. Waters and wetlands in the proposed impact area are more specifically described in the following table:

Proposed Impacts:	
1. Creeks/Open Water	7 acres.
1a. Perennial Streams.	13,385 linear feet.
1b. Intermittent Streams.	15,903 linear feet.
2. Brackish Marsh Complex.	0 acres.
3. Bottomland Hardwood Forest.	73 acres.
4. Herbaceous Assemblage.	333 acres.
5. Scrub-Shrub Assemblage.	445 acres.
6. Pine Plantation	641 acres.
7. Hardwood Forest	1,075 acres.
8. Mixed Pine-Hardwood Forest.	910 acres.
9. Pine Forest	353 acres.
10. Pocosin/Bay Forest	264 acres.
11. Sand Ridge Forest	22 acres.
10. Ponds	11 acres.
Total	4,135 acres.

4. Alternatives. A full range of reasonable alternatives have been identified and evaluated through the scoping process. A complete description of all alternatives carried forward for detailed study is disclosed in Section 2 of the FEIS.

5. Scoping Process. A public scoping meeting was held on February 28, 2001, and an interdisciplinary Review Team (Review Team) comprised of representatives from other state and federal regulatory and commenting agencies, environmental advocacy groups, the applicant, and CZR Incorporated (CZR) (third party consultant to the Corps in accordance with RGL–05–08). The purpose of the Review Team is to identify major issues to be addressed in the EIS and to provide input on potential alternatives to be explored and potentially evaluated. As appropriate, the COE will

initiate consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act and the Fish and Wildlife Coordination Act, and with the National Marine Fisheries Service under the Magnuson-Stevens Act and Endangered Species Act. The Corps is coordinating with the North Carolina Division of Water Quality (NCDWQ) to ensure the EIS has assessed the potential water quality impacts pursuant to Section 401 of the Clean Water Act and with the North Carolina Division of Coastal Management (NCDCM) to determine the projects consistency with the Coastal Zone Management Act. The Corps is also coordinating with the NCDCM and NCDWQ in the development of the EIS to ensure the process complies with State Environmental Policy Act (SEPA) requirements, as well as the NEPA requirements. The Corps has attempted to design the FEIS to consolidate both NEPA and SEPA processes to eliminate duplications.

Following the FEIS comment period, the Corps will review all comments and pertinent information. The Corps will then prepare a Record of Decision responding to any substantive issues raised that have not been addressed in the FEIS and documenting the Corps' final decisions on compliance with the Clean Water Act, Section 404(b)(1) Guidelines, its decisions in the public interest review and the final permit decision.

Dated: May 15, 2008.

John E. Pulliam, Jr.,

Colonel, U.S. Army, District Commander.

[FR Doc. E8–11585 Filed 5–22–08; 8:45 am]

BILLING CODE 3710–GN–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2008–0045]

Privacy Act of 1974; System of Records

AGENCY: United States Marine Corps, DoD.

ACTION: Notice to add a system of records.

SUMMARY: The U.S. Marine Corps is adding a system of records notice to its inventory of records systems subject to the Privacy Act of 1974, as amended (5 U.S.C. 552a).

DATES: The new system of records will be effective on June 23, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to Headquarters, U.S. Marine Corps, FOIA/PA Section (CMC–ARSF), 2 Navy Annex, Room 3134, Washington, DC 20380–1775.

FOR FURTHER INFORMATION CONTACT: Ms. Teresa D. Ross at (703) 614–4008.

SUPPLEMENTARY INFORMATION: The U.S. Marine Corps' 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 report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on May 6, 2008 to the House Committee on Oversight and Governmental Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: May 16, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

M01133–3

SYSTEM NAME:

Marine Corps Recruiting Information Support System (MCRISS).

SYSTEM LOCATION:

Primary System: Marine Corps Recruiting Command (Attn: G–3 MCRISS), 3280 Russell Road, Quantico, VA 22134–5103.

Decentralized Segments—Recruiting Sub-Stations, Recruiting Stations, Recruiting District Headquarters, Region District Headquarters, Marine Corps Recruit Depots, and Military Entrance Processing Stations (MEPS).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Prospective applicants, delayed entry personnel, applicants for regular and reserve entitlement programs, and any other individuals who have initiated correspondence pertaining to enlistment or commissioning into the U.S. Marine Corps.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, home address, Social Security Number (SSN), Personal history records will include education, professional qualifications, mental aptitude, physical qualifications, character and interview appraisals, National Agency Checks and certifications, service performance and congressional or special interests. Information collected from DD Form 4 will include Enlistment/Reenlistment Documents—Armed Forces of the United States; DD Form 93, Record of Emergency Data; DD Form 1966, Application for Enlistment in the Armed Forces of the United States; SF–86, Questionnaire for National Security Positions; and medical and mental aptitude qualification information gathered during the qualification screening process at the Military Entrance Processing Command (MEPS).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5042, Headquarters, U.S. Marine Corps; 5 U.S.C. 301, Departmental Regulations; and E.O. 9397 (SSN).

PURPOSE(S):

To provide recruiters, administrators, and decision makers with information necessary, which may influence the decision to select/non-select an individual for enlistment or commissioning in the U.S. Marine Corps (i.e., personal history, education, professional qualifications, mental aptitude, and other individualized items).

To provide historical data for comparison of current applicants with those selected in the past.

To collect an initial data record which will be transitioned to the manpower and pay system, thereby reducing redundancy and duplicity.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USERS:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To officials and employees of other departments and agencies of the Executive Branch of government, upon request, in the performance of their official duties related to the management of quality military recruitment and the recruitment of Merchant Marine personnel.

The 'Blanket Routine Uses' set forth at the beginning of the Marine Corps' 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 in file folders and electronic storage media.

RETRIEVABILITY:

Name and Social Security Number (SSN).

SAFEGUARDS:

Records are maintained in area only accessible to authorized personnel that are properly screened, cleared, and trained. System software uses Primary Key Infrastructure (PKI)/Common Access Card (CAC) authentication to lock out unauthorized access. System software contains authorization/permission partitioning to limit access to appropriate organizational level.

RETENTION AND DISPOSAL:

Records are maintained for five years and then destroyed.

SYSTEM MANAGERS(S) AND ADDRESS:

Commanding General, Marine Corps Recruiting Command (Attn: G–3 MCRISS), 3280 Russell Road, Quantico, VA 22134–5103.

NOTIFICATION PROCEDURE:

Individuals seeking access to records about themselves contained in this system of records should address written requests to the Commanding General, Marine Corps Recruiting Command (Attn: G–3 MCRISS), Quantico, VA 22134.

Letter should contain the full name, address, Social Security Number and signature.

Individuals desiring to visit a Recruiting Station, District, or Marine Corps Recruit Depot should visit *https://www.marines.usmc.mil/* and follow the links section to get information on all facilities.

The requester may also visit any Marine Corps Recruiting Station to determine whether MCRISS contains records pertaining to him/her. In order to personally visit a Recruiting Station and obtain information, individuals must present proper identification such as a valid state driver's license or some other suitable proof of identity.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commanding Officer of the activity to which they were assigned or applied through.

Letter should contain the full name, address, Social Security Number and signature.

Individuals desiring to visit a Recruiting Station, District, or Marine Corps Recruit Depot should visit *https://www.marines.usmc.mil/* and follow the links section to get information on all facilities.

The requester may also visit any Marine Corps Recruiting Station, District Headquarters, or Marine Corps Recruit Depot to determine whether MCRISS contains records pertaining to him/her. In order to personally visit a Marine Corps Recruiting Station, District Headquarters, or Marine Corps Recruit Depot and obtain information, individuals must present proper identification such as military identification, a valid state driver's license, or some other suitable proof of identity.

CONTESTING RECORD PROCEDURES:

The U.S. Marine Corps rules for accessing records and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; Marine Corps Order P5211.2; 32 CFR Part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

U.S. Marine Corps recruiting and reserve personnel and administrative staff; medical personnel conducting physical examinations and/or private physicians providing consultation or patient history; character and employer references; educational institutions; staff and faculty members; Selective Service Commission; local, state, and federal law enforcement agencies; prior or current military service records; and members of Congress.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Parts of this system may be exempt under the provisions of 5 U.S.C. 552a(k)(1), (k)(5) and (k)(6) as applicable.

Information specially authorized to be classified under E.O.12958 implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

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, but only to the extent such material would reveal the identity of a confidential source, may be exempt pursuant to 5 U.S.C. 552a(k)(5).

Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal or military service, if the disclosure would compromise the objectivity or fairness of the test or examination process, may be exempt pursuant to 5 U.S.C. 552a(k)(6).

An exemption rule for this system has been promulgated in accordance with the 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. E8–11652 Filed 5–22–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2008–0046]

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 June 23, 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: May 16, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

N12630–1

SYSTEM NAME:

Voluntary Leave Transfer Program Records.

CHANGES:

Change ''N12630–1'' to read ''NM12630–1.''

SYSTEM NAME:

At beginning of entry, add ''DON''.

SYSTEM LOCATION:

Delete entry and replace with: ''DON Human Resources Offices. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx*.''

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''5 U.S.C. 301, Departmental Regulations; 5 U.S.C. 6331 *et seq.* (Leave); 5 CFR part 630 and E.O. 9397 (SSN).''

* * * * *

STORAGE:

Delete entry and replace with ''Paper and electronic storage media.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Policy official: Office of Civilian Human Resources, 614 Sicard Street, SE., Suite 100, Washington Navy Yard, DC 20374–5072.

RECORD HOLDER:

Director of local Human Resources Offices. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx*.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether this system contains information about themselves should address written inquires to their servicing Human Resources Office. 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 the name, approximate date during which the case record was developed, the address of the individual concerned and be signed.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about them contained in this system of records should address written inquiries to their servicing Human Resources Office. 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 the name, approximate date during which the case record was developed, the address of the individual concerned and be signed.''

* * * * *

NM12630–1

SYSTEM NAME:

DON Voluntary Leave Transfer Program Records.

SYSTEM LOCATION:

DON Human Resources Offices. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have volunteered to participate in the leave transfer program as either a donor or recipient.

CATEGORIES OF RECORDS IN THE SYSTEM:

Separate files exist for leave recipients and leave donors records.

Leave recipient records contain the individual's name, organization, office telephone number, Social Security Number, position title, grade, pay level, leave balance, number of hours requested, brief description of the medical or personal hardship which qualifies the individual for inclusion in the program, the status of that hardship, and a statement that selected data elements may be used in soliciting donations. The file may also contain medical or physician certifications and agency approvals or denials.

Leave donor records contain the individual's name, organization, office telephone number, Social Security Number, position title, grade and pay level, leave balance, number of hours donated and the name of the designated recipient.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 5 U.S.C. 6331 *et seq.* (Leave); 5 CFR part 630 and E.O. 9397 (SSN).

PURPOSE(S):

To manage the Department of the Navy's Voluntary Leave Transfer Program. The recipient's name, position data, organization, and brief hardship description are published internally for passive solicitation purposes. The Social Security Number is sought to effectuate the transfer of leave by human resources and pay offices from the donor's account to the recipient's account.

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. 522a(b)(3) as follows:

To the Department of Labor in connection with a claim filed by an employee for compensation due to a job-connected injury or illness, when leave donor and leave recipient are employed by different Federal agencies.

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 electronic storage media.

RETRIEVABILITY:

Name/Social Security Number of leave recipient for access to their files. Name/Social Security Number of leave donor for access to their files.

SAFEGUARDS:

Access to records is limited to the custodian of the records or by persons responsible for servicing the records in the performance of their official duties. Records are stored in locked cabinets or rooms and are controlled by personnel screening. Computer terminals are located in supervised areas. Access to computerized data is controlled by password or other user code systems.

RETENTION AND DISPOSAL:

Records are destroyed one year after the end of the year in which the file is closed.

SYSTEM MANAGER(S) AND ADDRESS:

Policy official: Office of Civilian Human Resources, 614 Sicard Street, SE., Suite 100, Washington Navy Yard, Washington, DC 20374–5072.

RECORD HOLDER:

Director of local Human Resources Offices. 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 contains information about themselves should address written inquires to their servicing Human Resources Office. 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 the name, approximate date during which the case record was developed, the address of the individual concerned and be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about them contained in this system of records should address written inquiries to their servicing Human Resources Office. 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 the name, approximate date during which the case record was developed, the address of the individual concerned and 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:

Employee, supervisors, co-workers or other agency or contractor-employee personnel, and private individuals to include family members of employee and outside practitioners.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–11662 Filed 5–22–08; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R09–OAR–2008–0399; FRL–8570–6]

Adequacy Status of Motor Vehicle Budgets in Submitted Eight-Hour Ozone Attainment Plan for the San Diego County Nonattainment Area for Transportation Conformity Purposes; California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Adequacy.

SUMMARY: In this notice, EPA is notifying the public that the Agency has found that the motor vehicle emissions budgets in the submitted *Eight-Hour Ozone Attainment Plan for San Diego County (May 2007)* (''2007 San Diego Eight-Hour Ozone Plan'') are adequate for transportation conformity purposes. The 2007 San Diego Eight-Hour Ozone Plan was submitted to EPA on June 15, 2007 by the California Air Resources Board as a revision to the California state implementation plan. As a result of our finding, the San Diego Association of Governments (SANDAG) and the U.S. Department of Transportation must use the motor vehicle emissions budgets from the submitted eight-hour ozone attainment plan for future transportation conformity determinations.

DATES: This finding is effective June 9, 2008.

FOR FURTHER INFORMATION CONTACT: John J. Kelly, U.S. EPA, Region IX, Air Division AIR–2, 75 Hawthorne Street, San Francisco, CA 94105–3901; (415) 947–4151 or *kelly.johnj@epa.gov*.

SUPPLEMENTARY INFORMATION:

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

Today's notice is simply an announcement of a finding that we have already made. EPA Region IX sent a letter to the California Air Resources Board (ARB) on May 13, 2008 stating that the motor vehicle emissions budgets for volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the submitted 2007 San Diego Eight-Hour Ozone Plan for 2008 are adequate. The budgets correspond to the San Diego County 8-hour ozone nonattainment area, which encompasses the entirety of the county, except for several excluded tribal areas in the southeastern portion of the county, in southwest California. Receipt of the 2007 San Diego Eight-Hour Ozone Plan and related motor vehicle emissions budgets was announced on EPA's transportation conformity Web site, and no comments were submitted. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

The adequate motor vehicle emissions budgets for the San Diego County 8-hour ozone nonattainment area are provided in the following table:

ADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS

[Summer day, tons per day]

Budget year	VOC motor vehicle emissions budget	NO_X motor vehicle emissions budget
2008	53	98

Transportation conformity is required by Clean Air Act section 176(c). EPA's conformity rule requires that transportation plans, programs, and projects conform to state air quality implementation plans (SIPs) and establishes the criteria and procedures for determining whether or not they do conform. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). The process for determining the adequacy of such budgets is set forth at 40 CFR 93.118(f). Please note that an adequacy review is separate from EPA's completeness review, and should not be used to prejudge EPA's ultimate approval action for the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

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

Dated: May 13, 2008.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. E8–11604 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6699–2]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 11, 2008 (73 FR 19833).

Draft EISs

EIS No. 20080044, ERP No. D–BIA–L69001–OR, Cascade Locks Resort and Casino Project, Application for the Fee-to-Trust Transfer of 25 Acres of Land within the City of Cascade Locks, Confederated Tribes of the Warn Springs Reservation of Oregon, Cascade Locks, Hood River County, OR.

Summary: EPA expressed environmental concerns about air quality impacts and construction impacts to fish populations, and recommended additional air quality analyses be performed. Rating EC2.

EIS No. 20080105, ERP No. D–AFS–K65339–CA, Orleans Community Fuels Reduction and Forest Health Project, To Manage Forest Stands to Reduce Hazardous Fuel Conditions, Orleans Ranger District, Six Rivers National Forest, Humboldt County, CA.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20080114, ERP No. D–BPA–L91030–WA, Lyle Falls Fish Passage Project, To Improve Fish Passage to Habitat in the Upper Part of the Watershed, Located on the Lower Klickitat River, Klickitat County, WA.

Summary: EPA does not object to the proposed action. Rating LO.

Final EISs

EIS No. 20070294, ERP No. F–APH–65176–00, ADOPTION—Resident Canada Goose Management Plan, Evaluate Alternative Strategies to Reduce, Manage, and Resident Canada Goose Population, Implementation, within the Conteriminous US.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20080026, ERP No. F–NRC–D09802–MD, License Renewal of the National Bureau of Standards Reactor (NBSR), Renew the Operating License for an Additional 20 Years, National Institute of Standards and Technology (NIST), NUREG–1873, Montgomery County, MD.

Summary: EPA does not object to the proposed action.

EIS No. 20080104, ERP No. F–JUS–K80049–NV, Las Vegas Detention Facility, Proposed Contractor-Owned/Contractor-Operated Detention. Facility, Implementation, Nevada Area.

Summary: EPA continues to have environmental concerns about water resource impacts and jurisdictional delineation. EPA also requested that the project incorporate green building design.

EIS No. 20080109, ERP No. F–AFS–L65512–OR, Mt. Hood National Forest and Columbia River Gorge National Scenic Area, Site-Specific Invasive Plant Treatments, Forest Plan Amendments #16, Mt. Hood National Forest and Columbia River Gorge National Scenic Area, Clackamas, Hood River, Multnomah and Wasco Counties, OR.

Summary: EPA's comments were addressed; therefore, EPA does not object to the proposed action.

EIS No. 20080130, ERP No. F–AFS–L65554–00, Mt. Ashland Late-Successional Reserve Habitat Restoration and Fuels Reduction Project, To Promote and Maintain Late-Successional Habitat, Oak Knoll Ranger District, Klamath National Forest, Siskiyou County, CA and Jackson County, OR.

Summary: The Final EIS addressed EPA's comments on the Draft EIS; therefore, EPA does not object to the proposed action.

EIS No. 20080148, ERP No. F–SFW–F65068–WI, Trempealeau National Wildlife Refuge Comprehensive Conservation Plan, Implementation, located within the Mississippi River Valley, Buffalo and Trempealeau Counties, WI.

Summary: EPA does not object to the proposed action.

Dated: May 20, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8–11664 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–6699–1]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 05/12/2008 through 05/16/2008.

Pursuant to 40 CFR 1506.9.

EIS No. 20080193, draft EIS, AFS, AK, Spencer Mineral Materials Project, Proposal to Develop and Extract Quarry Rock and Gravel from a Mineral Materials Site near Spencer Glacier, Chugach National Forest, Kenal Borough, AK, *Comment Period Ends:* 07/07/2008, *Contact:* Alice Allen 605–673–4853.

EIS No. 20080194, draft EIS, SFW, TX, Williamson County Regional Habitat Conservation Plan, Application for an Incidental Take Permit, Williamson County, TX, *Comment Period Ends:* 07/15/2008, *Contact:* Adam Zerrenner 512–490–0057.

EIS No. 20080195, draft supplement, FHW, TN, Interstate 69 Segment of Independent Utility (SIU) #8, New Information for a New Crossover Alternative, from TN–385 in Millington, TN to I–155/US 51 in Dyersburg, TN, Funding, Shelby, Tipton, Lauderdale and Dyer Counties, TN, *Comment Period Ends:* 07/07/2008, *Contact:* Charles J. O'Neill 615–781–5772.

EIS No. 20080196, final EIS, NRC, KS, Generic—License Renewal of Nuclear Plants Regarding Wolf Creek Generating Station, (WCGS) Unit 1. Supplement 32 to NUREG 1437, Implementation, Coffey County, KS, *Wait Period Ends:* 06/23/2008, *Contact:* Tam Tran 301–415–3617.

EIS No. 20080197, draft EIS, BLM, NV, Lincoln County Land Act (LCLA) Groundwater Development and Utility Right-of-Way Project, Implementation, To Grant a Right-of-Way Permit for Groundwater Development and Utility Facilities, Lincoln County, NV, *Comment Period Ends:* 07/21/2008, *Contact:* Penny Woods 775–861–6466.

EIS No. 20080198, final EIS, IBR, CA, Fish Passage Improvement Project, Red Bluff Diversion Dam (RBDD), Improvements of Anadromous Fish Passage both Upstream and Downstream, Tehama-Colusa Canal, RBDD to south of the Town of Dunnigan and Corning Canal, RBDD to south of the City of Corning, Funding, U.S. Army COE Section 10 and 404 Permits Issuance, Tehama, Glenn, Colusa, Yolo Counties, CA , *Wait Period Ends:* 07/07/2008, *Contact:* Don Reck 530–275–1554.

EIS No. 20080199, final supplement, BLM , AK, Northeast National Petroleum Reserve—Alaska Integrated Activity Plan, Updated Information, addressing the need for more Oil and Gas Production through Leasing Lands, Consideration of 4 Alternatives, North Slope Borough, AK, *Wait Period Ends:* 06/23/2008, *Contact:* Jim Ducker 907–271–3130.

EIS No. 20080200, draft EIS, AFS, UT, Dixie National Forest Motorized Travel Plan, Implementation, Dixie National Forest and the Teasdale portion of the Fremont River Ranger District on the Fishlake National Forest, Garfield, Iron, Kane, Piute, Washington and Wayne Counties, UT, *Comment Period Ends:* 07/07/2008, *Contact:* Andi Falsetto 435–896–9233.

EIS No. 20080201, final EIS, AFS, SD, Upper Spring Creek Project, Proposes to Implement Multiple Resource Management Actions, Mystic Ranger District, Black Hills National Forest, Pennington and Custer Counties, SD, *Wait Period Ends:* 06/23/2008, *Contact:* Katie Van Alstyne 605–343–1567.

EIS No. 20080202, draft EIS, COE, WI, Wisconsin Power and Light 300 MW Power Plant, Construction and Operation of a 300 Megawatt (MW) Baseload Coal-Fired Electric

Generating Unit, Nelson Dewey Generating Station, near Cassville, Grant County, WI, *Comment Period Ends:* 07/07/2008, *Contact:* Jon K. Ahlness 651–290–5381.

EIS No. 20080203, draft EIS, UCG, 00, Dry Cargo Residue (DCR) Discharges in the Great Lakes, To Regulate Nonhazardous and Nontoxic DRC Sweeping from Vessels in the Great Lakes that Fall under the Jurisdiction of the United States, *Comment Period Ends:* 07/22/2008, *Contact:* Greg Kirkbride 202–372–1479.

Amended Notices

EIS No. 20060490, draft EIS, OSM, 00, Black Mesa Project, Revisions to the Life-of-Mine Operation and Reclamation for the Kayenta and Black Mesa Surface-Coal Mining Operations, Right-of-Way Grant, Mohave, Navajo, Coconino and Yavapai Counties, AZ and Clark County, NV, *Comment Period Ends:* 07/07/2008, *Contact:* Peter A. Rutledge 303–844–1400 Ext. 1440. Revision to FR Notice Published 12/01/2006: Reopening and Extending Comment Period from 02/06/2007 to 07/07/2008. EIS No. 20080159, Second Draft Supplement, NOA, 00, Atlantic Mackerel, Squid and Butterfish, Fishery Management Plan, Amendment No. 10, Develop a Rebuilding Program that Allows the Butterfish Stock to Rebuild in the Shortest Amount of Time Possible, Exclusive Economic Zone (EEZ) off the U.S. Atlantic Coast, *Comment Period Ends:* 06/23/2008, *Contact:* Patricia A. Kurkul 978–281–9250. Revision to FR Notice Published 05/02/2008: Extending Comment Period from 06/16/2008 to 06/23/2008.

Dated: May 20, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8–11614 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA—New England Region I—EPA–R01–OW–2008–20214; FRL–8570–5]

Massachusetts Marine Sanitation Device Standard—Receipt of Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice—Receipt of Petition.

SUMMARY: Notice is hereby given that a petition has been received from the state of Massachusetts requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of Cape Cod Bay in the towns of Provincetown, Truro, Wellfleet, Eastham, Orleans, Brewster, Dennis, Yarmouth, Barnstable, Sandwich and Bourne.

DATES: Comments are due by June 23, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OW–2008–0214 by one of the following methods: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

- *E-mail: rodney.ann@epa.gov.*
- *Fax:* (617) 918–0538.

Mail and hand delivery: U.S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m.–5 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R01–OW–2008–0212. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov,* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office is open from 8 a.m.–5 p.m., Monday through Friday, excluding legal holidays. The telephone number is (617) 918–1538.

FOR FURTHER INFORMATION CONTACT: Ann Rodney, U.S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. *Telephone:* (617) 918–1538, *Fax number:* (617) 918–0538; *e-mail address: rodney.ann@epa.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that a petition has been received from the Commonwealth of Massachusetts requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, pursuant to Section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the area within the following boundaries:

Waterbody/general area	Latitude	Longitude
Eastern Landward Boundary-Line of longitude.	.....	70°10′00″ W
Northeastern Seaward Boundary.	42°08′00″ N.	70°10′00″ W
Boundary curves west along the 3-mile limit and intersects with the Mean High Water line.	42°09′00″ N.	70°42′00″ W

The proposed NDA boundary includes the municipal waters of Provincetown, Truro, Wellfleet, Eastham, Orleans, Brewster, Dennis, Yarmouth, Barnstable, Sandwich and Bourne and extends to the boundary between state and federal waters. Cape Cod Bay is bordered on three sides by the geographic landforms of Cape Cod and the South Shore of Massachusetts.

There are marinas, yacht clubs and public landings/piers in the proposed area with a combination of mooring fields and dock space for the recreational and commercial vessels. Massachusetts has certified that there are seven pumpout facilities within the proposed area available to the boating public and two additional facilities pending. The majority of facilities are connected to a holding tank, which is emptied by a licensed septic hauler that transports the waste to an approved disposal facility. A list of the facilities, phone numbers, locations, and hours of operation is provided at the end of this petition.

Massachusetts has provided documentation indicating that the total vessel population is estimated to be 3250 in the proposed area. It is estimated that 2010 of the total vessel population may have a Marine Sanitation Device (MSD) of some type.

In 1974, the Massachusetts Oceans Sanctuaries Act recognized Cape Cod Bay as an important ocean sanctuary. In 1990, EPA designated Cape Cod Bay as an ''Estuary of National Significance'' under its National Estuary Program as part of the Mass Bays Program. Four state-recognized Areas of Critical Environmental Concern are within Cape Cod Bay. Cape Cod Bay also contains federally designated Critical Habit for rare and endangered species of marine mammals, including the endangered Northern Atlantic Right whale and Humpback whale. In addition, Cape Cod Bay contains critical habitat (e.g., eelgrass beds, mud flats, estuaries, etc.) for other rare, endangered, and/or economically important species of coastal and pelagic birds (Roseate Tern and Piping Plover), fish (winter flounder, haddock, cod, stripped bass, herring, lobster, crabs, etc.), and turtles (Hawksbill sea turtle, Kemp's Ridley sea turtle, Leatherback sea turtle, Green turtle, Loggerhead sea turtle and Diamondback Terrapin). Cape Cod Bay has over 390 public beaches and there are an estimated 410,000 acres of shellfish growing areas between Provincetown and the Back River in Hull. All of these important natural resources would benefit from a No Discharge Area.

PUMPOUT FACILITIES WITHIN PROPOSED NO DISCHARGE AREA

Name	Location	Contact info.	Hours	Mean low water depth
Sandwich Marina	Sandwich	(508) 833–0808 VHF 9, 16	8 a.m.–5 p.m. 7 days a week	5 ft.
Barnstable Town Marina	Barnstable	(508) 790–6272 VHF 9, 16	8 a.m.–4 p.m. 7 days a week	4.5 ft.
Northside Marina	East Dennis	(508) 385–3936 VHF 7	8 a.m.–5 p.m. 7 days a week	8 ft.
Orleans Town Pier at Rock Harbor.	Orleans	(508) 240–3755 VHF 16, 66	8 a.m.–4 p.m. 7 days a week	4 ft.
Town of Wellfleet Marina	Wellfleet	(508) 349–0320 VHF 9	8 a.m.–6 p.m. 7 days a week	6 ft.
Provincetown Harbor	Provincetown	(508) 487–7030 VHF 9,16	10 a.m.–4 p.m. 7 days a week	6 ft.
Pending				
** Dennis	Dennis	TBD	TBD	N/A.
Provincetown	Provincetown	TBD	TBD	N/A.

** = Pending facilities, installation to be completed by June 30, 2008.

Dated: May 16, 2008.

Robert W. Varney,

Regional Administrator, New England Region.

[FR Doc. E8–11613 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8570–8]

Science Advisory Board Staff Office; Clean Air Scientific Advisory Committee (CASAC); Notification of Public Advisory Committee Meetings (Teleconferences) of the CASAC Lead Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public teleconference meeting of the Clean Air Scientific Advisory Committee's (CASAC) Lead Review Panel (Panel) to provide comments concerning EPA's proposed rule for the revision of the National Ambient Air Quality Standard (NAAQS) for Lead (May 1, 2008) and a follow-on public teleconference meeting for the CASAC Panel to review the draft letter to the EPA Administrator and for the chartered CASAC to approve the letter.

DATES: Public teleconference meetings of the CASAC Lead Review Panel will be held on Monday, June 9, 2008 from 1 p.m. to 5 p.m. (Eastern Time) and on Tuesday, July 8, 2008 from 1 p.m. to 4 p.m. (Eastern Time).

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to obtain the teleconference call-in numbers and access codes; submit a written or brief oral statement (three minutes or less); or receive further information concerning this teleconference meeting, must contact Mr. Fred Butterfield, CASAC Designated Federal Officer (DFO). Mr. Butterfield may be contacted at the EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or via telephone/voice mail: 202–343–9994; fax: 202–233–0643; or e-mail at: *butterfield.fred@epa.gov.* General information concerning the CASAC can be found on the EPA Web site at: *http://www.epa.gov/casac.*

SUPPLEMENTARY INFORMATION:

Background: The CASAC, which is comprised of seven members appointed by the EPA Administrator, was established under section 109(d)(2) of the Clean Air Act (CAA or Act) (42 U.S.C. 7409) as an independent scientific advisory committee. The CASAC provides advice, information and recommendations on the scientific and technical aspects of issues related to air quality criteria and NAAQS under

sections 108 and 109 of the Act. The CASAC is chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The CASAC Lead Review Panel consists of the seven members of the chartered CASAC supplemented by subject-matter-experts. The CASAC Lead Review Panel provides advice and recommendations to EPA concerning lead in ambient air. The CASAC Panel complies with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Section 109(d)(1) of the CAA requires that the Agency periodically review and revise, as appropriate, the air quality criteria and the NAAQS for the ''criteria'' air pollutants, including lead. In December 2007, the CASAC Panel met to review the Agency's Advance Notice of Proposed Rulemaking (ANPR) on the NAAQS for Lead. In addition, the Panel also reviewed EPA's Final Lead Staff Paper and the Final Lead Risk Assessment. The CASAC's letter to the Administrator from that meeting (EPA–CASAC–08–007, dated January 22, 2008) is posted on the CASAC's Web site at: *http://www.epa.gov/casac*. On May 1, 2008, the Agency released the proposed rule for the revision of the NAAQS for Lead. The proposed rule and supplemental materials can be accessed from the ''Regulatory Actions'' page for the Lead NAAQS found on EPA's Web site at URL: *http://epa.gov/air/lead/actions.html*. This proposed rule is scheduled for publication in the **Federal Register** on or about May 21, 2008.

The purpose of the public teleconference meeting on June 9, 2008 is for the CASAC Panel to provide comments concerning the proposed rule for the revision of the NAAQS for lead. The purpose of the public teleconference meeting on July 8, 2008 is for the CASAC Panel to review the draft letter to the EPA Administrator and for the chartered CASAC to approve the letter.

Technical Contact: Any questions concerning the Agency's proposed rule for the revision of the NAAQS for lead should be directed to Dr. Deirdre Murphy, Health and Environmental Impacts Division, EPA's Office of Air Quality Planning and Standards (OAQPS), at phone: 919–541–0729, or e-mail: *murphy.deirdre@epa.gov*.

Availability of Meeting Materials: The draft agendas and other materials for these public teleconference meetings of the CASAC Panel will be posted on the CASAC's Web site at: *http://www.epa.gov/casac* prior to the meetings.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the CASAC Lead Review Panel to consider on the topics included in this advisory activity and/or the group conducting the activity. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference meeting will be limited to three minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact Mr. Butterfield, CASAC DFO, in writing (preferably via e-mail), by June 2, 2008, at the contact information noted above, to be placed on the list of public speakers for the June 9 public teleconference meeting of the CASAC Panel; and by July 1, 2008 to be placed on the list of public speakers for the CASAC Panel's July 8 public teleconference meeting. *Written Statements:* Written statements for the June 9 public teleconference meeting should be received in the SAB Staff Office by June 5, 2008, so that the information may be made available to the CASAC Panel for its consideration prior to this teleconference. Written statements for the July 8 public teleconference meeting should be received in the SAB Staff Office by July 3, 2008, so that the information may be made available to the CASAC Panel in advance of this teleconference. Written statements should be supplied to the Mr. Butterfield electronically via e-mail (acceptable file formats: Adobe PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP/Vista format).

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Butterfield at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: April 15, 2008.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8–11606 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8570–4]

National Environmental Justice Advisory Council; Notification of Public Meeting and Public Comment

AGENCY: Environmental Protection Agency.

ACTION: Notification of Public Meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), Public Law 92–463, the U.S. Environmental Protection Agency (EPA) hereby provides notice that the National Environmental Justice Advisory Council (NEJAC) will meet on the dates and times described below. All meetings are open to the public. Members of the public are encouraged to provide comments relevant to the specific issues being considered by the NEJAC. For additional information about registering for public comment, please see **SUPPLEMENTARY INFORMATION**. Due to limited space, seating at the NEJAC meeting will be on a first-come basis.

DATES: The NEJAC meeting will convene Tuesday, June 10, 2008, from 1 p.m. to 9:30 p.m., and reconvene Wednesday, June 11, 2008, from 9 a.m. to 5 p.m., and Thursday, June 12, 2008, from 9 a.m. to 3 p.m. One public comment session relevant to the specific issues being considered by the NEJAC (see **SUPPLEMENTARY INFORMATION**) is scheduled for Tuesday evening, June 10, 2008, from 6:30 p.m. to 9:30 p.m. All noted times are Eastern Time. Members of the public who wish to participate in the public comment period are encouraged to pre-register by May 27, 2008.

ADDRESSES: The NEJAC committee meeting will be held at the Washington Court Hotel, 525 New Jersey Avenue, NW., Washington, DC, 20001, telephone 202–628–2100.

FOR FURTHER INFORMATION CONTACT: Correspondence concerning the meeting should be sent to Ms. Victoria Robinson, NEJAC Program Manager, U.S. Environmental Protection Agency, at 1200 Pennsylvania Avenue, NW., (MC2201A), Washington, DC 20460; via e-mail at *environmental-justice-epa@epa.gov*; by telephone at (202) 564–6349; or by FAX at (202) 564–1624. Additional information about the meeting is available at the Internet Web site: *http://www.epa.gov/compliance/environmentaljustice/nejac/meetings.html*.

Pre-registration for all attendees is recommended. To register online, visit the Web site above. Requests for pre-registration forms should be sent to Ms. Julianne Pardi of ICF International at: 9300 Lee Highway, Fairfax, Virginia 22031; Telephone: (703) 934–3873; E-mail: *jpardi@icfi.com*, or FAX: (703) 934–3270. Hearing-impaired individuals or non-English speaking attendees wishing to arrange for a sign language or foreign language interpreter may make appropriate arrangements using these numbers also.

SUPPLEMENTARY INFORMATION: The Charter of the NEJAC states that the advisory committee shall provide independent advice to the Administrator on areas that may include, among other things, ''advice about EPA's progress, quality and adequacy in planning, developing and implementing environmental justice strategies, projects and programs'' relating to environment justice.

The meeting shall be used to receive comments, discuss, and provide recommendations regarding four major areas: (1) Nationally consistent environmental justice screening approaches; (2) strengthening strategic partnerships with State governments to addressing environmental justice concerns; (3) ways to enhance business opportunities and commitments to social and environmental responsibility through green business and sustainability; and (4) strategies to identify, mitigate, and/or otherwise address the disproportionate burden on communities of air pollution resulting from goods movement activities.

A. Public Comment: Individuals or groups making oral presentations during the public comment period will be limited to a total time of five minutes. Only one representative of a community, an organization, or a group will be allowed to speak. Any number of written comments can be submitted for the record. The suggested format for individuals making public comment should be as follows: Name of Speaker, Name of Organization/Community, Address/Telephone/E-mail, Description of Concern and its Relationship to the policy issue(s), and Recommendations or desired outcome. Written comments received by May 27, 2008 will be included in the materials distributed to the members of the NEJAC. Written comments received after that date will be provided to the NEJAC as logistics allow. All information should be sent to the address, e-mail, or fax number listed in the CONTACT section above.

B. Information about Services for the Handicapped: Individuals requiring special accommodations at this meeting, including wheelchair access to the conference room, should contact Ms. Julianne Pardi at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation. For information about facilities or services for the handicapped or to request special assistance at the meetings, contact Ms. Pardi as soon as possible. All requests should be sent to the address, e-mail, or fax number listed in the **FOR FURTHER INFORMATION CONTACT** section above.

Dated: May 16, 2008.

Charles Lee,

Designated Federal Officer, National Environmental Justice Advisory Council.

[FR Doc. E8–11610 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8570–9]

Science Advisory Board Staff Office; Notification of Upcoming Meeting of the Science Advisory Board Ecological Processes and Effects Committee Augmented for the Advisory on EPA's Ecological Research Program Multi-Year Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office announces a public teleconference of the SAB Ecological Processes and Effects Committee Augmented for the Advisory on EPA's Ecological Research Program Multi-Year Plan (Plan). The teleconference is being held to discuss the Committee's draft advisory report.

DATES: The teleconference will be held on June 13, 2008 from 1 p.m. to 4 p.m. (Eastern Daylight Time).

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding the public teleconference may contact Dr. Thomas Armitage, Designated Federal Officer (DFO). Dr. Armitage may be contacted at the EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or via *telephone/voice mail:* (202) 343–9995; fax (202) 233–0643; or e-mail at: *armitage.thomas@epa.gov*. General information about the EPA SAB, as well as any updates concerning the teleconference announced in this notice, may be found in the SAB Web site at: *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the SAB Ecological Processes and Effects Committee Augmented for the Advisory on EPA's Ecological Research Program Multi-Year Plan will hold a public teleconference to discuss a draft advisory report on the EPA Ecological Research Program Multi-Year Plan. The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background

The EPA Office of Research and Development developed a draft Ecological Research Program Multi-Year Plan that establishes long-term and annual goals for the Agency's Ecological Research Program and discusses planned research. The Multi-Year Plan describes a new direction for the Ecological Research Program intended to fill the need for a better understanding of the implications of human impacts on ecosystems and the services they provide. The redirected Ecological Research Program builds on past research efforts in ecosystem monitoring, restoration, and functioning to develop operational methods for incorporating quantitative information on ecosystem services into decision making.

EPA's Office of Research and Development requested that the SAB provide advice on the program focus, research questions, and implementation approach articulated in the Agency's draft Ecological Research Program Multi-Year Plan. The SAB was asked to comment on:

(1) The utility of the program in offering meaningful contributions to ecological sciences and providing useful information for decision making, (2) the adequacy of the proposed goals, objectives, and research questions in meeting the overall purpose of the program, (3) the proposed implementation approach, (4) anticipated challenges to achieving the overall goal of the program, and (5) ways to measure the progress, productivity, efficiency, and effectiveness of the program.

In response to EPA's request, the SAB Ecological Processes and Effects Committee is providing advice on the Plan. To augment the expertise on the Committee the SAB Staff Office selected several SAB committee members with expertise in valuing ecosystem services to participate in this advisory activity. The Committee has previously held one face-to-face meeting (73 FR 9327). Information about the SAB Ecological Processes and Effects Committee Augmented for the Advisory on EPA's Ecological Research Program Multi-Year Plan is available on the SAB Web site at: *http://www.epa.gov/sab*.

Availability of Meeting Materials: The draft *Ecological Research Program Multi-Year Plan 2008–2014* reviewed by the SAB Committee is available on the following EPA Office of Research and Development Web site: *http://www.epa.gov/ord/npd/pdfs/ERP-MYP-complete-draft-v5.pdf.* The agenda and other material for the upcoming public teleconference will be posted on the SAB Web site at: *http://www.epa.gov/sab* in advance of the teleconference.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB Committee to consider during the advisory process. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact Dr. Armitage, DFO, in writing (preferably via e-mail) at the contact information noted above, no later than June 6, 2008 to be placed on a list of public speakers for the teleconference. *Written Statements:* Written statements should be received in the SAB Staff Office by June 6, 2008 so that the information may be made available to the SAB Committee members for their consideration. Written statements should be supplied to the DFO in the following formats: One hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Armitage at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting to give EPA as much time as possible to process your request.

Dated: May 19, 2008.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8–11609 Filed 5–22–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The 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 June 20, 2008.

A. Federal Reserve Bank of Kansas City (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Downing Partnership, L.P., Ellis, Kansas, to acquire 12.251 percent of the voting shares of Equity Bancshares, Inc., and thereby indirectly acquire voting shares of Equity Bank, N.A., both of Andover, Kansas.

Board of Governors of the Federal Reserve System, May 20, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E8–11595 Filed 5–22–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Secretary's Advisory Committee on Re-Designation of Head Start Grantees

AGENCY: U.S. Department of Health and Human Services (HHS).

ACTION: Notice; FACA Committee Meetings Announcement.

Pursuant to Public Law 92–463, the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the second meeting of the Secretary's Advisory Committee on Re-designation of Head Start Grantees, Department of Health and Human Services (HHS). The meeting will be held from approximately 8:30 a.m. to 5 p.m. on Wednesday, June 4, 2008, and from 8:30 a.m. to 5 p.m. on Thursday, June 5, 2008, at the Four Points by Sheraton, 1201 K Street, NW., Washington, DC. The meeting will be open to the public; however, seating is limited and preregistration is encouraged (see below).

FOR FURTHER INFORMATION CONTACT: Colleen Rathgeb, Office of Head Start, e-mail *colleen.rathgeb@acf.hhs.gov* or (202) 205–7378.

SUPPLEMENTARY INFORMATION: The Improving Head Start for School Readiness Act of 2007 [Pub. L. 110–134, Section 641(c)(2) [42 U.S.C. 9836]] requires the Secretary of Health and Human Services to develop a system for designation renewal to determine if Head Start agencies are delivering high-quality and comprehensive Head Start programs that meet the educational, health, nutritional, and social needs of the children and families they serve, and meet program and financial management requirements and the program performance standards. The Advisory Committee on Re-Designation of Head Start Grantees will provide advice and recommendations on the development of a transparent, reliable and valid system for designation renewal as required under the statute.

The Advisory Committee will hear presentations on and discuss the grantee application and renewal process; recommendations on prospective criteria; data sources; and plans for future work of the Committee.

The meeting will be open to the public; however, seating is limited and preregistration is encouraged. To pre-register, please e-mail *AdvisoryCommittee@pal-tech.com* with ''Meeting Registration'' in the subject line or call Tara Nordlander at 703–243–0495 by 5 p.m. EST, on June 2, 2008. Registration must include your name, affiliation, phone number, and days attending. If you require a sign language interpreter or other special assistance, please call Tara Nordlander at 703–243–0495 as soon as possible.

Written comments may be submitted electronically to *AdvisoryCommittee@pal-tech.com* with ''Public Comment'' in the subject line. HHS recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment, and it allows

HHS to contact you if further information on the substance of the comment is needed or if your comment cannot be read due to technical difficulties. HHS's policy is that HHS will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment placed in the official public record. If HHS cannot read your comment because of technical difficulties and cannot contact you for clarification, HHS may not be able to consider your comment. Written comments to be available at the meeting will be accepted up to Friday, May 30, 2008.

Documents pertaining to Committee deliberations will be available upon written request beginning on June 9, 2008. Requests should be sent to *AdvisoryCommittee@pal-tech.com* with ''Materials Request'' in the subject line and should include include your name, mailing address, and an e-mail address or other contact information.

Because of the Advisory Committee's full agenda and the timeframe in which to cover the agenda topics, there will be no opportunity for oral presentations from the public at this meeting. The public will be able to submit comments to *AdvisoryCommittee@pal-tech.com* both before and after the meeting; these will be included in the public record.

Dated: May 15, 2008.

Daniel Schneider,

Acting Assistant Secretary for Children and Families.

[FR Doc. E8–11552 Filed 5–22–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control; Special Emphasis Panel (SEP): Associations of Vaccine Adverse Events and Human Genetic Variations, Request for Proposal Number (RFP) 2008–R–VAC01

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 12 p.m.–2 p.m., June 12, 2008 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of proposals received in response to ''Associations of Vaccine Adverse Events and Human Genetic Variations, Request for Proposal (RFP) Number 2008–R–VAC01.''

Contact Person for More Information: Christine J. Morrison, PhD, Scientific Review Administrator, CDC, 1600 Clifton Road, NE., Mailstop D72, Atlanta, GA 30333, Telephone: (404) 639–3098.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 16, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–11589 Filed 5–22–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–138, CMS–10147, CMS–10146 and CMS–10064]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections 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.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicare Geographic Classification Review Board (MGCRB) Procedures and Criteria and Supporting Regulations in 42 CFR 412.256 & 412.230; *Use:* Section 1886(d)(10) of the Social Security Act established the MGCRB, an entity that has the authority to accept short-term hospital inpatient prospective payment system (IPPS) hospital applications requesting geographic reclassification for wage index or standardized payment amounts and to issue decisions on these requests. Since it is important to ensure the accuracy of the MGCRB decisions and remain apprised of potential payment impacts, the regulations note that CMS should also receive a copy of any hospital's application to the MGCRB. The information submitted by the hospitals is used by CMS staff to determine the validity of the hospitals' requests and the discretion used by the MGCRB in reviewing and making decisions regarding hospitals' requests for geographic reclassification. Since CMS wrote the guidelines for the MGCRB, it is essential that CMS staff monitor this process. *Form Number:* CMS–R–138 (OMB# 0938–0573); *Frequency:* Yearly; *Affected Public:* Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 300; *Total Annual Responses:* 300; *Total Annual Hours:* 300.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicare Prescription Drug Coverage and Your Rights; *Use:* Section 42 CFR 423.562, requires each Part D plan sponsor to arrange with its network pharmacies to post or distribute the Medicare Prescription Drug Coverage and Your Rights notice to Part D plan enrollees at each pharmacy visit when the enrollee disagrees with the information provided by the pharmacist. The purpose of this notice is to provide enrollees with information about how to contact their Part D plans to request a coverage determination, including a request for an exception to the Part D plan's formulary. *Form Number:* CMS 10147 (OMB# 0938–0975); *Frequency:* Daily; *Affected Public:* Business or other for-profits; *Number of Respondents:* 40,000; *Total Annual Responses:* 30,000,000; *Total Annual Hours:* 500,000.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Notice of Denial of Medicare Prescription Drug Coverage; *Use:* Section 1860D–4(g)(1) of the Social Security Act, requires Part D plan sponsors that deny prescription drug coverage to provide a written notice of the denial to the enrollee. The written

notice must include a statement, in clear language, of the reasons for the denial and a description of the appeals process. *Form Number:* CMS 10146 (OMB# 0938–0976); *Frequency:* Daily; *Affected Public:* Business or other for-profits; *Number of Respondents:* 758; *Total Annual Responses:* 290,344; *Total Annual Hours:* 145,172.

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Minimum Data Set (MDS) for Swing Bed Hospitals and Supporting Regulations in 42 CFR 413.114(a)(2) and 413.343(a); *Use:* Exercising CMS' authority under section 1888(e)(7) of the Social Security Act to determine the most appropriate manner in which to implement the Skilled Nursing Facility Prospective Payment System (SNF PPS) for swing bed hospitals, CMS designed a 2-page MDS instrument for use by swing bed hospitals that includes all resident assessment data needed to reimburse swing bed hospitals for SNF-level care furnished to Medicare beneficiaries and to provide CMS with the basic demographic and utilization data for future planning and analysis. *Form Number:* CMS–10064 (OMB# 0938–0872); *Frequency:* Occasionally; *Affected Public:* Business or other for-profits, not-for-profit institutions and State, Local, or Tribal Governments; *Number of Respondents:* 481; *Total Annual Responses:* 50,505; *Total Annual Hours:* 328,283.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *July 22, 2008:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov*. Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, *Attention:* Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: May 15, 2008.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E8–11386 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–211, CMS–10258, CMS–209, CMS–10259, CMS–R–266, and CMS–R–306]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections 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 function; (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.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Model Application Template for State Child Health Plan Under Title XXI of the Social Security Act, State Children's Health Insurance Program, Instructions for Model Application Template; *Use:* States are required to submit Title XXI plans and amendments for approval by the Secretary pursuant to section 2102 of the Social Security Act in order to receive funds for initiating and expanding health insurance coverage for uninsured children. The model application template is used to assist States in submitting a State Child Health Plan and amendments to that plan. *Form Number:* CMS–R–211 (OMB# 0938–0707); *Frequency:* Yearly and occasionally; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 40; *Total Annual Hours:* 3,200.

2. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Survey of State Medicaid Agencies: Innovative Approaches to Collecting Citizenship Documentation; *Use:* The purpose of the survey is to collect information from State Medicaid agencies on innovative approaches used to collect citizenship documentation from Medicaid applicants and recipients. Prior to the Deficit Reduction Act of 2005 (DRA), Medicaid applicants could self-attest to citizenship. As of July 1, 2006, applicants and recipients are required to provide original documentation of citizenship. For some states, this new requirement is challenging because there has been a general movement towards virtual applications by phone, mail, or online submission. CMS is using this survey to identify innovative ways that states have taken advantage of existing information within the state system such as matching data, forming unique partnerships, or holding training sessions to facilitate effective and efficient collection of citizenship documentation. CMS will use the information collected with the survey to compile a snapshot of the innovative and unique approaches states are employing to meet the citizenship documentation requirements of the DRA. The results will be incorporated into a final comprehensive report that will be used as an outreach tool that will then be distributed to states. *Form Number:* CMS–10258 (OMB# 0938–NEW); *Frequency:* Once; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 100; *Total Annual Responses:* 100; *Total Annual Hours:* 25.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Laboratory Personnel Report (CLIA) and Supporting Regulations in 42 CFR 493.1—493.2001; *Use:* This form is used by the State agency to determine a laboratory's compliance with personnel qualifications under CLIA. This information is needed for a laboratory's CLIA certification and recertification. *Form Number:* CMS–209 (OMB# 0938–0151); *Frequency:* Biennially; *Affected Public:* Private Sector: Business or other

for-profits, not-for-profit institutions; State, Local or Tribal Governments; and Federal Government. *Number of Respondents:* 21,000; *Total Annual Responses:* 10,500; *Total Annual Hours:* 5,248.

4. *Type of Information Collection Request:* New collection; *Title of Information Collection:* State Plan Amendment template for 1915(i) State Plan Home and Community-Based Services (HCBS) Benefit; *Use:* Section 6086 of the Deficit Reduction Act (DRA), expanded access to HCBS for the elderly and disabled and added a new section 1915(i) to the Social Security Act. Under 1915(i), States can amend their State plans to add these services. The template includes the information needed by CMS to determine whether the State's services will meet the requirements under 1915(i). *Form Number:* CMS–10259 (OMB# 0938–NEW); *Frequency:* Once; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 3; *Total Annual Hours:* 240.

5. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Disproportionate Share Hospital Annual Reporting; *Use:* Section 1923(j)(i) of the Social Security Act requires States to submit an annual report that identifies each disproportionate share hospital (DSH) that received a DSH payment under the State's Medicaid program in the preceding fiscal year and the amount of DSH payments paid to that hospital in the same year and such other information as the Secretary determines necessary to ensure the appropriateness of DSH payments. The information supplied will satisfy the requirements under section 1923(a)(2)(D) of the Act as well. *Form Number:* CMS–R–266 (OMB# 0938–0746); *Frequency:* Yearly; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 52; *Total Annual Responses:* 52; *Total Annual Hours:* 1976.

6. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Use of Restraint and Seclusion in Psychiatric Residential Treatment Facilities (PRTFs) for Individuals Under Age 21; *Use:* PRTFs are required to report deaths, serious injuries and attempted suicides to the State Medicaid Agency and the Protection and Advocacy Organization. They are also required to provide residents the restraint and seclusion policy in writing, and to document in the residents' records all activities involving the use of restraint and seclusion. *Form Number:* CMS–R–306 (OMB# 0938–0833); *Frequency:* Annually; *Affected Public:* Private Sector: Business or other for-profits; *Number of Respondents:* 500; *Total Annual Responses:* 329,500; *Total Annual Hours:* 501,750.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on June 23, 2008: OMB Human Resources and Housing Branch, Attention: Carolyn Raffaelli, New Executive Office Building, Room 10235, Washington, DC 20503, Fax Number: (202) 395–6974.

Dated: May 14, 2008.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. E8–11397 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[CMS–2896–PN]

Medicare and Medicaid Programs; The Joint Commission for Continued Deeming Authority for Critical Access Hospitals

AGENCY: Centers for Medicare and Medicaid Services, HHS.

ACTION: Proposed notice.

SUMMARY: This proposed notice with comment period acknowledges the receipt of a deeming application from the Joint Commission for continued recognition as a national accrediting organization for critical access hospitals (CAHs) that wish to participate in the Medicare or Medicaid programs. Section 1865(b)(3)(A) of the Social Security Act requires that within 60 days of receipt of an organization's complete application, we publish a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 23, 2008.

ADDRESSES: In commenting, please refer to file code CMS–2896–PN. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically*. You may submit electronic comments on specific issues in this regulation to *http://www.regulations.gov*. Follow the instructions for ''Comment of Submission'' and enter the filecode to find the document accepting comments.

2. *By regular mail*. You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2896–PN, P.O. Box , Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail*. You may send written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2896–PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier*. If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses:

a. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

If you intend to deliver your comments to the Baltimore address, please call (410) 786–7195 in advance to schedule your arrival with one of our staff members.

b. 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments mailed to the addresses indicated as appropriate for hand or

courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Cindy Melanson, (410) 786–0310. Patricia Chmielewski, (410) 786–6899.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov. Follow the search instructions* on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a CAH provided certain requirements are met. Sections 1820(c)(2)(B) and 1861(mm) of the Social Security Act (the Act) establish distinct criteria for facilities seeking designation as a CAH. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 485, subpart F specify the conditions that a CAH must meet in order to participate in the Medicare program, and the scope of covered services. The conditions for Medicare payment for CAHs are set out at § 413.70.

Generally, in order to enter into a provider agreement with the Medicare program, a CAH must first be certified by a State survey agency as complying with the conditions or requirements set forth in part 482 and part 485, subpart F of CMS regulations. Thereafter, the CAH is subject to regular surveys by a State survey agency to determine whether it continues to meet these requirements. There is an alternative, however, to surveys by State agencies.

Section 1865(b)(1) of the Act provides that, if a provider entity demonstrates through accreditation by an approved national accrediting organization that all applicable Medicare conditions are met or exceeded, CMS shall deem those provider entities as having met the requirements. Accreditation by an accrediting organization is voluntary and is not required for Medicare participation.

If an accrediting organization is recognized by the Secretary as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare conditions. A national accrediting organization applying for deeming authority under part 488, subpart A, must provide us with reasonable assurance that the accrediting organization requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the reapproval of accrediting organizations are set forth at §§ 488.4 and 488.8(d)(3). The regulations at § 488.8(d)(3) require accrediting organizations to reapply for continued deeming authority every 6 years or sooner as determined by CMS.

The Joint Commission's term of approval as a recognized accreditation program for CAHs expires November 21, 2008.

II. Approval of Deeming Organizations

Section 1865(b)(2) of the Act and our regulations at § 488.8(a) require that our findings concerning review and reapproval of a national accrediting organization's requirements consider, among other factors, the applying accrediting organization's: Requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data for validation.

Section 1865(b)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice identifying the national accrediting body making the request, describing the nature of the request, and providing at least a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of the Joint Commission's request for continued deeming authority for CAHs. This notice also solicits public comment on whether the Joint Commission's requirements meet or exceed the Medicare conditions for participation for CAHs.

III. Evaluation of Deeming Authority Request

The Joint Commission submitted all the necessary materials to enable us to make a determination concerning its request for reapproval as a deeming organization for CAHs. This application was determined to be complete on March 28, 2008. Under section 1865(b)(2) of the Act and our regulations at § 488.8 (Federal review of accrediting organizations), our review and evaluation of the Joint Commission will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of the Joint Commission's standards for a CAH as compared with CMS' CAH conditions of participation.
- The Joint Commission's survey process to determine the following:

—The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

—The comparability of the Joint Commission's processes to those of State agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

—The Joint Commission's processes and procedures for monitoring CAHs found out of compliance with the Joint Commission's program requirements. These monitoring procedures are used only when the Joint Commission identifies noncompliance. If noncompliance is identified through validation reviews or complaint surveys, the State survey agency monitors corrections as specified at § 488.7(d).

—The Joint Commission's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

—The Joint Commission's capacity to provide us with electronic data in ASCII comparable code, and reports necessary for effective validation and assessment of the organization's survey process.

—The adequacy of the Joint Commission's staff and other resources, and its financial viability.

—The Joint Commission's capacity to adequately fund required surveys.

—The Joint Commission's policies with respect to whether surveys are announced or unannounced, to assure that surveys are unannounced.
—The Joint Commission's agreement to provide us with a copy of the most current accreditation survey together with any other information related to the survey as we may require (including corrective action plans).

IV. Response to Public Comments and Notice Upon Completion of Evaluation

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Upon completion of our evaluation, including evaluation of comments received as a result of this notice, we will publish a final notice in the **Federal Register** announcing the result of our evaluation.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

VI. Regulatory Impact Statement

In accordance with the provisions of Executive Order 12866 (September 1993, Regulatory Planning and Review, the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354)), the Office of Management and Budget did not review this proposed notice.

In accordance with Executive Order 13132, we have determined that this proposed notice would not have a significant effect on the rights of States, local or tribal governments.

Authority: Section 1865 of the Social Security Act (42 U.S.C. 1395bb).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 1, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. E8–10776 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[CMS–2224–N]

RIN 0938–ZA98

Medicare, Medicaid, and CLIA Programs; Continuing Approval of AABB (Formerly the American Association of Blood Banks as a CLIA Accreditation Organization

AGENCY: Centers for Medicare and Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: In this notice, we reapprove and grant AABB (formerly known as the American Association of Blood Banks) deeming authority as an accrediting organization for clinical laboratories under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) program. This deeming authority is granted to AABB for the Blood Bank and Transfusion Service (BB/TS) accreditation program and the Immunohematology Reference Laboratory (IRL) Program.

DATES: *Effective Date:* This notice is effective from May 23, 2008 to May 23, 2014.

FOR FURTHER INFORMATION CONTACT: Daralyn Hassan, (410) 786–9360.

SUPPLEMENTARY INFORMATION:

I. Background and Legislative Authority

On October 31, 1988, the Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA), Public Law 100–578. CLIA replaced in its entirety, section 353(e)(2) of the Public Health Service Act, as enacted by the Clinical Laboratory Improvement Act of 1967. We issued a final rule implementing the accreditation provisions of CLIA on July 31, 1992 (57 FR 33992). Under the CLIA program, CMS may grant deeming authority to an accreditation organization that accredits clinical laboratories if the organization meets certain requirements. An organization's requirements for accredited laboratories must be equal to, or more stringent than, the applicable CLIA program requirements in 42 CFR part 493 (Laboratory Requirements). The regulations in subpart E (Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program) specify the requirements an accreditation organization must meet to be an approved accreditation organization. We approve an accreditation organization for a period not to exceed 6 years.

In general, the approved accreditation organization must:

- Use inspectors qualified to evaluate laboratory performance and agree to inspect laboratories at the frequency determined by CMS.
- Apply standards and criteria that are equal to, or more stringent than, those condition-level requirements established by CMS.
- Assure that laboratories accredited by the accreditation organization continually meet these standards and criteria.
- Provide us with the name of any laboratory that has had its accreditation denied, suspended, withdrawn, limited, or revoked within 30 days of the action taken.
- Notify us at least 30 days before implementing any proposed changes in its standards.
- If we withdraw our approval, notify the accredited laboratories of the withdrawal within 10 days of the withdrawal.

CLIA requires that we perform an annual evaluation of approved accreditation organizations by inspecting a representative sample of laboratories accredited by an approved accreditation organization as well as by any other means that we determine to be appropriate.

II. Notice of Approval of AABB as an Accreditation Organization

In this notice, we approve AABB as an organization that may accredit laboratories for purposes of establishing their compliance with CLIA requirements. We have examined the AABB application and all subsequent submissions to determine equivalency with our requirements under subpart E of part 493 that an accreditation organization must meet to be approved under CLIA. We have determined that AABB complies with the applicable CLIA requirements and grant AABB approval as an accreditation organization under subpart E, as for the period stated in the ''Effective Date'' section of this notice for the following specialty and subspecialty areas:

- Microbiology, including Bacteriology, Virology.
- Diagnostic Immunology, including Syphilis Serology, General Immunology.
- Chemistry, including Routine Chemistry, Urinalysis, Toxicology.
- Hematology.
- Immunohematology, including ABO Group and Rh Group, Antibody Detection, Antibody Identification, Compatibility Testing.

As a result of this determination, any laboratory that is accredited by AABB during the effective time period for an approved specialty or subspecialty is deemed to meet the CLIA requirements for the laboratories found in part 493 of our regulations and, therefore, is not subject to routine inspection by a State survey agency to determine its compliance with CLIA requirements. The accredited laboratory, however, is subject to validation and complaint investigation surveys performed by us, or by any other validly authorized agent.

III. Evaluation of AABB Request for Approval as an Accreditation Organization Under CLIA

The following describes the process used to determine that requirements of the AABB accreditation program are equal to or more stringent than the CLIA condition level requirements, and that AABB has met the requirements of subpart E of 42 CFR part 493.

AABB formally reapplied to us for approval as an accreditation organization under CLIA for the following specialties and subspecialties:

- Microbiology, including Bacteriology, Virology.
- Diagnostic Immunology, including Syphilis Serology, General Immunology.
- Chemistry, including Routine Chemistry, Urinalysis, Toxicology.
- Hematology.
- Immunohematology, including ABO Group and Rh Group, Antibody Detection, Antibody Identification, Compatibility Testing.

We evaluated the AABB application to determine compliance with our implementing and enforcement regulations, and the deeming/exemption requirements of the CLIA rules.

We verified that the AABB BB/TS and IRL accreditation program requirements and methods require the laboratories it accredits to be, and that the organization is, in compliance with the following subparts of part 493 as explained below:

Subpart E—Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program

AABB submitted the specialties and subspecialties that it would accredit; a comparison of its accreditation requirements to CLIA condition level requirements; a description of its inspection process and its proficiency testing (PT) monitoring process; its data management and analysis system; a listing of the size, composition, education and experience of its inspection teams; its investigative and complaint response procedures; its notification agreements with CMS; its procedures for removing or withdrawing laboratory accreditation; its current list of accredited laboratories; and its announced or unannounced inspection process.

AABB has additional requirements pertaining to waived testing. AABB will routinely inspect laboratories that perform waived tests that are normally associated with blood centers and transfusion services. These laboratories will be inspected to verify that tests are performed according to manufacturer's instructions. In addition, AABB requires that there be appropriately qualified personnel—that is a director, a supervisor, and testing personnel for waived testing. Section 493.15 of the CLIA regulations requires only that a laboratory follow manufacturer's instructions and does not require routine inspections of waived testing. Thus the requirements of AABB are more stringent than the requirements of the CLIA regulations.

Subpart H—Participation in Proficiency Testing for Laboratories Performing Nonwaived Testing

AABB's requirements are equal to the CLIA requirements at § 493.801 through § 493.865. Both CLIA regulations and AABB standards require accredited laboratories to participate in a CMS-approved proficiency testing (PT) program for any of the tests listed in subpart I. Additionally, AABB administers a non-regulated PT program to challenge the ability of the labs in the IRL program to resolve complex serological problems.

Subpart J—Facility Administration for Nonwaived Testing

AABB requirements are equal to or more stringent than the CLIA requirements at § 493.1100 through § 493.1105. The following specific AABB requirements are more stringent than the requirements of the CLIA regulations:

- AABB's record-keeping requirements are more extensive and detailed than the CLIA requirements. For example, AABB requires laboratories to retain quality assessment records for 5 years, while the CLIA regulations require laboratories to retain those records for only 2 years.
- The IRL standards require laboratories to maintain an extensive inventory of rare reagents for resolving complex serological problems.

Subpart K— Quality System for Nonwaived Testing

The quality control requirements of AABB have been evaluated against the requirements of the CLIA regulations. AABB, like CLIA, uses a quality system approach in its requirements for laboratories. AABB inspectors use detailed checklists to ensure that compliance with specific CLIA requirements is met. AABB requirements are equal to the CLIA requirements at § 493.1200 through § 493.1299.

Subpart M—Personnel for Nonwaived Testing

AABB uses the criteria identified in the CLIA regulations at §§ 493.1441, 493.1447, 493.1453, 493.1459, and 493.1487 (applicable to laboratories performing high-complexity testing). A qualified individual must fulfill the responsibilities of each required position in the laboratory. The laboratory director and laboratory personnel must meet educational and experience requirements. Although certain duties of the laboratory director may be delegated to qualified individuals, the laboratory director remains ultimately responsible.

Subpart Q—Inspections

We have determined that the AABB requirements are equal to the CLIA requirements at § 493.1771 through § 493.1780. AABB will continue to perform onsite inspections every 2 years.

Subpart R—Enforcement Procedures

AABB meets the requirements of subpart R to the extent that it applies to accreditation organizations. AABB policy sets forth the actions the organization takes when laboratories it accredits do not comply with its requirements and standards for accreditation. When appropriate, AABB will deny, suspend, or revoke accreditation in a laboratory accredited by AABB and report that action to us within 30 days. AABB also provides an appeal process for laboratories that have had accreditation denied, suspended, or revoked.

We have determined that AABB's laboratory enforcement and appeal policies are equal to the requirements of part 493 subpart R as they apply to accreditation organizations.

IV. Federal Validation Inspections and Continuing Oversight

The Federal validation inspections of AABB accredited laboratories may be conducted on a representative sample basis or in response to substantial allegations of noncompliance (that is, complaint inspections). The outcome of those validation inspections, performed by CMS or our agents, the State survey agencies, will be our principal means

for verifying that the laboratories accredited by AABB remain in compliance with CLIA requirements. This Federal monitoring is an ongoing process.

V. Removal of Approval as an Accrediting Organization

Our regulations provide that we may rescind the approval of an accreditation organization, such as that of AABB, for cause, before the end of the effective date of approval. If we determine that AABB failed to adopt requirements that are equal to, or more stringent than, the CLIA requirements, or that systemic problems exist in its inspection process, we may give it a probationary period, not to exceed 1 year, to allow AABB to adopt comparable requirements.

Should circumstances result in our withdrawal of the AABB's approval, we will publish a notice in the **Federal Register** explaining the basis for removing its approval.

VI. Collection of Information Requirements

This notice does not impose any information collection and record keeping requirements subject to the Paperwork Reduction Act (PRA). Consequently, it does not need to be reviewed by the Office of Management and Budget (OMB) under the authority of the PRA. The requirements associated with the accreditation process for clinical laboratories under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) program, codified in 42 CFR part 493, subpart E, are currently approved by OMB under OMB approval number 0938–0686.

Authority: Section 353 of the Public Health Service Act (42 U.S.C. 263a).

Dated: April 11, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. E8–10769 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–7009–N]

Medicare Program; Announcement of Meeting of the Advisory Panel on Medicare Education, June 26, 2008

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces a meeting of Advisory Panel on Medicare Education (the Panel). The Panel advises and makes recommendations to the Secretary of Health and Human Services and the Administrator of the Centers for Medicare & Medicaid Services on the effectiveness of consumer education strategies concerning the Medicare program. This meeting is open to the public.

DATES: *Meeting Date:* June 26, 2008 from 9 a.m. to 3:30 p.m., d.s.t.

Deadline for Meeting Registration, Presentations and Comments: June 19, 2008, 12 noon, d.s.t.

Deadline for Requesting Special Accommodations: June 12, 2008, 12 noon, d.s.t.

ADDRESSES: *Meeting Location:* Four Points Hotel, 1201 K Street, NW., Washington, DC 20005, (202) 349–2205.

Meeting Registration, Presentations, and Written Comments: Lynne Johnson, Designated Federal Official, Division of Forum and Conference Development, Office of External Affairs, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mailstop S1–05–06, Baltimore, MD 21244–1850 or contact Ms. Johnson via e-mail at *Lynne.Johnson@cms.hhs.gov.*

Registration: The meeting is open to the public, but attendance is limited to the space available. Persons wishing to attend this meeting must register by contacting Lynne Johnson at the address listed in the **ADDRESSES** section of this notice or by telephone at (410) 786–0090, by the date listed in the **DATES** section of this notice.

FOR FURTHER INFORMATION CONTACT: Lynne Johnson, (410) 786–0090. Please refer to the CMS Advisory Committees' Information Line (1–877–449–5659 toll free)/(410–786–9379 local) or the Internet (*http://www.cms.hhs.gov/FACA/04_APME.asp*) for additional information and updates on committee activities. Press inquiries are handled through the CMS Press Office at (202) 690–6145.

SUPPLEMENTARY INFORMATION: Section 9(a)(2) of the Federal Advisory Committee Act authorizes the Secretary of Health and Human Services (the Secretary) to establish an advisory panel if the Secretary determines that the panel is ''in the public interest in connection with the performance of duties imposed * * * by law.'' Such duties are imposed by section 1804 of the Social Security Act (the Act), requiring the Secretary to provide informational materials to Medicare beneficiaries about the Medicare program, and section 1851(d) of the Act, requiring the Secretary to provide for ''activities * * * to broadly disseminate information to [M]edicare beneficiaries * * * on the coverage options provided under [Medicare Advantage] in order to promote an active, informed selection among such options.''

The Panel is also authorized by 1114(f) of the Act (42 U.S.C. 1311(f)) and section 222 of the Public Health Service Act (42 U.S.C. 217a). The Secretary signed the charter establishing this Panel on January 21, 1999 and approved the renewal of the charter on November 14, 2006. The establishment of the charter and the renewal of the charter were announced in the February 17, 1999 **Federal Register** (64 FR 7899), and the March 23, 2007 **Federal Register** (72 FR 13796), respectively. The Panel advises and makes recommendations to the Secretary and the Administrator of the Centers for Medicare & Medicaid Services (CMS) on opportunities to enhance the effectiveness of consumer education strategies concerning the Medicare program. The Secretary delegates authority to the Administrator.

The goals of the Panel are as follows:

- To provide recommendations on the development and implementation of a national Medicare education program that describes the options for selecting a health plan and prescription drug plan under Medicare.
- To enhance the Federal government's effectiveness in informing the Medicare consumer, including the appropriate use of public-private partnerships.
- To provide recommendations on how to expand outreach to vulnerable and underserved communities, including racial and ethnic minorities, in the context of a national Medicare education program.
- To assemble an information base of best practices for helping consumers evaluate health plan options and build a community infrastructure for information, counseling, and assistance.

The current members of the Panel are: Anita B. Boles, Executive Director, Society for the Arts in Healthcare; Gwendolyn T. Bronson, SHINE/SHIP Counselor, Massachusetts SHINE Program; Dr. Yanira Cruz, President and Chief Executive Officer, National Hispanic Council on Aging; Clayton Fong, President and Chief Executive Officer, National Asian Pacific Center on Aging; Nan Kirsten-Forte, Executive Vice President, Consumer Services, WebMD; Dr. Jessie C. Gruman, President and Chief Executive Officer, Center for the Advancement of Health; Dr. David Lansky, PhD., President and Chief

Executive Officer, Pacific Business Group on Health; Dr. Daniel Lyons, Senior Vice President, Government Programs, Independence Blue Cross; Dr. Frank B. McArdle, Manager, Hewitt Research Office, Hewitt Associates; Traci McClellan, J.D., Executive Director, National Indian Council on Aging; Dr. Keith Mueller, Professor and Section Head, Health Services Research and Rural Health Policy, University of Nebraska; Lee Partridge, Senior Health Policy Advisor, National Partnership for Women and Families; Gary A. Puckrein, PhD., President and Chief Executive Officer, National Minority Quality Forum; Rebecca Snead, Executive Vice President and Chief Executive Officer, National Alliance of State Pharmacy Associations; William A. Steel, Past President, The National Grange; Marvin Tuttle, Jr., CAE, Executive Director and Chief Executive Officer, Financial Planning Association; Catherine Valenti, Consultant, American Academy of HIV Medicine; and Grant Wedner, Vice President, Partnerships and Corporate Development, Daily Strength, Inc.

The agenda for the June 26, 2008 meeting will include the following:

- Recap of the previous (March 11, 2008) meeting.
- Medicare Outreach and Education Strategies.
- Public Comment.
- Listening Session with CMS Leadership.
- Next Steps.

Individuals or organizations that wish to make a 5-minute oral presentation on an agenda topic should submit a written copy of the oral presentation to Lynne Johnson at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice. The number of oral presentations may be limited by the time available. Individuals not wishing to make a presentation may submit written comments to Ms. Johnson at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

Individuals requiring sign language interpretation or other special accommodations should contact Ms. Johnson at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

Authority: Sec. 222 of the Public Health Service Act (42 U.S.C. 217a) and sec. 10(a) of Pub. L. 92–463 (5 U.S.C. App. 2, sec. 10(a) and 41 CFR 102–3).

(Catalog of Federal Domestic Assistance Program No. 93.733, Medicare—Hospital Insurance Program; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 23, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. E8–10778 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2273–N2 and CMS–2265–N]

RIN 0938–AO99 and 0938–APO7

State Children's Health Insurance Program (SCHIP); Retrospective Adjustment for Additional Allotments To Eliminate Fiscal Year (FY) 2007 Funding Shortfalls; Final SCHIP Allotments for FYs 2008 and 2009; Redistribution of Unused SCHIP FY 2005 Allotments To Eliminate FY 2008 Funding Shortfalls; Additional Allotments To Eliminate FY 2008 Funding Shortfalls; and Provisions for Continued Authority for Qualifying States To Use a Portion of Certain SCHIP Funds for Medicaid Expenditures

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice describes the implementation of certain funding provisions under title XXI of the Social Security Act (SCHIP) as amended by the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), (Pub. L. 110–173), and other related SCHIP legislation. These funding provisions include: The retrospective adjustment of the additional allotments to eliminate fiscal year (FY) 2007 SCHIP funding shortfalls; the final FYs 2008 and 2009 SCHIP allotments; the redistribution of the amounts of States' unused FY 2005 allotments to eliminate FY 2008 SCHIP funding shortfalls; the provision of additional allotments to eliminate FY 2008 SCHIP funding shortfalls; and the provision for ''qualifying States'' to elect to use a portion of their available SCHIP allotments as increased Federal matching funds for certain expenditures in their Medicaid programs under title XIX of the Act.

DATES: *Effective Date*: This notice is effective on June 23, 2008. The allotments set forth in this notice are available for expenditures on or after the start of the identified fiscal year to which they pertain.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

SUPPLEMENTARY INFORMATION

I. Background

A. Availability and Redistribution of SCHIP Fiscal Year Allotments

Title XXI of the Social Security Act (the Act) sets forth the State Children's Health Insurance Program (SCHIP) to enable States, the District of Columbia, and specified Commonwealths and Territories to initiate and expand health insurance coverage to uninsured, low-income children. The 50 States, the District of Columbia, and the Commonwealths and Territories may implement the SCHIP through a separate child health program under title XXI of the Act, an expanded Medicaid program under Title XIX of the Act, or a combination of both.

Federal funds appropriated for Title XXI are limited, and the law specifies a formula to divide the total annual appropriation into individual allotments available for each State, the District of Columbia, and each U.S. Territory and Commonwealth with an approved child health plan.

Section 2104(b) of the Act requires States, the District of Columbia, and U.S. Territories and Commonwealths to have an approved child health plan for the fiscal year in order for the Secretary to provide an allotment for that fiscal year.

Section 2104(e) of the Act specifies that in general the SCHIP allotments for a Federal fiscal year are available for payment to States for their expenditures under an approved State child health plan for an initial 3-fiscal year period of availability, including the fiscal year for which the allotment was provided. Section 2104(f) of the Act specifies that in general the amounts of States' allotments which are not expended during the initial 3-year period of availability are to be redistributed to those States that have fully spent these fiscal year allotments during this period of availability in accordance with an appropriate procedure determined by the Secretary. Furthermore, section 2104(e) of the Act specifies that the amounts of the redistributed allotments continue to be available for expenditure by the States receiving these redistributions to the end of the fiscal year in which these funds are redistributed.

B. Enactment of the National Institutes of Health Reform Act, the U.S. Troop Readiness, Veteran's Care, Katrina Recovery, and Iraq Accountability Appropriations Act, and Special Rules for Addressing FY 2007 SCHIP Funding Shortfalls

Under section 2104(e) and (f) of the Act, in general any unexpended SCHIP allotments remaining following the end of the initial 3-year period of availability would otherwise be redistributed in accordance with an appropriate procedure determined by the Secretary. However, section 201(a) of the National Institutes of Health Reform Act of 2006 (NIHRA) (Pub. L. 109–482, enacted on January 15, 2007) amended the SCHIP statute to add a new section 2104(h) of the Act. This legislation provided for special rules to address States' FY 2007 SCHIP funding shortfalls. Specifically, in order to address States' FY 2007 SCHIP funding shortfalls, section 2104(h)(*1*) of the Act provided for the redistribution in FY 2007 of the unexpended FY 2004 allotments remaining at the end of FY 2006. Furthermore, section 2104(h)(*2*) of the Act provided for the redistribution in months after March 31, 2007 of certain amounts of unexpended FY 2005 allotments. On May 29, 2007, we published a notice in the **Federal Register** (72 FR 29502) describing the implementation of section 201(a) of the NIHRA and containing the amounts of the States' redistributed FY 2004 and FY 2005 allotments, determined in accordance with the NIHRA legislation.

In accordance with the methodology established under NIHRA, the amounts of the States' projected FY 2007 shortfalls, and the associated FY 2004 and FY 2005 redistributed allotments, were determined on a monthly basis to address the FY 2007 shortfalls. Since the total amounts of the FY 2004 and FY 2005 allotments available for redistribution were limited (to about $146.9 million and $137.8 million, respectively), the total FY 2007 shortfalls for the 6 States receiving the redistributions were not fully addressed. The total amounts of the FY 2004 and FY 2005 redistributed allotments that were provided to the six recipient States were only sufficient to address the States' FY 2007 shortfalls experienced through May 2007. These amounts were not sufficient to cover the States' remaining FY 2007 shortfalls occurring in months after May 2007; nor were these amounts sufficient to address other States' FY 2007 projected shortfalls occurring after May 2007.

On May 29, 2007, the U.S. Troop Readiness, Veteran's Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (UTRA), (Pub. L. 110–28) was enacted; in particular, title VII of this law amended section 2104(h) of the Act (as amended by NIHRA), to provide for additional allotment amounts to fund States' remaining SCHIP funding shortfalls in FY 2007.

Under paragraph 2104(h)(7) of the Act as amended by the NIHRA, the special rules for the redistribution of the unexpended FY 2004 and FY 2005 allotments in FY 2007 to address FY 2007 SCHIP funding shortfalls apply only to a State that receives an allotment for FY 2007 under section 2104(b) of the Act. Under section 2104(b) of the Act, allotments are made only to the 50 States and the District of Columbia. Therefore, section 2104(h) of the Act, as amended by NIHRA and as further amended by UTRA, does not apply to the Commonwealths and Territories, which received SCHIP allotments for FY 2007 under the authority of section 2104(*c*) of the Act. Accordingly, unless otherwise indicated in this notice, in referring to the redistribution of the FY 2004 and FY 2005 allotments or the additional allotments for eliminating FY 2007 shortfalls, the term ''State'' means only the 50 States and the District of Columbia, as applicable.

On December 19, 2007 we published a notice in the **Federal Register** (72 FR 71915) which indicated the amounts of States' additional allotments to eliminate SCHIP funding shortfalls in FY 2007. These additional allotments were determined based on the most recent data available prior to the end of FY 2007. As indicated in that notice, under section 2104(h)(5) of the Act a retrospective adjustment may be applied with respect to the amounts of the redistributions and additional shortfall allotments the States' received in FY 2007 to eliminate the FY 2007 shortfalls based on States' actual FY 2007 SCHIP-related expenditures reported no later than November 30, 2007. Section II of this notice contains the final additional FY 2007 shortfall allotments determined based on the retrospective adjustment provision of section 2104(h)(5) of the Act.

C. Enactment of Continuing Appropriations and Medicare, Medicaid, and SCHIP Extension Act of 2007

The continuing appropriation legislation enacted on September 29, 2007 (Pub. L. 110–92) contained provisions to extend funding under the SCHIP through November 16, 2007. In particular, section 136(a) of Public Law 110–92 appropriated $5 billion for the purposes of providing FY 2008 allotments to the 50 States, the District of Columbia, and the Commonwealths and Territories. Additionally, $40 million was appropriated by this section to provide additional allotments to the Commonwealths and Territories in FY 2008. Section 136(b) of Public Law 110–92 provided that the FY 2008 allotments be determined in accordance with the same methodology as previous SCHIP fiscal year allotments were determined. Section 136(c) of Public Law 110–92 amended the SCHIP statute to add a new section 2104(i) of the Act to provide for the redistribution in FY 2008 of the unexpended FY 2005 allotments remaining at the end of FY 2007 to those 50 States or the District of Columbia that had estimated shortfalls in FY 2008. Finally, section 106 of Public Law 110–92 provided that the FY 2008 allotment funds were only available for States' SCHIP expenditures for assistance provided through November 16, 2007.

Subsequent to the enactment of Public Law 110–92, further continuing appropriation legislation was enacted which extended the dates through which the FY 2008 allotment funds were available as provided in section 106 of Public Law 110–92; in particular, Public Law 110–116 (enacted on November 13, 2007), Public Law 110–137 (enacted on December 14, 2007), and Public Law 110–149 (enacted on December 21, 2007) extended the dates to December 14, 2007, December 21, 2007, and December 31, 2007, respectively.

Section 201 of MMSEA amended section 2104(a) of the SCHIP statute to explicitly provide funding for SCHIP allotments in the amount of $5 billion for each of FYs 2008 and 2009 for the 50 States and the District of Columbia and the Commonwealths and Territories, and for $40 million for the Commonwealths and Territories for each of FYs 2008 and 2009. These allotments would be determined in accordance with the existing methodology in SCHIP statute for fiscal years prior to FY 2008. The funding provided for FY 2008 under the Continuing Appropriation Acts discussed above and enacted prior to MMSEA would no longer be available (and thus expenditures for FY 2008 would be paid from the MMSEA allotments). MMSEA provides that the FY 2008 and FY 2009 allotment funds were only available for expenditures through March 31, 2009.

Section 201 of MMSEA amended SCHIP statute to add section 2104(j) of the Act which appropriates $1.6 billion for the purpose of providing additional

allotments to eliminate States' SCHIP shortfalls in FY 2008.

D. Expenditures, Authority for Qualifying States To Use Available SCHIP Allotments for Medicaid Expenditures

Under section 2105(a)(1)(A) through (D) and (a)(2) of the Act, and before enactment of Public Law 108–74 (Extension of Availability of SCHIP Allotment Act, enacted on August 15, 2003), only Federal payments for the following Medicaid and SCHIP expenditures were applied against States' available SCHIP allotments: (1) Medical assistance provided under Title XIX (Medicaid) to targeted low-income children in a SCHIP-related Medicaid expansion, for which the enhanced SCHIP Federal Medical assistance program (FMAP) rate is available; (2) medical assistance provided on behalf of a child during a period of presumptive eligibility under section 1920A of the Act (these funds are matched at the regular Medicaid FMAP rate); (3) child health assistance to targeted low-income children that meets minimum benefit requirements under SCHIP; and (4) expenditures in SCHIP that are subject to the 10-percent limit on non-primary expenditures (including other child health assistance for targeted low-income children, health services initiatives, outreach, and administrative costs).

Section 1(b) of Public Law 108–74, as amended by Public Law 108–127 (Social Security Act, Technical corrections, enacted November 17, 2003), added new section 2105(g) to the Act under which certain ''qualifying States'' that met prescribed criteria could elect to use up to 20 percent of any of the States' available SCHIP allotments for FY 1998, 1999, 2000, or 2001 to increase the FMAP rate for regular Medicaid expenditures to the enhanced FMAP rate available under SCHIP. As described in the **Federal Register** published on July 23, 2004 (69 FR 44013), if a qualified State submitted both 20 percent allowance expenditures and other ''regular'' SCHIP expenditures at the same time in a quarter, the 20 percent allowance expenditures would be applied first against the available fiscal year reallotments. However, the 20 percent allowance expenditures could be applied only against the specified fiscal year allotment funds (upon which the 20 percent allowances were based) and which would remain available. Under section 2104(g)(1)(B)(iii) of the Act, the amounts of States' FY 2001 reallotments would only be available through the end of FY 2005; therefore, the FY 2001 20 percent allowances for the qualifying States are only available through the end of FY 2005.

Section 6103 of the Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006) amended section 2105(g) of the Act to provide for continued authority for qualifying States to use a portion of their available FY 2004 and FY 2005 SCHIP allotments to allow the use of the enhanced (FMAP) rate (as determined under section 2105(b) of the Act) for certain expenditures made under the Medicaid program.

Section 201(b) of the NIHRA amended section 2105(g) of the Act to provide for continued authority for qualifying States to use a portion of their available FY 2006 and FY 2007 SCHIP allotments to allow the use of the enhanced Federal Medical assistance percentage (FMAP) rate (as determined under section 2105(b) of the Act) for certain expenditures made under the Medicaid program.

Finally, section 201(b) of MMSEA amended 2105(g) of the Act to provide for continued authority for qualifying States to use a portion of their available FY 2008 and FY 2009 SCHIP allotments to allow the use of the enhanced Federal Medical assistance percentage (FMAP) rate (as determined under section 2105(b) of the Act) for certain expenditures made under the Medicaid program. Thus, MMSEA provides that the FY 2008 and FY 2009 allotment funds were only available for expenditures through March 31, 2009.

II. Provisions of This Notice

The purpose of this notice is to: Describe the retrospective adjustment for the FY 2007 shortfall funding; set forth the FY 2008 and FY 2009 allotments for the 50 States and the District of Columbia, and the U.S. Commonwealths and Territories; describe the methodology and process used to implement the MMSEA provisions for eliminating States' SCHIP funding shortfalls in FY 2008 including the determination of FY 2005 redistributions and the additional FY 2008 allotments; and describe the implementation of the continued authority for ''qualifying States'' to elect to receive a portion of certain of their available FY 2008 and FY 2009 SCHIP allotments as increased Federal matching funds for certain expenditures in their Medicaid programs.

A. Retrospective Adjustment of FY 2007 Shortfall Allotments

Section 2104(h)(5) of the Act, as amended by NIHRA and UTRA, provides for a potential retrospective adjustment with respect to the amounts of States' FY 2004 and FY 2005 redistributed funds and FY 2007 shortfall allotments provided to them in FY 2007 and based on expenditure reports for FY 2007 submitted no later than November 30, 2007. Prior to the end of FY 2007 and based on States' estimated FY 2007 SCHIP expenditures, we had provided approximately $616.0 million in total additional FY 2007 shortfall allotments to States with projected FY 2007 shortfalls. However, based on the States' actual FY 2007 expenditures, as submitted through November 30, 2007, the actual shortfalls after the provisions of the FY 2004 and FY 2005 redistributed allotments in FY 2007 totaled only to approximately $528.2 million. Therefore, there was approximately $87.8 million ($616.0 million minus $528.2 million) in excess FY 2007 shortfall allotments provided to States in FY 2007 to address FY 2007 shortfalls; this $87.8 million represents the total of the amounts of retrospective adjustments that will be made to the FY 2007 shortfall allotments made under the provisions of section 2104(h)(5) of the Act. Since States still had $528.2 million in shortfalls in FY 2007 without consideration of the FY 2007 shortfall allotments, we will not make any retrospective adjustments to the FY 2004 and FY 2005 redistributed allotments made in FY 2007. Table 1 in this notice presents the final FY 2007 shortfall allotments after making the retrospective adjustment under section 2104(h)(5) of the Act.

B. Final FY 2008 and FY 2009 Allotments

Initially, section 136 of the continuing appropriation legislation (Pub. L. 110–92) appropriated $5.0 billion for the purpose of providing FY 2008 allotments to the 50 States and the District of Columbia and the Commonwealths and Territories, and $40 million for the purpose of providing additional allotments to the Commonwealths and Territories. Subsequently, this authority was replaced by the provisions of section 201 of MMSEA, which amended section 2104(a)(11) of the Act to appropriate $5.0 billion for each of FYs 2008 and 2009 for the purpose of providing FY 2008 and FY 2009 allotments to the 50 States and the District of Columbia and the Commonwealths and Territories, and $40 million for each of FYs 2008 and 2009 for the purpose of providing additional allotments to the Commonwealths and Territories in FYs 2008 and 2009. As described in detail below, the FYs 2008 and 2009 allotments are determined in

accordance with the same methodology as applicable to the calculation of SCHIP fiscal year allotments prior to FY 2008. Under section 201(a)(2) of the MMSEA, the FYs 2008 and 2009 allotments are not available for States' expenditures for child health assistance for items and services furnished after March 31, 2009.

Section 2104(a) of the Act provides that, for purposes of providing allotments to the 50 States and the District of Columbia, the following amounts are appropriated: $4,295,000,000 for FY 1998; $4,275,000,000 for each FY 1999 through FY 2001; $3,150,000,000 for each FY 2002 through FY 2004; $4,050,000,000 for each FY 2005 through FY 2006; and $5,000,000,000 for FY 2007. Additionally, as amended by MMSEA, section 2104(a)(11) of the Act appropriates $5,000,000,000 for each of FY 2008 and FY 2009. However, under section 2104(c) of the Act, 0.25 percent of the total amount appropriated each year is available for allotment to the U.S. Territories and Commonwealths of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands. The total amounts are allotted to the U.S. Territories and Commonwealths according to the following percentages: Puerto Rico, 91.6 percent; Guam, 3.5 percent; the Virgin Islands, 2.6 percent; American Samoa, 1.2 percent; and the Northern Mariana Islands, 1.1 percent.

Section 2104(c)(4)(B) of the Act provides for additional amounts for allotment to the Territories and Commonwealths: $34,200,000 for each FY 2000 through FY 2001; $25,200,000 for each FY 2002 through FY 2004; $32,400,000 for each FY 2005 through FY 2006; and $40,000,000 for FY 2007. Additionally, as amended by MMSEA, $40,000,000 is appropriated for additional allotments for the Commonwealths and Territories for each of FY 2008 and FY 2009. Since, for FY 2008 and FY 2009, title XXI of the Act provides an additional $40,000,000 for allotment to the U.S. Territories and Commonwealths, the total amount available for allotment to the U.S. Territories and Commonwealths in FY 2008 and FY 2009 is $52,500,000; that is, $40,000,000 plus $12,500,000 (0.25 percent of the FY 2008/2009 appropriation of $5,000,000,000).

Therefore, the total amount available nationally for allotment for the 50 States and the District of Columbia for FY 2008 and FY 2009 was determined in accordance with the following formula:

$A_T = S_{2104(a)} - T_{2104(c)}$

A_T = Total amount available for allotment to the 50 States and the District of Columbia for the fiscal year.

$S_{2104(a)}$ = Total appropriation for the fiscal year indicated in section 2104(a) of the Act. For FY 2008 and FY 2009, this is $5,000,000,000.

$T_{2104(c)}$ = Total amount available for allotment for the U.S. Territories and Commonwealths; determined under section 2104(c) of the Act as 0.25 percent of the total appropriation for the 50 States and the District of Columbia. For FY 2008 and FY 2009, this is: .0025 × $5,000,000,000 = $12,500,000.

Therefore, for each of FY 2008 and FY 2009, the total amount available for allotment to the 50 States and the District of Columbia is $4,987,500,000. This was determined as follows:

A_T ($4,987,500,000) = $S_{2104(a)}$ ($5,000,000,000) − $T_{2104(c)}$ ($12,500,000)

For purposes of the following discussion, the term ''State,'' as defined in section 2104(b)(1)(D)(ii) of the Act, ''means one of the 50 States or the District of Columbia.''

Under section 2104(b) of the Act, the determination of the number of children applied in determining the SCHIP allotment for a particular fiscal year is based on the three most recent March supplements to the Current Population Survey (CPS) of the Bureau of the Census officially available before the beginning of the calendar year in which the fiscal year begins. The determination of the State cost factor is based on the annual average wages per employee in the health services industry, which is determined using the most recent 3 years of such wage data as reported and determined as final by the Bureau of Labor Statistics (BLS) of the Department of Labor to be officially available before the beginning of the calendar year in which the fiscal year begins. Since FY 2008 begins on October 1, 2007 (that is, in calendar year 2007), in determining the FY 2008 SCHIP allotments, we are using the most recent official data from the Bureau of the Census and the BLS, respectively, available before January 1 of calendar year 2007 (that is, through the end of December 31, 2006). Similarly, with respect to the FY 2009 SCHIP allotment we are using the most recent official data from the Census and the BLS, respectively, available before January 1 of calendar year 2008 (that is, through the end of December 31, 2007).

1. Number of Children

For FY 2008, as specified by section 2104(b)(2)(A)(iii) of the Act, the number of children is calculated as the sum of 50 percent of the number of low-income, uninsured children in the State, and 50 percent of the number of low-income children in the State. The number of children factor for each State is developed from data provided by the Bureau of the Census based on the standard methodology used to determine official poverty status and uninsured status in the annual CPS on these topics. As part of a continuing formal process between the Centers for Medicare & Medicaid Services (CMS) and the Bureau of the Census, each fiscal year we obtain the number of children data officially from the Bureau of the Census.

Under section 2104(b)(2)(B) of the Act, the number of children for each State (provided in thousands) was determined and provided by the Bureau of the Census based on the arithmetic average of the number of low-income children and low-income children with no health insurance as calculated from the three most recent March supplements to the CPS officially available from the Bureau of the Census before the beginning of the 2007 calendar year. In particular, through December 31, 2006, the most recent official data available from the Bureau of the Census on the numbers of children were data from the three March CPSs conducted in March 2004, 2005, and 2006 (representing data for years 2003, 2004, and 2005). Similarly, for the FY 2009 SCHIP allotments the most recent official data available from the Bureau of the Census on the numbers of children were data from the three March CPSs conducted in March 2005, 2006, and 2007 (representing data for years 2004, 2005, and 2006).

2. State Cost Factor

The State cost factor is based on annual average wages in the health services industry in the State. The State cost factor for a State is equal to the sum of: 0.15 and 0.85 multiplied by the ratio of the annual average wages in the health industry per employee for the State to the annual wages per employee in the health industry for the 50 States and the District of Columbia.

Under section 2104(b)(3)(B) of the Act, as amended by the Balanced Budget Refinement Act of 1999 (BBRA) Public Law 106–113, enacted on November 29, 1999, the State cost factor for each State for a fiscal year is calculated based on the average of the annual wages for employees in the health industry for each State using data for each of the most recent 3 years as reported and determined as final by the BLS in the Department of Labor and available before the beginning of the calendar year in which the fiscal year begins. Therefore, the State cost factor for FY 2008 is based on the most recent

3 years of BLS data officially available as final before January 1, 2007 (the beginning of the calendar year in which FY 2008 begins); that is, it is based on the BLS data available as final through December 31, 2006. In accordance with these requirements, we used the final State cost factor data available from BLS for 2003, 2004, and 2005 in calculating the FY 2008 final allotments. Similarly, for the FY 2009 allotments we used the final State cost factor data available from BLS for 2004, 2005, and 2006.

The State cost factor is determined based on the calculation of the ratio of each State's average annual wages in the health industry to the national average annual wages in the health care industry. Since BLS is required to suppress certain State-specific data in providing us with the State-specific average wages per health services industry employee due to the Privacy Act, we calculated the national average wages directly from the State-specific data provided by BLS. As part of a continuing formal process between CMS and the BLS, each fiscal year CMS obtains these wage data officially from the BLS.

Section 2104(b)(3)(B) of the Act, as amended by the BBRA, refers to wage data as reported by BLS under the ''Standard Industrial Classification'' (SIC) system. However, in calendar year 2002, BLS phased-out the SIC wage and employment reporting system and replaced it with the ''North American Industry Classification System'' (NAICS). In accordance with section 2104(b)(3)(B) of the Act, for purposes of calculating the FY 2008 allotments, BLS provided wage data for the 3 most recent years as available through December 31, 2006; in this case, the 3 years of wage data are 2003, 2004, and 2005. Because of the wage and employment classification change at BLS, the BLS wage data used in calculating the FY 2008 SCHIP allotments necessarily reflect NAICS data, rather than SIC data, to obtain the 3-year average required for the allotments. Similarly, for purposes of calculating the FY 2009 SCHIP allotments, BLS provided wage data for the 3 most recent years as available through December 31, 2007; in this case, the 3 years of wage data are 2004, 2005, and 2006.

Under the SIC system, BLS provided CMS with wage data for each State under the SIC Code. However, the wage data codes under the SIC system do not map exactly to the wage data codes under the NAICS. As a result, BLS provided us with wage data using three NAICS wage data codes that represent approximately 98 percent of the wage data that would have been provided under the related SIC Code 80. Specifically, in lieu of SIC Code 80 data, BLS provided CMS data that are based on the following three NAICS codes: NAICS Code 621 (Ambulatory health care services), Code 622 (Hospitals), and Code 623 (Nursing and residential care facilities).

Under section 2104(b)(4) of the Act, each State and the District of Columbia is allotted a ''proportion'' of the total amount available nationally for allotment to the States. The term ''proportion'' is defined in section 2104(b)(4)(D)(i) of the Act and refers to a State's share of the total amount available for allotment for any given fiscal year. In order for the entire total amount available to be allotted to the States, the sum of the proportions for all States must exactly equal one. Under the statutory definition, a State's proportion for a fiscal year is equal to the State's allotment for the fiscal year divided by the total amount available nationally for allotment for the fiscal year. In general, a State's allotment for a fiscal year is calculated by multiplying the State's proportion for the fiscal year by the national total amount available for allotment for that fiscal year in accordance with the following formula:

$SA_i = P_i \times A_T$

SA_i = Allotment for a State or District of Columbia for a fiscal year.

P_i = Proportion for a State or District of Columbia for a fiscal year.

A_T = Total amount available for allotment to the 50 States and the District of Columbia for the fiscal year. For each FY 2008 and FY 2009, this is $4,987,500,000.

In accordance with the statutory formula for determining allotments, the State proportions are determined under two steps, which are described below in further detail.

Under the first step, each State's proportion is calculated by multiplying the State's Number of Children and the State Cost Factor to determine a ''product'' for each State. The products for all States are then summed. Finally, the product for a State is divided by the sum of the products for all States, thereby yielding the State's preadjusted proportion.

3. Application of Floors and Ceiling

Under the second step, the preadjusted proportions are subject to the application of proportion floors, ceiling, and a reconciliation process, as appropriate. The SCHIP statute specifies three proportion floors, or minimum proportions, that apply in determining States' allotments. The first proportion floor is equal to $2,000,000 divided by the total of the amount available nationally for the fiscal year. This proportion ensures that a State's minimum allotment would be $2,000,000. The second proportion floor is equal to 90 percent of the allotment proportion for the State for the previous fiscal year; that is, a State's proportion for a fiscal year must not be lower than 10 percent below the previous fiscal year's proportion. The third proportion floor is equal to 70 percent of the allotment proportion for the State for FY 1999; that is, the proportion for a fiscal year must not be lower than 30 percent below the FY 1999 proportion.

Each State's allotment proportion for a fiscal year is also limited by a maximum ceiling amount, equal to 145 percent of the State's proportion for FY 1999; that is, a State's proportion for a fiscal year must be no higher than 45 percent above the State's proportion for FY 1999. The floors and ceiling are intended to minimize the fluctuation of State allotments from year to year and over the life of the program as compared to FY 1999. The floors and ceiling on proportions are not applicable in determining the allotments of the U.S. Territories and Commonwealths; they receive a fixed percentage specified in the statute of the total allotment available to the U.S. Territories and Commonwealths.

As determined under the first step for determining the States' preadjusted proportions, which is applied before the application of any floors or ceiling, the sum of the proportions for all the States and the District of Columbia will be equal to exactly one. However, the application of the floors and ceiling under the second step may change the proportions for certain States; that is, some States' proportions may need to be raised to the floors, while other States' proportions may need to be lowered to the maximum ceiling. If this occurs, the sum of the proportions for all States and the District of Columbia may not exactly equal one. In that case, the statute requires the proportions to be adjusted, under a method that is determined by whether the sum of the proportions is greater or less than one.

The sum of the proportions would be greater than one if the application of the floors and ceiling resulted in raising the proportions of some States (due to the application of the floors) to a greater degree than the proportions of other States were lowered (due to the application of the ceiling). If, after application of the floors and ceiling, the sum of the proportions is greater than one, the statute requires the Secretary to determine a maximum percentage increase limit, which, when applied to

the State proportions, would result in the sum of the proportions being exactly one.

If, after the application of the floors and ceiling, the sum of the proportions is less than one, the statute requires the States' proportions to be increased in a ''pro rata'' manner so that the sum of the proportions again equals one. Finally, it is also possible, although unlikely, that the sum of the proportions (after the application of the floors and ceiling) will be exactly one; in that case, the proportions would require no further adjustment.

4. Determination of Preadjusted Proportions

The following is an explanation of how we applied the two State-related factors specified in the statute to determine the States' ''preadjusted'' proportions for FY 2008 and FY 2009. The term ''preadjusted,'' as used here, refers to the States' proportions before the application of the floors and ceiling and adjustments, as specified in the SCHIP statute. The determination of each State and the District of Columbia's preadjusted proportion for both FY 2008 and FY 2009 is in accordance with the following formula:

$PP_i = (C_i \times SCF_i) / ?(C_i \times SCF_i)$.

PP_i = Preadjusted proportion for a State or District of Columbia for a fiscal year.

C_i = *Number of children* in a State (section 2104(b)(1)(A)(i) of the Act) for a fiscal year. This number is based on the number of low-income children for a State for a fiscal year and the number of low-income uninsured children for a State for a fiscal year determined on the basis of the arithmetic average of the number of such children as reported and defined in the three most recent March supplements to the CPS of the Bureau of the Census, officially available before the beginning of the calendar year in which the fiscal year begins. (*See* section 2104(b)(2)(B) of the Act.)

For FYs 2008 and 2009, the number of children is equal to the sum of 50 percent of the number of low-income uninsured children in the State for the fiscal year and 50 percent of the number of low-income children in the State for the fiscal year. (*See* section 2104(b)(2)(A)(iii) of the Act.)

SCF_i = *State Cost Factor* for a State (section 2104(b)(1)(A)(ii) of the Act). For a fiscal year, this is equal to: $0.15 + 0.85 \times (W_i / W_N)$.

W_i = The annual average wages per employee for a State for such year (section 2104(b)(3)(A)(ii)(I) of the Act).

W_N = The annual average wages per employee for the 50 States and the District of Columbia (section 2104(b)(3)(A)(ii)(II) of the Act).

The annual average wages per employee for a State or for all States and the District of Columbia for a fiscal year is equal to the average of such wages for employees in the health services industry, as reported and determined as final by the BLS of the Department of Labor for each of the most recent 3 years officially available before the beginning of the calendar year in which the fiscal year begins. (See section 2104(b)(3)(B) of the Act).

(Ci × SCFi) = The sum of the products of (Ci x SCFi) for each State (section 2104(b)(1)(B) of the Act).

The resulting proportions would then be subject to the application of the floors and ceiling specified in the SCHIP statute and reconciled, as necessary, to eliminate any deficit or surplus of the allotments because the sum of the proportions was either greater than or less than one.

Section 2104(e) of the Act requires that the amounts allotted to a State for a fiscal year be available to the State for a total of 3 years; the fiscal year for which the amounts are allotted, and the 2 following fiscal years.

Table 2 and Table 3 in this notice present the FY 2008 and FY 2009 SCHIP allotments, respectively, determined in accordance with section 2104 of the Act.

C. FY 2005 Redistributed Allotments and Additional Allotments to Eliminate States' SCHIP funding shortfalls in FY 2008

Section 2104(i)(1) and (2) of the Act, as amended by section 136(c) of Public Law 110–92 specifies the methodology for determining the amounts of States' redistributions of the unexpended FY 2005 allotments remaining at the end of FY 2007.

In general, section 2104(f) of the Act provides for the Secretary to determine an appropriate procedure to redistribute the entire amount of States' unexpended SCHIP allotments following the end of the related initial 3-year period of availability only to those States that fully expended the allotments by the end of the initial 3-year period of availability. However, section 2104(i) of the Act as added by section 136(c) of Public Law 110–92, specifies the application of special rules for the redistribution of the unexpended FY 2005 allotments in FY 2008 with respect to certain ''shortfall States.'' As described below, the procedure for redistribution of States' unexpended FY 2005 allotments remaining at the end of FY 2007 is in accordance with the provisions of section 2104(i) of the Act relating to the elimination of funding shortfalls in the SCHIP in FY 2008.

Under section 2104(i)(2) of the Act, a shortfall State is a State with an approved child health plan under Title XXI of the Act, for which the Secretary estimates, on a monthly basis using the most recent data available to the Secretary, that the State's projected FY 2008 expenditures under this plan will exceed the sum of:

- The amount of the State's allotments for each of FY's 2006 and 2007 that were not expended by the end of FY 2007 and remain available in FY 2008;
- The amount of the State's allotment for FY 2008.

In determining the amount of any unexpended FY 2005 allotments that might be redistributed to address a State's FY 2008 SCHIP funding shortfall, we first determined the amount, if any, of each State's FY 2005 allotments that were not expended by the end of FY 2007 based on the States' quarterly expenditure reports (Forms CMS–21 and CMS–64) as submitted and certified by States through November 30, 2007. We also determined the amounts of each States' unexpended FY 2006 and FY 2007 allotments that were not expended by the end of FY 2007, also based on States' quarterly expenditure reports (Forms CMS–21 and CMS–64) as submitted and certified by States through November 30, 2007. The amounts of the States' allotments for FY 2008 are as published in this **Federal Register**.

For purposes of calculating the FY 2005 redistribution amounts, we initially based the determination of the amounts of States' projected FY 2008 expenditures using the States' most recent estimates for such expenditures available as of the date of the enactment of Public Law 100–92, September 29, 2007; that is, we used the States' estimates of their FY 2008 expenditures obtained from their certified submissions of their August 2007 quarterly report forms CMS–21b and CMS–37. Using that data, we had projected that States would not face shortfalls in FY 2008 until sometime in December 2007. Since section 2104(i)(2) of the Act requires that we determine the shortfall status of States on a monthly basis using the most recent data available for such purpose, we subsequently used the States' updated estimates of their FY 2008 expenditures contained in their certified submissions of their November 30, 2007 quarterly report Forms CMS–21b and CMS–37 to determine the States' FY 2008 funding shortfalls on a monthly basis for the months of December 2007 and following months through March 2008 (the month through which the FY 2005 redistributed allotments were exhausted). In accordance with section 2104(i)(4) of the Act, if the amounts of the unexpended FY 2005 allotments available for redistribution are less than the total amounts of the estimated

shortfalls determined for a month, the amount of the FY 2005 redistribution for that month must be reduced proportionally. This was the basis for determining the amount of the March 2008 FY 2005 redistributions. Table 4 provides the monthly determination and total of the FY 2005 redistributed allotments for the months of December 2007 through March 2008.

As indicated, the FY 2005 redistributed allotments determined under section 2104(i) of the Act were insufficient to fully eliminate the States' FY 2008 funding shortfalls; however, section 201(c) of MMSEA added a new section 2104(j) of the Act. Under that section, $1.6 billion was appropriated for purposes of providing additional allotments to eliminate FY 2008 funding shortfalls for the 50 States and the District of Columbia; it also provides for certain amounts of that appropriation to be available for additional allotment to the Commonwealths and Territories.

In particular, section 2104(j)(2) of the Act, as amended by MMSEA, provides for additional allotment amounts to eliminate the FY 2008 SCHIP funding shortfalls remaining after the redistribution of the unexpended FY 2005 allotments in FY 2008, both for States that received the FY 2005 redistributions, as well as for other States that did not receive such redistributions, but which also have projected FY 2008 shortfalls. Under section 2104(j)(2) of the Act, a ''shortfall State'' is defined as a State for which the Secretary estimates on the basis of the most recent data available to the Secretary as of November 30, 2007 that the projected FY 2008 Federal SCHIP expenditures will exceed the sum of:

- The amounts of the State's allotments for FY 2006 and FY 2007 that were not expended by the end of FY 2007.
- The amounts, if any, of the FY 2005 allotments that were redistributed to the State in FY 2008, in accordance with section 2104(i) of the Act (as described above).
- The amount of the State's allotment for FY 2008.

Furthermore, section 2104(j)(3) of the Act, as amended by MMSEA, provided for certain amounts to be provided as additional FY 2008 allotments to the Commonwealths and Territories. In particular, 1.05 percent of the sum of the FY 2008 shortfall allotments for the 50 States and the District of Columbia (determined as indicated above) is available for additional allotments to the Commonwealths and Territories. This total amount is allocated to each Commonwealth/Territory in accordance with the percentage specified in section 2104(c)(3) of the Act.

Finally, under the retrospective adjustment provisions sections 2104(i)(5) and 2104(j)(5) of the Act, the Secretary may adjust the determinations of the FY 2005 redistributed allotments and the additional FY 2008 allotments, respectively, on the basis of actual expenditures for FY 2008 reported by States not later than November 30, 2008 on the Forms CMS–64 or CMS–21.

Table 5 indicates the calculation of the additional FY 2008 shortfall allotments to the 50 States and the District of Columbia, and to the Commonwealths and Territories.

D. Ordering of Expenditures

In applying States' expenditures against their available SCHIP allotments, expenditures are ordered in accordance with the provisions of section 2105(a)(1)(A) through (D) and 2105(a)(2) of the Act as follows:

- Title XIX SCHIP-related expenditures for which payment is made at the enhanced FMAP (section 2105(a)(1)(A) of the Act);
- Title XIX expenditures for medical assistance provided during a presumptive eligibility period under section 1920A of the Act (section 2105(a)(1)(B) of the Act);
- Child health assistance for targeted low-income children in the form of providing health benefits coverage that meets the requirements of section 2103 (per section 2105(a)(1)(C) of the Act);
- Expenditures listed in section 2105(a)(1)(D)(i) through (iv) of the Act, respectively: Other child health assistance for targeted low-income children; health services initiatives under the plan for improving the health of children (including targeted low-income children and other low-income children); expenditures for outreach activities; and administration expenditures.

In accordance with the ordering of allotments and expenditures provisions described above, for FY 2008 the expenditures of States will be applied against the FY 2006 and FY 2007 SCHIP allotments carried over into FY 2008, the FY 2008 allotments, the FY 2005 redistributed allotments, and the additional FY 2008 shortfall allotments.

E. No Ordering Election for Amounts of States' FY 2005 Redistributed Allotments and FY 2008 Shortfall Allotments

In the past, for purposes of applying States' expenditures against the redistributed allotments, States receiving redistributed allotment amounts were given flexibility to decide the ordering of the redistributed allotments with respect to the States' other available allotments. This allowed the redistribution States to optimize the use of these redistributed funds. However, because of the statutory provisions made by the MMSEA on the identification of shortfall States and the determination of the amount of the funding shortfalls on a monthly basis, and the requirement that these redistributed allotments and additional allotments be available only after the States' other SCHIP allotment funds have been exhausted, we believe that the FY 2005 redistributed allotments and the additional FY 2008 allotments must be ordered after the States' other available allotments are exhausted. Therefore, shortfall States must spend their available FY 2006, FY 2007, and FY 2008 allotments first, before any amounts of redistributed FY 2005 allotments and FY 2008 shortfall allotments. Furthermore, since the FY 2008 shortfall allotments are only available for any remaining FY 2008 shortfalls, the FY 2005 redistributed allotments must be ordered prior to any FY 2008 shortfall allotments.

As specified in section 2104(i)(6) of the Act (as amended by section 136(c) of Pub. L. 110–92), the amounts of the unexpended FY 2005 allotments redistributed to a State in FY 2008, and the amounts of the FY 2008 shortfall allotments (as specified in section 2104(j)(6) of the Act (as amended by MMSEA) are only available for expenditure by the State through September 30, 2008; and, any amounts of these redistributed allotments or additional allotments remaining at the end of FY 2008 shall not be subject to redistribution under section 2104(f) of the Act.

The amounts of the FY 2005 redistributed allotment amounts, and the amounts of the additional FY 2008 shortfall allotments, will be incorporated into the Form CMS–21C (Allocation of Title XIX and Title XXI Expenditures to the SCHIP Fiscal Year Allotment). Form CMS–21C is used for tracking States' expenditures against their available SCHIP allotments. The Medicaid and SCHIP expenditure system will then automatically apply expenditures reported on the quarterly expenditure reports for FY 2008 against all of the SCHIP allotment funds available in FY 2008.

IV. Tables

Following are the keys and associated tables for the SCHIP funding provisions as discussed in previous sections:

Table 1. Retrospective Adjustment for the FY

2007 Shortfall Funding
Table 2. Final FY 2008 Allotments
Table 3. Final FY 2009 Allotments
Table 4. Redistribution of Unexpended FY 2005 Allotments
Table 5. Additional FY 2008 Allotments

A. Table 1—Retrospective Adjustment for FY 2007 Shortfall Funding

Key to Table 1

Column/Description

Column A = *State.* Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *Final FY 2007 Expenditures Reported 11/30/07.* Column B contains the final FY 2007 expenditures as reported and certified by States on the Forms CMS–21 and CMS–64 through November 30, 2007.

Column C = *NET FY 2005 Allotments.* Column C contains the ''net'' FY 2005 allotment for each State remaining after the application of section 2104(h)(3) of the Act. Under that provision, for specified States identified in section 2104(h)(3)(A) of the Act, certain amounts of their unexpended FY 2005 allotments in FY 2007 became unavailable to such States on and after April 1, 2007; such amounts were effectively ''contributed'' as an FY 2005 redistribution in FY 2007 to certain States with SCHIP funding shortfalls in FY 2007. The implementation of this provision was described in the **Federal Register** published on May 29, 2007 (72 FR 29502). The amount of the net FY 2005 allotment remaining after the application of the provisions of section 2104(h)(3) of the Act and available to each State for expenditure in FY 2007 is contained in Column C.

Column D = *FY 2006 Allotments C/O Fr. FY 2006.* Column D contains the amount of the unexpended FY 2006 allotments remaining at the end of FY 2006 and available for expenditure in FY 2007.

Column E = *FY 2007 Allotments.* Column D contains the full amount of each state's FY 2007 allotment available for expenditure in FY 2007, as contained in the **Federal Register** published on July 28, 2006 (71 FR 42854).

Column F = *Tot. Allots in FY 07 NOT Incl. FY 04/05 Redists. C + D + E.* Column F contains the total SCHIP allotment funds for each State available for expenditure in FY 2007 not including any FY 2004 or FY 2005 redistributed allotments, calculated as the sum of the amounts in Column C, D, and E.

Column G = *Tot. FY 07 SF Before Redist. Or Addt'l Allots. B–F.* For States with projected expenditures for FY 2007 in Column B that are in excess of their available SCHIP allotment funds in F, Column G contains the shortfall in SCHIP funds in FY 2007 calculated as the amount in Column B minus the amount in Column F.

Column H = *For SF States FY 2004 Redistributions u/NIHRA.* For States with a projected FY 2007 shortfall in SCHIP funds in Column G, Column H contains the total FY 2004 redistribution provided to such State in FY 2007 as determined in accordance with the provisions of section 2104(h)(1) of the Act and as contained in the **Federal Register** published on May 29, 2007 (72 FR 29502).

Column I = *For SF States FY 2005 Redistributions u/NIHRA.* For States with a projected FY 2007 shortfall in SCHIP funds in Column G, Column H contains the total FY 2005 redistribution provided to such State in FY 2007 as determined in accordance with the provisions of section 2104(h)(2) of the Act and as contained in the **Federal Register** published on May 29, 2007 (72 FR 29502).

Column J = *Tot. FY 04/05 Redist. Amounts. H + I.* Column J contains the total of the FY 2004 and FY 2005 redistributed allotments available to each State in FY 2007, calculated as the sum of the amounts in Column H and Column I.

Column K = *Retro Adjusted FY 07 SF Allot After Redist. G–J.* For States with FY 2007 shortfalls before the provision of any FY 2004 and FY 2005 redistributions as indicated in Column G, and for which such shortfalls are greater than the total available FY 2004 and FY 2005 redistributed allotments as indicated in Column J, Column K contains the final remaining shortfall for the State, calculated as the amount of the shortfall in Column G minus the amount of the total FY 2004 and FY 2005 redistributions in Column J; the amount in Column K represents the amount of the final retrospective adjustment for the FY 2007 shortfall allotment, determined under the purview of section 2104(h)(5) of the Act.

TABLE 1 - RETROSPECTIVE ADJUSTMENT FOR THE FY 2007 SHORTFALL FUNDING

STATE	Final FY 2007 Expenditures Reported 11/30/07	NET FY 2005 Allotments /1	FY 2006 Allotments C/O Fr. FY 2006	FY 2007 Allotments	Tot. Allots in FY 07 NOT Incl. FY 04/05 Redists C + D + E	Tot. FY 07 SF Before Redist. or Addtl Allots. B - F	For SF States FY 2004 Redistributions u/NIHRA /2	For SF States FY 2005 Redistributions u/NIHRA /2	Tot. FY 04/05 Redist. Amounts H + I	Retro Adjusted FY 07 SF Allot After Redist. G - J
A	B	C	D	E	F	G	H	I	J	K
Alabama	$95,241,524	$2,561,671	$64,182,128	$74,295,313	$141,039,112	$0	$0	$0	$0	$0
Alaska	$16,217,204	$0	$5,270,465	$11,534,589	$16,805,054	$0	$0	$0	$0	$0
Arizona	$117,681,872	$0	$22,907,967	$127,858,497	$150,766,464	$0	$0	$0	$0	$0
Arkansas	$68,787,989	$32,172,778	$43,795,428	$49,307,483	$125,275,689	$0	$0	$0	$0	$0
California	$980,749,941	$0	$486,033,373	$790,789,213	$1,276,822,586	$0	$0	$0	$0	$0
Colorado	$65,916,210	$36,110,945	$57,951,287	$71,544,798	$165,607,030	$0	$0	$0	$0	$0
Connecticut	$30,070,269	$24,452,297	$34,535,088	$39,890,581	$98,877,966	$0	$0	$0	$0	$0
Delaware	$8,625,809	$6,463,460	$9,045,121	$11,057,552	$26,566,133	$0	$0	$0	$0	$0
District of Columbia	$7,181,599	$6,330,992	$9,557,107	$11,708,552	$27,596,651	$0	$0	$0	$0	$0
Florida	$261,704,169	$169,411,165	$249,329,871	$296,066,768	$714,807,804	$0	$0	$0	$0	$0
Georgia	$328,056,099	$0	$17,791,405	$165,874,160	$183,665,565	$144,390,534	$7,033,401	$28,653,319	$35,686,720	$108,703,814
Hawaii	$18,722,945	$4,963,730	$12,404,524	$15,314,228	$32,682,482	$0	$0	$0	$0	$0
Idaho	$27,383,129	$19,197,008	$20,610,739	$24,316,412	$64,124,159	$0	$0	$0	$0	$0
Illinois	$448,536,789	$0	$3,258,082	$209,767,107	$213,025,189	$235,511,600	$18,116,576	$37,071,617	$55,188,193	$180,323,407
Indiana	$92,143,473	$40,878,025	$73,000,528	$93,469,355	$207,347,908	$0	$0	$0	$0	$0
Iowa	$51,337,743	$0	$5,470,174	$36,229,776	$41,699,950	$9,637,793	$0	$0	$0	$9,637,793
Kansas	$45,136,408	$522,663	$27,489,909	$36,541,720	$64,554,292	$0	$0	$0	$0	$0
Kentucky	$81,229,305	$16,204,296	$57,764,350	$70,114,712	$144,083,358	$0	$0	$0	$0	$0
Louisiana	$119,858,587	$0	$67,242,403	$89,585,836	$156,828,239	$0	$0	$0	$0	$0
Maine	$31,249,494	$0	$9,327,915	$15,171,887	$24,499,802	$6,749,692	$0	$0	$0	$6,749,692
Maryland	$138,446,014	$0	$4,712,289	$66,960,838	$71,673,127	$66,772,887	$10,784,498	$15,638,268	$26,422,766	$40,350,121
Massachusetts	$211,517,193	$0	$137	$73,334,995	$73,335,132	$138,182,061	$40,642,921	$21,616,185	$62,259,106	$75,922,955
Michigan	$171,555,438	$0	$65,896,197	$149,382,856	$215,279,053	$0	$0	$0	$0	$0
Minnesota	$64,436,512	$0	$14,307,326	$48,613,498	$62,920,824	$1,515,688	$0	$0	$0	$1,515,688
Mississippi	$107,462,912	$0	$36,432,330	$60,494,559	$96,926,889	$10,536,023	$0	$0	$0	$10,536,023
Missouri	$79,360,456	$0	$23,248,070	$72,140,346	$95,388,416	$0	$0	$0	$0	$0
Montana	$18,241,033	$3,953,265	$12,558,064	$15,736,459	$32,247,788	$0	$0	$0	$0	$0
Nebraska	$33,154,098	$0	$11,706,585	$21,891,551	$33,598,136	$0	$0	$0	$0	$0
Nevada	$30,339,072	$26,773,624	$41,896,088	$52,056,449	$120,726,161	$0	$0	$0	$0	$0
New Hampshire	$11,128,191	$5,904,101	$9,192,336	$10,779,193	$25,875,630	$0	$0	$0	$0	$0
New Jersey	$280,007,379	$0	$2,678,405	$105,206,164	$107,884,569	$172,122,810	$50,484,114	$27,708,720	$78,192,834	$93,929,976
New Mexico	$49,882,711	$30,254,889	$42,156,779	$52,045,406	$124,457,074	$0	$0	$0	$0	$0
New York	$324,369,298	$158,069,046	$272,452,310	$340,806,655	$771,328,011	$0	$0	$0	$0	$0
North Carolina	$166,646,858	$0	$46,263,692	$136,117,313	$182,381,005	$0	$0	$0	$0	$0
North Dakota	$10,507,847	$0	$4,655,638	$7,737,529	$12,393,167	$0	$0	$0	$0	$0
Ohio	$186,931,469	$0	$91,330,334	$157,996,958	$249,327,292	$0	$0	$0	$0	$0
Oklahoma	$96,376,717	$1,957,419	$57,370,830	$70,828,185	$130,156,434	$0	$0	$0	$0	$0
Oregon	$66,550,259	$26,864,035	$46,886,967	$56,734,200	$130,485,202	$0	$0	$0	$0	$0
Pennsylvania	$189,962,069	$31,495,433	$134,097,011	$173,554,494	$339,146,938	$0	$0	$0	$0	$0
Rhode Island	$47,747,057	$0	$6,228,523	$13,982,960	$20,211,483	$27,535,574	$19,818,422	$7,144,187	$26,962,609	$572,965
South Carolina	$31,443,638	$27,696,060	$55,545,268	$70,651,421	$153,892,749	$0	$0	$0	$0	$0
South Dakota	$9,815,781	$0	$5,291,176	$10,354,308	$15,645,484	$0	$0	$0	$0	$0
Tennessee	$4,141,305	$58,904,574	$80,406,910	$97,459,570	$236,771,054	$0	$0	$0	$0	$0
Texas	$385,656,675	$429,972,119	$454,741,626	$557,980,188	$1,442,693,933	$0	$0	$0	$0	$0
Utah	$38,856,325	$6,544,453	$32,207,704	$40,485,868	$79,238,025	$0	$0	$0	$0	$0
Vermont	$5,936,710	$2,843,319	$4,817,413	$5,753,333	$13,414,065	$0	$0	$0	$0	$0
Virginia	$110,731,159	$9,721,332	$72,302,825	$94,070,318	$176,094,475	$0	$0	$0	$0	$0
Washington	$36,808,872	$44,705,479	$64,705,479	$79,883,308	$189,294,266	$0	$0	$0	$0	$0
West Virginia	$35,413,299	$7,852,933	$23,349,395	$27,516,914	$58,719,242	$0	$0	$0	$0	$0
Wisconsin	$84,507,065	$0	$26,672,001	$69,563,162	$96,235,163	$0	$0	$0	$0	$0
Wyoming	$7,815,499	$4,706,456	$5,881,004	$6,942,463	$17,529,923	$0	$0	$0	$0	$0
TOTAL	$5,931,569,469	$1,237,487,567	$3,026,958,576	$4,987,500,000	$9,251,946,143	$812,954,662	$146,879,932	$137,832,296	$284,712,228	$528,242,434

/1 "Net" FY 2005 Allotments Available to State after reduction (if applicable) based on NIHRA and February 2007 Estimates
/2 As determined under NIHRA and published in the Federal Register on May 29, 2007

B. Table 2 Final FY 2008 Allotments and Table 3 Final FY 2009 Allotments

Key to Table 2 and Table 3

Column/Description

Column A = *State.* Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *Number of Children.* Column B contains the number of children for each State (provided in thousands) was determined and provided by the Bureau of the Census based on the arithmetic average of the number of low-income children and low-income uninsured children, and is based on the three most recent March supplements to the CPS of the Bureau of the Census officially available before the beginning of the calendar year in which the fiscal year begins. The FY 2008 allotments were based on the 2004, 2005, and 2006 March supplements to the CPS; the FY 2009 allotments were based on the 2005, 2006, and 2007 March supplements to the CPS. These data represent the number of people in each State under 19 years of age whose family income is at or below 200 percent of the poverty threshold appropriate for that family, and who are reported to be without health insurance coverage. The number of children for each State was developed by the Bureau of the Census based on the standard methodology used to determine official poverty status and uninsured status in its annual March CPS on these topics.

For FY 2008 and FY 2009, the number of children is equal to the sum of 50 percent of the number of low-income uninsured children in the State and 50 percent of the number of low-income children in the State.

Column C = *State Cost Factor.* Column C contains the State cost factor for a State is equal to the sum of: 0.15, and 0.85 multiplied by the ratio of the annual average wages in the health industry per employee for the State to the annual wages per employee in the health industry for the 50 States and the District of Columbia. The State cost factor for each State was calculated based on such wage data for each State as reported and determined as final by the BLS in the Department of Labor for each of the most recent 3 years and available before the beginning of the calendar year in which the fiscal year begins. The FY 2008 allotments were based on final BLS wage data for 2003, 2004, and 2005; the FY 2009 allotments were based on final BLS wage data for 2004, 2005, and 2006.

Column D = *Product.* Column D contains the Product for each State was calculated by multiplying the Number of Children in Column B by the State Cost Factor in Column C. The sum of the Products for all 50 States and the District of Columbia is below the Products for each State in Column D. The Product for each State and the sum of the Products for all States provides the basis for allotment to States and the District of Columbia.

Column E = *Proportion of Total.* Column E contains the calculated percentage share for each State of the total allotment available to the 50 States and the District of Columbia. The Percent Share of Total is calculated as the ratio of the Product for each State in Column D to the sum of the Products for all 50 States and the District of Columbia below the Products for each State in Column D.

Column F = *Adjusted Proportion of Total.* Column F contains the calculated percentage share for each State of the total allotment available after the application of the floors and ceiling and after any further reconciliation needed to ensure that the sum of the State proportions is equal to one. The three floors specified in the statute are: (1) The percentage calculated by dividing $2,000,000 by the total of the amount available for all allotments for the fiscal year; (2) an annual floor of 90 percent

of (that is, 10 percent below) the preceding fiscal year's allotment proportion; and (3) a cumulative floor of 70 percent of (that is, 30 percent below) the FY 1999 allotment proportion. There is also a cumulative ceiling of 145 percent of (that is, 45 percent above) the FY 1999 allotment proportion.

Column G = *Allotment.* Column G contains the SCHIP allotment for each State, Commonwealth, or Territory for the fiscal year. For each of the 50 States and the District of Columbia, this is determined as the Adjusted Proportion of Total in Column F for the State multiplied by the total amount available for allotment for the 50 States and the District of Columbia for the fiscal year.

For each of the U.S. Territories and Commonwealths, the allotment is determined as the Proportion of Total in Column E multiplied by the total amount available for allotment to the U.S. Territories and Commonwealths. For the U.S. Territories and Commonwealths, the Proportion of Total in Column E is specified in section 2104(c) of the Act. The total amount is then allotted to the U.S. Territories and Commonwealths according to the percentages specified in section 2104 of the Act. There is no adjustment made to the allotments of the U.S. Territories and Commonwealths as they are not subject to the application of the floors and ceiling. As a result, Column F in the table, the Adjusted Proportion of Total, is empty for the U.S. Territories and Commonwealths.

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TABLE 2 - STATE CHILDREN'S HEALTH INSURANCE PROGRAM ALLOTMENTS FOR FEDERAL FISCAL YEAR:						2008
A	B	C	D	E	F	G
STATE	NUMBER OF CHILDREN (000)	STATE COST FACTOR	PRODUCT	PROPORTION OF TOTAL (3)	ADJUSTED PROPORTION OF TOTAL (3)	ALLOTMENT (1)
ALABAMA	271	0.9710	262.6615	1.4466%	1.4502%	$72,328,116
ALASKA	39	1.0416	40.6241	0.2237%	0.2243%	$11,186,515
ARIZONA	474	1.0953	519.1515	2.8593%	2.8663%	$142,956,789
ARKANSAS	188	0.9184	172.6572	0.9509%	0.9533%	$47,543,965
CALIFORNIA	2,513	1.1406	2,865.8719	15.7842%	15.8228%	$789,164,316
COLORADO	254	1.0624	269.3176	1.4833%	1.4345%	$71,544,798
CONNECTICUT	125	1.1275	140.9403	0.7762%	0.7781%	$38,810,205
DELAWARE	41	1.1441	46.3370	0.2552%	0.2558%	$12,759,650
DISTRICT OF COLUMBIA	35	1.2691	43.7855	0.2412%	0.2417%	$12,057,061
FLORIDA	1,054	1.0396	1,095.7204	6.0348%	6.0496%	$301,724,376
GEORGIA	595	1.0258	609.8200	3.3587%	3.3669%	$167,923,820
HAWAII	50	1.1071	55.3542	0.3049%	0.3056%	$15,242,690
IDAHO	98	0.8821	86.4415	0.4761%	0.4773%	$23,803,069
ILLINOIS	732	1.0343	756.6061	4.1671%	4.1773%	$208,343,771
INDIANA	368	0.9623	353.6559	1.9478%	1.9526%	$97,384,888
IOWA	134	0.8991	120.4847	0.6636%	0.6652%	$33,177,409
KANSAS	147	0.9050	133.0412	0.7327%	0.7345%	$36,635,060
KENTUCKY	260	0.9531	247.8029	1.3648%	1.3682%	$68,236,560
LOUISIANA	332	0.8881	294.3987	1.6214%	1.6859%	$84,083,019
MAINE	60	0.9351	56.1069	0.3090%	0.3098%	$15,449,944
MARYLAND	245	1.0754	262.9344	1.4481%	1.4517%	$72,403,254
MASSACHUSETTS	241	1.1246	270.4600	1.4896%	1.4704%	$73,334,995
MICHIGAN	528	1.0116	534.1328	2.9418%	2.9490%	$147,082,132
MINNESOTA	176	1.0247	180.3546	0.9933%	0.9747%	$48,613,498
MISSISSIPPI	244	0.9096	221.4821	1.2198%	1.2228%	$60,988,699
MISSOURI	301	0.9364	281.8714	1.5524%	1.5562%	$77,617,870
MONTANA	65	0.8964	57.8205	0.3185%	0.3192%	$15,921,821
NEBRASKA	85	0.9133	77.6296	0.4276%	0.4286%	$21,376,574
NEVADA	155	1.2004	185.4691	1.0215%	1.0240%	$51,071,928
NEW HAMPSHIRE	37	1.0603	38.7000	0.2131%	0.2137%	$10,656,681
NEW JERSEY	338	1.1354	383.1961	2.1105%	2.1157%	$105,519,251
NEW MEXICO	167	0.9451	157.3656	0.8667%	1.0435%	$52,045,406
NEW YORK	1,107	1.0782	1,193.6097	6.5740%	6.5901%	$328,679,791
NORTH CAROLINA	567	0.9753	553.0036	3.0457%	2.7292%	$136,117,313
NORTH DAKOTA	33	0.8815	28.6491	0.1578%	0.1582%	$7,888,996
OHIO	598	0.9586	573.2667	3.1573%	3.1651%	$157,858,294
OKLAHOMA	246	0.8805	216.6141	1.1930%	1.4201%	$70,828,185
OREGON	215	1.0178	218.3122	1.2024%	1.2053%	$60,115,810
PENNSYLVANIA	614	0.9981	612.8498	3.3754%	3.3836%	$168,758,145
RHODE ISLAND	52	0.9842	50.6888	0.2792%	0.2799%	$13,957,989
SOUTH CAROLINA	264	0.9787	257.8997	1.4204%	1.4239%	$71,016,874
SOUTH DAKOTA	41	0.9304	38.1473	0.2101%	0.2106%	$10,504,473
TENNESSEE	356	1.0185	362.5776	1.9969%	2.0018%	$99,841,627
TEXAS	2,087	0.9680	2,019.8213	11.1244%	11.1517%	$556,190,553
UTAH	170	0.8821	149.9529	0.8259%	0.8279%	$41,291,966
VERMONT	22	0.9305	20.4703	0.1127%	0.1130%	$5,636,822
VIRGINIA	324	1.0126	328.0672	1.8069%	1.8113%	$90,338,630
WASHINGTON	320	1.0001	320.0467	1.7627%	1.6017%	$79,883,308
WEST VIRGINIA	104	0.9006	93.2084	0.5134%	0.5146%	$25,666,451
WISCONSIN	272	1.0119	274.7255	1.5131%	1.3948%	$69,563,162
WYOMING	24	0.9571	22.4925	0.1239%	0.1278%	$6,373,481
TOTAL STATES ONLY			18,156.5991	100.0000%	100.0000%	$4,987,500,000
ALLOTMENTS FOR COMMONWEALTHS AND TERRITORIES (2)						
PUERTO RICO				91.6%		$48,090,000
GUAM				3.5%		$1,837,500
VIRGIN ISLANDS				2.6%		$1,365,000
AMERICAN SAMOA				1.2%		$630,000
N. MARIANA ISLANDS				1.1%		$577,500
TOTAL COMMONWEALTHS AND TERRITORIES ONLY				100.0%		$52,500,000
TOTAL STATES AND COMONWEALTHS AND TERRITORIES						$5,040,000,000

FOOTNOTES

The numbers in Columns B - F are rounded for presentation purposes; the actual numbers used in the allotment calculations are not rounded

(1) Total amount available for allotment to the 50 States and the District of Columbia is $4,987,500,000; determined as the fiscal year appropriation ($5,000,000,000) reduced by the total amount available for allotment to the Commonwealths and Territories under section 2104(c) of the Act ($12,500,000)

(2) Total amount available for allotment to the Commonwealths and Territories is $12,500,000 (.25 percent of $5,000,000,000, the fiscal year appropriation), plus $40,000,000, as specified in section 2104(c)(4)(B) of the Act

(3) Percent share of total amount available for allotment to the Commonwealths and Territories is as specified in section 2104(c) of the Act

TABLE 3 - STATE CHILDREN'S HEALTH INSURANCE PROGRAM ALLOTMENTS FOR FEDERAL FISCAL YEAR:						2009
A	B	C	D	E	F	G
STATE	NUMBER OF CHILDREN (000)	STATE COST FACTOR	PRODUCT	PROPORTION OF TOTAL (3)	ADJUSTED PROPORTION OF TOTAL (3)	ALLOTMENT (1)
ALABAMA	264	0.9718	256.5460	1.4115%	1.4247%	$71,056,418
ALASKA	37	1.0262	37.9680	0.2089%	0.2089%	$10,419,103
ARIZONA	495	1.0988	543.3470	2.9896%	2.9890%	$149,074,041
ARKANSAS	200	0.9187	183.7485	1.0110%	1.0107%	$50,409,786
CALIFORNIA	2,526	1.1530	2,912.4258	16.0245%	16.0235%	$799,172,168
COLORADO	260	1.0571	274.3115	1.5093%	1.4345%	$71,544,798
CONNECTICUT	123	1.1227	137.5358	0.7567%	0.7567%	$37,742,257
DELAWARE	42	1.1411	47.9245	0.2637%	0.2636%	$13,149,433
DISTRICT OF COLUMBIA	35	1.2759	44.6556	0.2457%	0.2457%	$12,253,325
FLORIDA	1,062	1.0401	1,104.0875	6.0748%	6.0747%	$302,975,056
GEORGIA	626	1.0222	639.8673	3.5206%	3.5199%	$175,553,509
HAWAII	48	1.1098	53.2681	0.2931%	0.2931%	$14,617,724
IDAHO	99	0.8830	86.9789	0.4786%	0.4786%	$23,868,238
ILLINOIS	702	1.0320	723.9290	3.9831%	3.9831%	$198,658,964
INDIANA	360	0.9576	344.2470	1.8941%	1.8941%	$94,467,475
IOWA	139	0.8962	124.1244	0.6829%	0.6829%	$34,057,616
KANSAS	153	0.9017	137.9666	0.7591%	0.7590%	$37,854,500
KENTUCKY	258	0.9534	245.5061	1.3508%	1.3508%	$67,371,232
LOUISIANA	311	0.8913	276.7380	1.5226%	1.6859%	$84,083,019
MAINE	58	0.9347	53.7441	0.2957%	0.2957%	$14,748,335
MARYLAND	238	1.0752	255.9013	1.4080%	1.4080%	$70,223,851
MASSACHUSETTS	234	1.1307	264.0101	1.4526%	1.4526%	$72,449,046
MICHIGAN	529	1.0069	532.6662	2.9308%	2.9308%	$146,173,055
MINNESOTA	188	1.0266	192.9953	1.0619%	0.9747%	$48,613,498
MISSISSIPPI	257	0.9094	233.7164	1.2859%	1.2856%	$64,120,566
MISSOURI	321	0.9311	298.4182	1.6419%	1.6415%	$81,870,388
MONTANA	59	0.9026	52.8003	0.2905%	0.2905%	$14,489,345
NEBRASKA	90	0.9119	82.0711	0.4516%	0.4515%	$22,516,181
NEVADA	158	1.2039	190.2208	1.0466%	1.0437%	$52,056,449
NEW HAMPSHIRE	37	1.0598	38.6812	0.2128%	0.2128%	$10,614,794
NEW JERSEY	330	1.1298	372.2600	2.0482%	2.0482%	$102,154,736
NEW MEXICO	158	0.9467	149.1078	0.8204%	1.0435%	$52,045,406
NEW YORK	1,079	1.0741	1,158.9193	6.3765%	6.3765%	$318,028,014
NORTH CAROLINA	570	0.9677	551.1334	3.0324%	2.7292%	$136,117,313
NORTH DAKOTA	33	0.8841	28.7348	0.1581%	0.1581%	$7,885,338
OHIO	601	0.9545	573.1597	3.1536%	3.1536%	$157,285,194
OKLAHOMA	248	0.8848	219.4350	1.2074%	1.4201%	$70,828,185
OREGON	219	1.0229	223.4943	1.2297%	1.2296%	$61,324,862
PENNSYLVANIA	610	0.9977	608.5915	3.3485%	3.3485%	$167,008,303
RHODE ISLAND	49	0.9824	48.1377	0.2649%	0.2649%	$13,209,840
SOUTH CAROLINA	265	0.9758	258.0882	1.4200%	1.4200%	$70,823,971
SOUTH DAKOTA	43	0.9316	39.5911	0.2178%	0.2178%	$10,862,735
TENNESSEE	356	1.0224	363.4498	1.9997%	1.9997%	$99,737,076
TEXAS	2,073	0.9662	2,002.8577	11.0199%	11.0199%	$549,619,657
UTAH	182	0.8858	160.7746	0.8846%	0.8321%	$41,500,506
VERMONT	20	0.9397	18.7944	0.1034%	0.1034%	$5,157,513
VIRGINIA	349	1.0133	353.1463	1.9430%	1.9424%	$96,877,519
WASHINGTON	299	1.0054	300.6100	1.6540%	1.6017%	$79,883,308
WEST VIRGINIA	102	0.8979	91.1374	0.5014%	0.5014%	$25,009,711
WISCONSIN	259	1.0091	261.3529	1.4380%	1.3948%	$69,563,162
WYOMING	23	0.9631	21.6694	0.1192%	0.1278%	$6,373,481
TOTAL STATES ONLY			18,174.8461	100.0000%	100.0000%	$4,987,500,000
ALLOTMENTS FOR COMMONWEALTHS AND TERRITORIES (2)						
PUERTO RICO				91.6%		$48,090,000
GUAM				3.5%		$1,837,500
VIRGIN ISLANDS				2.6%		$1,365,000
AMERICAN SAMOA				1.2%		$630,000
N. MARIANA ISLANDS				1.1%		$577,500
TOTAL COMMONWEALTHS AND TERRITORIES ONLY				100.0%		$52,500,000
TOTAL STATES AND COMONWEALTHS AND TERRITORIES						$5,040,000,000

FOOTNOTES

The numbers in Columns B - F are rounded for presentation purposes, the actual numbers used in the allotment calculations are not rounded

(1) Total amount available for allotment to the 50 States and the District of Columbia is $4,987,500,000 determined as the fiscal year appropriation $5,000,000,000, reduced by the total amount available for allotment to the Commonwealths and Territories under section 2104(c) of the Act, $12,500,000

(2) Total amount available for allotment to the Commonwealths and Territories is $12,500,000 (.25 percent of $5,000,000,000, the fiscal year appropriation), plus $40,000,000, as specified in section 2104(c)(4)(B) of the Act

(3) Percent share of total amount available for allotment to the Commonwealths and Territories is as specified in section 2104(c) of the Act

C. Table 4—Redistribution of Unexpended FY 2005 Allotments

Table 4 contains the amounts, if any, of each State's FY 2005 redistributed allotment determined in accordance with section 2104(i) of the Act, as amended by section 136(c) of Public Law 110–92. Under this provision, in FY 2008 the redistribution of the unexpended FY 2005 allotments remaining at the end of FY 2007 was determined on a monthly basis using the States' projected FY 2008 expenditures as compared to their other allotments available in FY 2008 to determine States' projected monthly shortfalls in FY 2008. The unexpended FY 2005 allotments were applied towards meeting these projected State FY 2008 monthly shortfalls.

Key to Table 4

Column/Description

Column A = *State*. Column A contains the name of the State.

Column B = *FY 2005 Redistribution for December 2007*. Column B contains the amount if any of the State's FY 2005 redistributed allotment for the month of December 2007, determined in accordance with the provisions of section 2104(i) of the Act.

Column C = *FY 2005 Redistribution for January 2008*. Column C contains the amount if any of the State's FY 2005 redistributed allotment for the month of January 2008, determined in accordance with the provisions of section 2104(i) of the Act.

Column D = *FY 2005 Redistribution for February 2008*. Column D contains the amount if any of the State's FY 2005 redistributed allotment for the month of February 2008, determined in accordance with the provisions of section 2104(i) of the Act.

Column E = *FY 2005 Redistribution for March 2008*. Column E contains the amount if any of the State's FY 2005 redistributed allotment for the month of March 2008, determined in accordance with the provisions of section 2104(i) of the Act.

Column F = *Total FY 2005 Redistribution. B + C + D + E*. Column F contains the total amount if any of the State's FY 2005 redistributed allotment in FY 2008, calculated as the sum of the amounts in Columns B, C, D and E, representing the amounts of such redistributions for the months of December 2007, and January, February, and March of 2008, respectively.

Table 4 - Redistribution of Unexpended FY 2005 Allotments					
Bal. Unexp FY 05 Allots:	$106,975,320	$106,034,309	$80,616,489	$28,993,621	
State	FY 2005 Redistribution for December 2007	FY 2005 Redistribution for January 2008	FY 2005 Redistribution for February 2008	FY 2005 Redistribution for March 2008	Total FY 2005 Redistribution B + C + D + E
A	B	C	D	E	F
Alabama	$0	$0	$0	$0	$0
Alaska	$0	$0	$0	$0	$0
Arizona	$0	$0	$0	$0	$0
Arkansas	$0	$0	$0	$0	$0
California	$0	$0	$0	$0	$0
Colorado	$0	$0	$0	$0	$0
Connecticut	$0	$0	$0	$0	$0
Delaware	$0	$0	$0	$0	$0
Dist. Of Col.	$0	$0	$0	$0	$0
Florida	$0	$0	$0	$0	$0
Georgia	$0	$0	$0	$0	$0
Hawaii	$0	$0	$0	$0	$0
Idaho	$0	$0	$0	$0	$0
Illinois	$0	$0	$0	$0	$0
Indiana	$0	$0	$0	$0	$0
Iowa	$0	$0	$0	$0	$0
Kansas	$0	$0	$0	$0	$0
Kentucky	$0	$0	$0	$0	$0
Louisiana	$0	$0	$0	$0	$0
Maine	$0	$0	$0	$338,173	$338,173
Maryland	$0	$0	$0	$3,274,469	$3,274,469
Massachusetts	$0	$15,182,664	$21,459,681	$10,260,595	$46,902,941
Michigan	$0	$0	$0	$0	$0
Minnesota	$0	$0	$0	$0	$0
Mississippi	$0	$0	$0	$698,349	$698,349
Missouri	$0	$0	$0	$0	$0
Montana	$0	$0	$0	$0	$0
Nebraska	$0	$0	$0	$0	$0
Nevada	$0	$0	$0	$0	$0
New Hampshire	$0	$0	$0	$0	$0
New Jersey	$0	$5,193,397	$25,446,703	$12,166,925	$42,807,025
New Mexico	$0	$0	$0	$0	$0
New York	$0	$0	$0	$0	$0
North Carolina	$0	$0	$0	$0	$0
North Dakota	$0	$0	$0	$0	$0
Ohio	$0	$0	$0	$0	$0
Oklahoma	$0	$0	$0	$0	$0
Oregon	$0	$0	$0	$0	$0
Pennsylvania	$0	$0	$0	$0	$0
Rhode Island	$941,011	$5,041,758	$4,716,484	$2,255,109	$12,954,362
South Carolina	$0	$0	$0	$0	$0
South Dakota	$0	$0	$0	$0	$0
Tennessee	$0	$0	$0	$0	$0
Texas	$0	$0	$0	$0	$0
Utah	$0	$0	$0	$0	$0
Vermont	$0	$0	$0	$0	$0
Virginia	$0	$0	$0	$0	$0
Washington	$0	$0	$0	$0	$0
West Virginia	$0	$0	$0	$0	$0
Wisconsin	$0	$0	$0	$0	$0
Wyoming	$0	$0	$0	$0	$0
Totals	$941,011	$25,417,820	$51,622,868	$28,993,621	$106,975,320

D. Table 5—Determination of the Additional FY 2008 Shortfall Allotments

Key to Table 5—ADDITIONAL FY 2008 ALLOTMENTS TO ELIMINATE THE REMAINING FY 2008 SHORTFALLS

Table 5 presents the determination of the amounts of the additional FY 2008 shortfall allotments to eliminate the shortfalls remaining in FY 2008 for the 50 States and DC based on the most recent expenditure projections for FY 2008, after the provision of the FY 2005 redistributed allotments. It also presents the determination of the additional FY 2008 allotments provided to the Commonwealths and Territories.

Column/Description

Column A = *State*. Column A contains the name of the State, District of Columbia, the Commonwealth or Territory.

Column B = *Total Expenditures FY 2008*. Column B contains the projected FY 2008 Federal expenditures based on the submissions by State through November 30, 2007.

Column C = *Carryover FY 06 & 07 Allotments Avail. in FY 08*. Column C contains the total unexpended FY 2006 and FY 2007 allotments remaining at the end of FY 2007 and carried over into and available in FY 2008.

Column D = *FY 2008 Allotments*. Column D contains the amounts of the 50 States' and District of Columbia FY 2008 allotments (same as in Table 2).

Column E = *FY 2005 Redistribution*. Column E contains the total FY 2005 redistributed allotments determined in accordance with section 2104(i) of the Act (same as in Table 4).

Column F = *FY 2008 Total Available Allotments*. Column F contains the total allotment funds available to each State in FY 2008, calculated as the sums of the amounts in Columns C, D, and E.

Column G = *FY 2008 Shortfall/FY 2008 SF Allotment. B − F*. For the 50 States and the District of Columbia, Column G contains the determination of the shortfall (if any) in SCHIP funding for each State in FY 2008 after the application of the projected expenditures for FY 2008 against the total allotments available in FY 2008, calculated as the amount in Column B minus the amount in Column F. For the 50 States and the District of Columbia, the amount in Column G represents the amount of the FY 2008 shortfall allotment to eliminate the FY 2008 shortfall in SCHIP funding. For the Commonwealths and Territories the amount in Column G is the additional FY 2008 allotment. The aggregate amount available for additional allotment to the Commonwealths and Territories ($12,164,562) is calculated as 1.05 percent of the total projected FY 2008 shortfalls ($1,158,529,602).

Table 5 - FY 2008 Additional Allotments

State	Total Expenditures FY 2008 /1	Carryover FY 06 & FY 07 Allotments Avail. in FY 08	FY 2008 Allotments	FY 2005 Redistribution	FY 2008 Total Available Allotments C + D + E	FY 2008 Shortfall/ FY 2008 SF Allotment B - F
A	B	C	D	E	F	G
Alabama	112,547,000	$45,797,588	$72,328,116	$0	$118,125,704	$0
Alaska	22,780,000	$587,849	$11,186,515	$0	$11,774,364	$11,005,636
Arizona	137,799,000	$33,084,592	$142,956,789	$0	$176,041,381	$0
Arkansas	117,977,000	$56,487,700	$47,543,965	$0	$104,031,665	$13,945,335
California	1,290,430,000	$296,072,645	$789,164,316	$0	$1,085,236,961	$205,193,039
Colorado	77,671,000	$99,690,820	$71,544,798	$0	$171,235,618	$0
Connecticut	33,043,000	$68,807,697	$38,810,205	$0	$107,617,902	$0
Delaware	9,471,000	$17,940,324	$12,759,650	$0	$30,699,974	$0
Dist. Of Col	7,490,000	$20,415,052	$12,057,061	$0	$32,472,113	$0
Florida	290,471,000	$453,103,635	$301,724,376	$0	$754,828,011	$0
Georgia	325,501,000	$0	$167,923,820	$0	$167,923,820	$157,577,180
Hawaii	18,346,000	$13,959,537	$15,242,690	$0	$29,202,227	$0
Idaho	31,109,000	$36,741,030	$23,803,069	$0	$60,544,099	$0
Illinois	268,822,333	$0	$208,343,771	$0	$208,343,771	$60,478,562
Indiana	92,646,000	$115,204,435	$97,384,888	$0	$212,589,323	$0
Iowa	62,374,000	$0	$33,177,409	$0	$33,177,409	$29,196,591
Kansas	51,233,000	$19,417,884	$36,635,060	$0	$56,052,944	$0
Kentucky	83,030,000	$62,854,053	$68,236,560	$0	$131,090,613	$0
Louisiana	137,287,000	$36,969,652	$84,083,019	$0	$121,052,671	$16,234,329
Maine	32,411,000	$0	$15,449,944	$338,173	$15,788,117	$16,622,883
Maryland	159,448,000	$0	$72,403,254	$3,274,469	$75,677,723	$83,770,277
Massachusetts	275,637,000	$0	$73,334,995	$46,902,941	$120,237,936	$155,399,064
Michigan	183,042,000	$43,723,615	$147,082,132	$0	$190,805,747	$0
Minnesota	84,059,000	$0	$48,613,498	$0	$48,613,498	$35,445,502
Mississippi	133,440,000	$0	$60,988,699	$698,349	$61,687,048	$71,752,952
Missouri	108,682,000	$16,027,960	$77,617,870	$0	$93,645,830	$15,036,170
Montana	21,666,000	$14,006,755	$15,921,821	$0	$29,928,576	$0
Nebraska	35,457,000	$444,038	$21,376,574	$0	$21,820,612	$13,636,388
Nevada	37,943,000	$90,387,089	$51,071,928	$0	$141,459,017	$0
New Hampshire	13,350,000	$14,747,439	$10,656,681	$0	$25,404,120	$0
New Jersey	323,057,000	$0	$105,519,251	$42,807,025	$148,326,276	$174,730,724
New Mexico	102,960,000	$74,574,363	$52,045,406	$0	$126,619,769	$0
New York	376,694,000	$446,958,713	$328,679,791	$0	$775,638,504	$0
North Carolina	194,654,000	$15,734,147	$136,117,313	$0	$151,851,460	$42,802,540
North Dakota	12,903,000	$1,885,320	$7,888,996	$0	$9,774,316	$3,128,684
Ohio	208,958,000	$62,395,823	$157,858,294	$0	$220,254,117	$0
Oklahoma	124,361,000	$33,779,717	$70,828,185	$0	$104,607,902	$19,753,098
Oregon	87,017,000	$63,934,943	$60,115,810	$0	$124,050,753	$0
Pennsylvania	226,814,000	$149,194,869	$168,758,145	$0	$317,953,014	$0
Rhode Island	59,733,000	$0	$13,957,989	$12,954,362	$26,912,351	$32,820,649
South Carolina	117,673,000	$122,449,111	$71,016,874	$0	$193,465,985	$0
South Dakota	13,585,000	$5,829,703	$10,504,473	$0	$16,334,176	$0
Tennessee	113,290,000	$177,866,480	$99,841,627	$0	$277,708,107	$0
Texas	792,682,000	$1,012,721,814	$556,190,553	$0	$1,568,912,367	$0
Utah	51,585,000	$40,381,700	$41,291,966	$0	$81,673,666	$0
Vermont	4,389,000	$7,477,355	$5,636,822	$0	$13,114,177	$0
Virginia	124,805,000	$65,363,316	$90,338,630	$0	$155,701,946	$0
Washington	30,043,000	$144,588,787	$79,883,308	$0	$224,472,095	$0
West Virginia	40,490,000	$23,305,943	$25,666,451	$0	$48,972,394	$0
Wisconsin	80,054,000	$11,728,098	$69,563,162	$0	$81,291,260	$0
Wyoming	7,793,000	$9,714,424	$6,373,481	$0	$16,087,905	$0
Totals	**$7,348,702,333**	**$4,026,356,015**	**$4,987,500,000**	**$106,975,320**	**$9,120,831,335**	**$1,158,529,602**

	Pct. Share For Territories	Tot. Avail for Add'tl Allots to Territories /2
		$12,164,561
Amer. Samoa	1.20%	$145,975
Guam	3.50%	$425,760
N. Mariana Islands	1.10%	$133,810
Puerto Rico	91.60%	$11,142,738
Virgin Islands	2.60%	$316,279
Total	100.00%	$12,164,562

National Total	$1,170,694,164

Footnotes:

/1 Estimates as submitted through November 30, 2007

/2 Under sec. 2104(j) of the Soc. Sec. Act, total available for Territories, $12,164,561, calculated as 1.05% of total shortfall for the 50 States/D.C. ($1,158,529,602)

BILLING CODE 4120–01–C

IV. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980 Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) and Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). We have determined that this notice is economically significant. However, this notice only announces the availability of such allotment funds determined that were calculated based on methodologies specified in statute and does not put forward any discretionary administrative policies. Therefore, we have determined that there are no policy options that require an analysis beyond that which is presented in section II. above.

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $6.5 million to $31.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this notice will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Core-Based Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $125 million. This notice will not create an unfunded mandate on States, tribal, or local governments. Therefore, we are not required to perform an assessment of the costs and benefits of this notice.

Executive Order 13132 establishes certain requirements that an agency must meet when it publishes a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this notice and have determined that it does not significantly affect States' rights, roles, and responsibilities.

Low-income children will benefit from payments under this program through increased opportunities for health insurance coverage. We believe this notice will have an overall positive impact by informing States, the District of Columbia, and Commonwealths and Territories of the extent to which they are permitted to expend funds under their child health plans using the additional FY 2007 shortfall allotment amounts.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

V. Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a proposed notice in the **Federal Register** to provide a period of public comment before the provisions of a notice, such as this, are effective in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). We also ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the APA (5 U.S.C 553(d)). However, we can waive both the notice of proposed rulemaking and the 30-day delay in effective date if the Secretary finds, for good cause, that it is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the notice.

We find there is good cause to waive notice of proposed rulemaking and the delay in the effective date of this issuance of the SCHIP funding provisions and associated methodologies because the delay required for a notice of proposed rulemaking and the delay in the effective date would be contrary to the public interest because the pressing financial needs faced by some States mean that such delays could result in disruption of program operations.

We determined the amounts of the FY 2008 SCHIP funds discussed in this notice as expeditiously as possible in order to make them available to the States as soon as possible. We believe that this was necessary to minimize any disruption in program operations that could result if States did not have secure funding commitments. In determining the amounts of the FY 2008 SCHIP funds discussed in this notice, we used State FY 2007 expenditures and FY 2008 projected Federal expenditures as contained in the most recent available States' quarterly expenditure and budget report submissions as certified by the States through November 30, 2007. The FY 2008 allotments, the FY 2005 redistributed allotments, and the additional FY 2008 allotments make available Federal funds to all States, and particularly shortfall States that may need these funds to continue program operations.

We are waiving notice of proposed rulemaking and the 30-day delay in effective date, and are publishing this issuance of the **Federal Register** as a notice.

In accordance with the provisions of this notice, we have determined the amounts of the FY 2008 SCHIP funding provisions contained in this notice are effective immediately upon publication of this notice.

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.767, State Children's Health Insurance Program)

Dated: April 1, 2008.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: April 29, 2008.

Michael O. Leavitt,

Secretary.

[FR Doc. E8–11612 Filed 5–22–08; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 a meeting of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Neurological Disorders and Stroke, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

Date: June 8–10, 2008.

Time: June 8, 2008, 7 p.m. to 10 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Time: June 9, 2008, 8:30 a.m. to 4:40 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Neuroscience Center (Room A), Rockville, MD 20852.

Time: June 9, 2008, 5:30 p.m. to 8:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Time: June 10, 2008, 8:30 a.m. to 11 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Alan P. Koretsky, PhD, Scientific Director, Division of Intramural Research, National Institute of Neurological Disorders & Stroke, NIH, 35 Convent Drive, Room 6a 908, Bethesda, MD 20892, 301–435–2232, *koretskya@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 Neurnsciences, National Institutes of Health, HHS)

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11497 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Tumor Immunology.

Date: June 2, 2008.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Manzoor Zarger, MS, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435–2477, *zargerma@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Study Section Member Conflicts.

Date: June 10, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Shirley Hilden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7814, Bethesda, MD 20892, (301) 435–1198, *hildens@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Prion Diseases.

Date: June 10, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Rossana Berti, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3191, MSC 7846, Bethesda, MD 20892, 301–402–6411, *bertiros@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel LIRR Member Conflict.

Date: June 12, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: George M. Barnas, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Genetic Variation and Evolution Study Section.

Date: June 17–18, 2008.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: David J. Remondini, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2210, MSC 7890, Bethesda, MD 20892, 301–435–1038, *remondid@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: Vision.

Date: June 18, 2008.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Christine L. Melchior, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, (301) 435–1713, *melchioc@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Non-HIV Anti-Infective Therapeutics.

Date: June 26, 2008.

Time: 7 a.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.

Contact Person: Rossana Berti, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3191, MSC 7846, Bethesda, MD 20892, 301–402–6411, *bertiros@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 DIG F 02 M Special Emphasis Panel.

Date: June 26, 2008.

Time: 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Rass M. Shayiq, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11491 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Skeletal Muscle and Exercise Physiology Study Section, June 12, 2008, 8:30 a.m. to June 13, 2008, 5 p.m., The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102 which was published in the **Federal Register** on April 29, 2008, 73 FR 23257–23259.

The meeting will be held one day only June 12, 2008, from 8:30 a.m. to 6 p.m. The meeting location remains the same. The meeting is closed to the public.

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11492 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Nuclear Dynamics and Transport, June 10, 2008, 8 a.m. to June 11, 2008, 5 p.m., Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007 which was published in the **Federal Register** on April 22, 2008, 73 FR 21636–21639.

The meeting will be held one day only June 10, 2008, from 8 a.m. to 6 p.m. The meeting location remains the same. The meeting is closed to the public.

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11493 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Synthetic and Biological Chemistry.

Date: June 5, 2008.

Time: 11:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: John L. Bowers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435–1725, *bowersj@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Microscopic Imaging Study Section.

Date: June 10, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

Contact Person: Ross D. Shonat, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5156, MSC 7849, Bethesda, MD 20892, (301) 435–2786, *shonatr@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Tissue Engineering Study Section.

Date: June 12–13, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jean D. Sipe, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4106, MSC 7814, Bethesda, MD 20892, (301) 435–1743, *sipej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fungal Pathogenesis.

Date: June 12–13, 2008.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Alexander D. Politis, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3210, MSC 7808, Bethesda, MD 20892, (301) 435–1150, *politisa@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Cellular and Molecular Immunology—A Study Section.

Date: June 12–13, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Hotel, 2399 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Samuel C. Edwards, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4200, MSC 7812, Bethesda, MD 20892, (301) 435–1152, *edwardss@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: HBPP.

Date: June 16, 2008.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Patricia Greenwel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2174, MSC 7818, Bethesda, MD 20892, (301) 435–1169, *greenwep@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships in Biochemical and Biophysical Sciences.

Date: June 19, 2008.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Nuria E. Assa-Munt, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3120, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: GCMB and CIGP.

Date: June 20, 2008.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Patricia Greenwel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2174, MSC 7818, Bethesda, MD 20892, (301) 435–1169, *greenwep@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Clinical Hematology.

Date: June 25–26, 2008.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Delia Tang, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7802, Bethesda, MD 20892, 301–435–2506, *tangd@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Topics in Bacterial Pathogenesis.

Date: June 26–27, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Rolf Menzel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, MSC 7808, Bethesda, MD 20892, 301–435–0952, *menzelro@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Retinopathy Studies.

Date: June 27, 2008.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Raya Mandler, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217, MSC 7840, Bethesda, MD 20892, 301–402–8228, *rayam@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflicts: Physiology and Modeling.

Date: June 27, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lynn E. Luethke, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5166, MSC 7844, Bethesda, MD 20892, (301) 435–1018, *luethkel@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Endocrinology and Reproductive Sciences.

Date: June 30, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Krish Krishnan, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, (301) 435–1041, *krishnak@csrWnih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Health of the Population SBIR 2 Study Section.

Date: July 1, 2008.

Time: 8:30 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.

Contact Person: Karin F. Helmers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, 301–435–1017. *helmersk@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, International Research Scientist Development Award.

Date: July 1–2, 2008.

Time: 10 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Manana Sukhareva, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, 301–435–1116, *sukharem@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel

Small Business: Digestive Sciences.

Date: July 1, 2008.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bonnie L. Burgess-Beusse, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2191C, MSC 7818, Bethesda, MD 20892, 301–435–1783, *beusseb@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Vascular Pathobiology.

Date: July 1, 2008.

Time: 1 p.m. to 4 .pm.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Ai-Ping Zou, PhD, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–435–1777, *zouai@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Hematopoiesis and Thrombosis.

Date: July 1, 2008.

Time: 2:30 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maqsood A. Wani, DVM, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2114, MSC 7814, Bethesda, MD 20892, 301–435–2270, *wanimaqs@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Boron Neutron Capture Therapy.

Date: July 3, 2008.

Time: 3:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Zhiqiang Zou, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6190, MSC 7804, Bethesda, MD 20892, 301–451–0132, *zouzhiq@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.M4, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11495 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed 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 Scientific Review Special Emphasis Panel; BST Member Conflict.

Date: May 28, 2008.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Alexander Gubin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm 5144, MSC 7812, Bethesda, MD 20892, 301–435–2902, *gubina@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11496 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Biological Rhythms and Sleep Study Section, June 4, 2008, 8 a.m. to June 4, 2008, 5 p.m., Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231 which was published in the **Federal Register** on April 4, 2008, 73 FR 18539–18542.

The meeting will be held at the Pier 5 Hotel, 711 Eastern Avenue, Baltimore, MD 21202. The meeting date and time remain the same. The meeting is closed to the public.

Dated: May 16, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11562 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: Heart, Lung, and Blood Initial Review Group; Heart, Lung, and Blood Program Project Review Committee.

Date: June 20, 2008.

Time: 8 a.m. to 2 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: Jeffrey H. Hurst, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7208, Bethesda, MD 20892–7924; 301–435–0303; or *hurstj@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 16, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11564 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development, Initial Review Group Biobehavioral and Behavioral Sciences Subcommittee.

Date: June 16–17, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications

Place: Double Tree Hotel, 1515 Rhode Island Ave., NW., Washington, DC.

Contact Person: Marita R. Hopmann, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health And Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892, (301) 435–6911, *hopmannm@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation

Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 14 2008,

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11487 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed 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 Child Health and Human Development, Initial Review Group Pediatrics Subcommittee.

Date: June 16, 2008.

Time: 8:30 a.m. to 5:30 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: Rita Anand, PhD, Scientific Review Administrator, Division Of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 496–1487, *anandr@mail.nih.gov.*

Name of Committee: National Institute of Child Health and Human Development, Special Emphasis Panel, HIV/AIDS in Uganda and South Africa.

Date: June 17, 2008.

Time: 8:30 a.m. to 5:30 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: Rita Anand, PhD., Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health And Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 14, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11488 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism, Special Emphasis Panel, ZAA1–EE71 Review of Deferred LRP Applications.

Date: May 30, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Katrina L. Foster, PhD, Scientific Review Administrator, National Inst. on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 3037, Rockville, MD 20852, 301–443–3037, *katrina@mail.nih.gov.*

Two LRP Applications were deferred because of administrative issues that caused the meeting to be rescheduled.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians: 93.272, Alcohol National Research Service Awards for Research Training: 93.273, Alcohol Research Programs: 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: May 14 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11490 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Recombinant DNA Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Recombinant DNA Advisory Committee.

Date: June 17–18, 2008.

Time: June 17, 2008, 8 a.m. to 5p.m.

Agenda: The Recombinant DNA Advisory Committee will review and discuss selected human gene transfer protocols as well as related data management activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Floor 6C, Room 6, Bethesda, MD 20892.

Time: June 18, 2008, 8:15 a.m. to 12:30 p.m.

Agenda: The Recombinant DNA Advisory Committee will review and discuss selected human gene transfer protocols and may begin a discussion on biocontainment for influenza viruses. Please check the meeting agenda at *http://www4.od.nih.gov/oba/RAC/meeting.html* for more information.

Place: National Institutes of Health, Building 31, 31 Center Drive, Floor 6C, Room 6, Bethesda, MD 20892.

Contact Person: Laurie Lewallen, Advisory Committee Coordinator, Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892–7985, 301–496–9838; or *lewallla@od.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license,

or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www4.od.nih.gov/oba/,* where an agenda and any additional information for the meeting will be posted when available.

OMB's ''Mandatory Information Requirements for Federal Assistance Program Announcements'' (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

(Catalog of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: May 15, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–11498 Filed 5–22–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–612, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection under Review: Form I–1612, Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act; OMB Control No. 1615–0030.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 17, 2008, at 73 FR 14262 allowing for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 23, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0030 in the subject box. Written comments and suggestions from the public and affected agencies 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:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–612. U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. This form is used by the USCIS to determine eligibility for a waiver.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,300 responses at 20 minutes (.333) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 433 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 19, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–11574 Filed 5–22–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–363, Revision of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–363, Request to Enforce Affidavit of Financial Support and Intent to Petition for Custody for Public Law 97–359 Amerasian; OMB Control Number 1615–0022.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 17, 2008, at 73 FR 14262 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 23, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0022. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the 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 information collection.

(2) *Title of the Form/Collection:* Request to Enforce Affidavit of Financial Support and Intent to Petition for Custody for Public Law 97–359 Amerasian.

(3) *Agency form number, if any and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–363. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as brief abstract: Primary:* Individuals or households. This information collection is used to ensure the financial support of an Amerasian child of a U.S. citizen. Without the use of this information collection, the USCIS is not able to ensure the child does not become a public charge.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 50 responses at .50 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 25 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: May 20, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–11577 Filed 5–22–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Intertek USA, Inc., as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of Intertek USA, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Intertek USA, Inc., 4398 Highway 77 N, Marion, AR 72364, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/xp/cgov/import/operations_support/labs_scientific_svcs/commercial_gaugers/.*

DATES: The accreditation and approval of Intertek USA, Inc., as commercial gauger and laboratory became effective on February 26, 2008. The next triennial inspection date will be scheduled for February 2011.

FOR FURTHER INFORMATION CONTACT: Randall Breaux, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: May 15, 2008.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. E8–11630 Filed 5–22–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation of Intertek USA, Inc., as a Commercial Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation of Intertek USA, Inc., as a commercial laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12, Intertek USA, Inc., 303 Weatherwood Street, Arkansas City, AR 71630, has been accredited to test petroleum, petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12. Anyone wishing to employ this entity to conduct laboratory analyses should request and receive written assurances from the entity that it is accredited by the U.S. Customs and Border Protection to conduct the specific test requested. Alternatively, inquires regarding the specific test this entity is accredited to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov*. Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/xp/cgov/import/operations_support/labs_scientific_svcs/commercial_gaugers/.*

DATES: The accreditation of Intertek USA, Inc., as commercial laboratory became effective on February 27, 2008. The next triennial inspection date will be scheduled for February 2011.

FOR FURTHER INFORMATION CONTACT: Randall Breaux, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: May 15, 2008.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. E8–11632 Filed 5–22–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Approval of Camin Cargo Control, Inc., as a Commercial Gauger

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of approval of Camin Cargo Control, Inc., as a commercial gauger.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.13, Camin Cargo Control, Inc., 73 Castle Coakely, Unit 3, Christiansted, St. Croix, VI 00821, has been approved to gauge petroleum, petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.13. Anyone wishing to employ this entity to conduct gauger services should request and receive written assurances from the entity that it is approved by the U.S. Customs and Border Protection to conduct the specific gauger service requested. Alternatively, inquires regarding the specific gauger service this entity is approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the website listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://cbp.gov/xp/cgov/import/operations_support/labs_scientific_svcs/commercial_gaugers/.*

DATES: The approval of Camin Cargo Control, Inc., as commercial gauger became effective on July 19, 2007. The next triennial inspection date will be scheduled for July 2010.

FOR FURTHER INFORMATION CONTACT: Randall Breaux, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: May 15, 2008.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. E8–11628 Filed 5–22–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5186–N–21]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: *Effective Date: May 23, 2008.*

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: May 15, 2008.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. E8–11320 Filed 5–22–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–33]

Public Housing Admissions/ Occupancy Policies and Procedures

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Public housing agencies (PHAs) that have entered into an Annual Contribution Contract (ACC) with HUD must develop, maintain, and keep on file the admission and occupancy policies. These policies are reflected in a PHA's Admissions and Occupancy Polices (ACOPs).

DATES: *Comments Due Date: June 23, 2008.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0220) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing

and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Public Housing Admissions/Occupancy Policies and Procedures.

OMB Approval Number: 2577–0220.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: Public housing agencies (PHAs) that have entered into an Annual Contribution Contract (ACC) with HUD must develop, maintain, and keep on file the admission and occupancy policies. These policies are reflected in PHA's Admissions and Occupancy Polices (ACOPs).

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	3,278	1		60		196,680

Total Estimated Burden Hours: 196,680.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: May 19, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–11551 Filed 5–22–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–35]

Public Housing Inventory Removal Application

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This collection of information centralizes and standardizes HUD's review and approval of non-funded, noncompetitive requests of Public Housing Agencies (PHAs) to remove public housing property from their inventories via disposition, demolition, voluntary conversion, required conversion, home ownership, or eminent domain proceedings.

DATES: Comments Due Date: June 23, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0075) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Public Housing Inventory Removal Application.

OMB Approval Number: 2577–0075.

Form Numbers: HUD–52860, HUD–52860–B, HUD–52860–C, HUD–52860–D, HUD–52860–E, HUD–52860–F.

Description of the Need for the Information and its Proposed Use: This collection of information centralizes and standardizes HUD's review and approval of non-funded, noncompetitive requests of Public Housing Agencies (PHAs) to remove public housing property from their inventories via disposition, demolition, voluntary conversion, required conversion, home ownership, or eminent domain proceedings.

Frequency of Submission: On occasion, other per transaction.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	851	1		7.06		6,010

Total Estimated Burden Hours: 6,010.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: May 19, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–11640 Filed 5–22–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–34]

Research Plan for a Study of Rents and Rent Flexibility

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Survey a sample of housing authorities and households recently admitted or on the waiting list for public housing or Housing Choice Vouchers to assess inequities and inefficiencies in the current rent system relating to subsidizing rents, setting rents/payment standards, and verifying income. The information collected will provide the needed information regarding PHA and tenant perceptions of alternative rent structures and their feasibility/practicality of incorporating them at a later date. The information shall be collected, analyzed and evaluated to provide recommendations for effective reforms on topics including but not limited to: Setting income eligibility guidelines, reporting tenant income, setting minimum and flat rents, and relating the rents and waiting period of unassisted tenants to rent setting and term limit policy, setting payment standards, and evaluating factors for an allocation formula of incremental vouchers.

DATES: Comments Due Date: June 23, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–NEW) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Research Plan for a Study of Rents and Rent Flexibility.

OMB Approval Number: 2577–NEW.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: Survey a sample of housing authorities and households recently admitted or on the waiting list for public housing or Housing Choice Vouchers to assess inequities and inefficiencies in the current rent system relating to subsidizing rents, setting rents/payment standards, and verifying income. The information collected will provide the needed information regarding PHA and tenant perceptions of alternative rent structures and their feasibility/practicality of incorporation them at later date. The information shall be collected, analyzed and evaluated to provide recommendations for effective reforms on topics including but not limited to, setting income eligibility guidelines, reporting tenant income, setting minimum and flat rents, and relating the rents and waiting period of unassisted tenants to rent setting and term limit policy, setting payment standards, and evaluating factors for an allocation formula of incremental vouchers.

Frequency of Submission: Other one-time.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	1,830	1		1.01	....	1,864

Total Estimated Burden Hours: 1,863.
Status: New Collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: May 19, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–11639 Filed 5–22–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2008–N0127; 40120–1112–0000–F2]

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). Ronald and Jacquelyn Perron (applicants) request an ITP pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The applicants anticipate taking about 0.25 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 applicants' 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 June 23, 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 TE182089–0, 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 TE182089–0 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 applicants' HCP will take place within Section 04, Township 40, Range 23, Punta Gorda, Charlotte County, Florida, at 26181 Bage Drive. This lot is within scrub-jay-occupied habitat.

The lot encompasses about 0.25 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 applicants propose to mitigate for the loss of 0.25 acre of scrub-jay habitat by contributing a total of $18,113 to the Florida Scrub-jay Conservation Fund administered by The Nature Conservancy or acquiring 0.50 acre of credit at a Service approved scrub-jay conservation bank. Funds in the Florida Scrub-jay Conservation Fund 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 applicants' 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: April 15, 2008.

Paul Souza,

Field Supervisor, South Florida Ecological Services Office.

[FR Doc. E8–11587 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N0050; 40136–1265–0000–S3]

Lower Florida Keys Refuges, Monroe County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; draft comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for the Lower Florida Keys Refuges for public review and comment. This DRAFT CCP/EA covers National Key Deer Refuge, Key West National Wildlife Refuge, and Great White Heron National Wildlife Refuge. In this Draft CCP/EA, we describe the alternative we propose to use to manage these refuges for the 15 years following approval of the Final CCP.

DATES: To ensure consideration, we must receive your written comments by June 23, 2008. Two meetings will be held to present the Draft CCP/EA to the public. Mailings, newspaper articles and posters will inform the public of the dates, times, and locations of the meetings.

ADDRESSES: Requests for copies of the Draft CCP/EA should be addressed to: Florida Keys National Wildlife Refuge Complex, Attn: Anne Morkill, Refuge Manager, 28950 Watson Boulevard, Big Pine Key, FL 33043; or, you may submit comments by e-mail to Mary Morris, Natural Resource Planner, at *mary_morris@fws.gov*. A copy of the Draft CCP/EA is available on compact diskette or hard copy.

You may view or obtain copies of the Draft CCP/EA by visiting the National Key Deer Refuge's visitor center located in the Big Pine Shopping Plaza, 175 Key Deer Boulevard, Big Pine Key, FL. Copies may also be viewed at the following Monroe County Public Libraries: Big Pine Key Branch, 213 Key Deer Boulevard, Big Pine Key, FL; Marathon Branch, 3251 Overseas Highway, Marathon, FL; and at the Key West Branch, 700 Fleming Street, Key West, FL.

You may also access or download copies of the Draft CCP/EA at the following Web site address: *http://southeast.fws.gov/planning*.

FOR FURTHER INFORMATION CONTACT: Mary Morris, Natural Resources Planner, at 850–567–6202; or Anne Morkill, Refuge Manager, at 305–872–2239.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for the Lower Keys National Wildlife Refuges. We started the process through a notice in the **Federal Register** on May 9, 2003 (68 FR 25058).

The Lower Florida Keys Refuges include three wildlife refuges—Key West and Great White Heron National Wildlife Refuges and National Key Deer Refuge, all in Monroe County, Florida.

Key West National Wildlife Refuge

Key West National Wildlife Refuge, west of Key West, Florida, and accessible only by boat or plane, consists of the Marquesas Keys and 13 other keys distributed across more than 375 square miles of open water. Key West Refuge is among the first refuges established in the United States. President Roosevelt created the refuge in 1908 as a preserve and breeding ground for colonial nesting birds and other wildlife. The refuge encompasses 208,308 acres of land and water with only one percent (2,019 acres) being land. Most islands are dominated by mangrove plant communities. Exceptions are the hardwood hammock in the Marquesas Keys, and the beaches and dunes there and on Boca Grande and Woman Keys. All islands lack fresh water and native, terrestrial mammals are absent.

The refuge provides habitat and protection for federally listed species, including piping plovers and roseate terns. The refuge harbors the largest wintering population of piping plovers and the largest colony of white-crowned pigeons in the Florida Keys. It is a haven for over 250 species of birds, including ten wading bird species that nest on the refuge. Other notable imperiled species include sea turtles. More loggerhead and green sea turtle nests are found each year on this refuge than in any area of the Florida Keys except the Dry Tortugas. Waters within the refuge's administrative boundaries are important developmental habitat for these sea turtle species, as well as hawksbills and Kemp's ridley sea turtles.

In 1975, Public Law 93–632 designated all islands on Key West Refuge, except Ballast Key, which is privately owned, as a part of the National Wilderness Preservation System. These islands total 2,109 acres.

Great White Heron National Wildlife Refuge

Great White Heron National Wildlife Refuge was established in 1938, by Executive Order 7993 signed by President Roosevelt, as a haven for great white herons, migratory birds, and other wildlife. The refuge encompasses 117,683 acres of land and water with 6,500 acres of land, the latter of which 1,900 were designated Wilderness in 1975, also under Public Law 93–632. The islands account for approximately 7,600 acres and are primarily mangroves. Some of the larger islands contain pine rockland and tropical hardwood hammock habitats. This vast area, known locally as the ''backcountry,'' provides critical nesting, feeding, and resting areas for more than 250 species of birds. The Service co-manages the open water and submerged lands owned by the State of Florida through a Management Agreement.

Great white herons are a white color-phase of great blue herons. In the United States, nesting is restricted to extreme south Florida, including the Florida Keys. The refuge was created to protect great white herons from extinction since the population was decimated by the demand for feathered hats. Protection of great white herons was successful, and these magnificent birds can be observed feeding on tidal flats throughout the refuge. The refuge islands are also used for nesting by ten wading bird species, including the reddish egret, and by many neotropical migratory bird species.

A few green and loggerhead sea turtles nest on Sawyer Key. These species, as well as hawksbill and possibly Kemp's ridley sea turtles, forage in State waters within refuge boundaries.

National Key Deer Refuge

National Key Deer Refuge was established on August 22, 1957, to protect and preserve Key deer and other wildlife resources. It comprises about 8,983 acres of land on several islands within the approved acquisition boundary, as well as additional parcels located outside the boundary administered by the refuge. These lands host diverse habitats, most notably globally endangered tropical hardwood hammocks and pine rocklands. The refuge provides habitat for hundreds of endemic and migratory species, including 21 federally listed species, such as the Key deer, Lower Keys marsh rabbit, and silver rice rat. It contains a variety of plants endemic to the Florida Keys.

The refuge is an important stopping point for thousands of migrating birds each year and an important wintering ground for many North American bird species. Notable species include the piping plover and peregrine falcon. The mosaic of upland and wetland habitats found in the Florida Keys are critical breeding and feeding grounds for birds, and refuge land acquisition efforts strive to add to the lands already protected.

Loggerhead, green, hawksbill, and Kemp's ridley sea turtles forage in the waters surrounding the refuge, but nesting is limited to refuge lands on Ohio Key, where a small number of loggerhead turtle nests are laid annually.

There are 2,278 acres of Wilderness designated on this refuge as of 1975 per Public Law 632.

Refuge Purposes

The purposes of the refuges come from the executive orders and subsequent laws Congress passed as it established each refuge. There are also specific purposes Congress designated for managing the National Wildlife Refuge System as a whole. Each of the three refuges has different enabling legislation and purposes. This Draft CCP/EA has been designed with

consideration of the distinct purposes of each refuge. These purposes are as follows:

Key West National Wildlife Refuge

'' * * * a preserve and breeding ground for native birds.'' EO 923 dated August 8, 1908.

'' * * * particular value in carrying out the national migratory bird management program.'' 16 U.S.C. 667b (An Act Authorizing the Transfer of Certain Real Property for Wildlife, or other purposes).

'' * * * so as to provide protection of these areas * * * and to ensure * * * the preservation of their wilderness character * * *'' (Wilderness Act of 1964, Pub. L. 88–577.)

Great White Heron National Wildlife Refuge

'' * * * as a refuge and breeding ground for great white herons (white phase of the great blue heron), other migratory birds and other wildlife.'' EO 7993, dated Oct 27, 1938.

'' * * * for use as an inviolate sanctuary, or for any other management purpose, for migratory birds.'' 16 U.S.C. 715d (Migratory Bird Conservation Act).

'' * * * to conserve (A) fish or wildlife which are listed as endangered species or threatened species * * * or (B) plants * * *'' 16 U.S.C. 1534 (Endangered Species Act of 1973).

'' * * * suitable for (1) incidental fish and wildlife-oriented recreational development, (2) the protection of natural resources, (3) the conservation of endangered species or threatened species * * *'' 16 U.S.C. 460k–1 ''* * * the Secretary * * * may accept and use * * * real * * * property. Such acceptance may be accomplished under the terms and conditions of restrictive covenants imposed by donors * * *'' 16 U.S.C. 460k–2 (Refuge Recreation Act (16 U.S.C. 460k–460k–4), as amended).

''* * * so as to provide protection of these areas * * * and to ensure * * * the preservation of their wilderness character * * *'' (Wilderness Act of 1964, Pub. L. 88–577.)

National Key Deer Refuge

''* * * to protect and preserve in the national interest the Key deer and other wildlife resources in the Florida Keys.'' 71 Stat. 412, dated Aug. 22, 1957.

''* * * to conserve (A) fish or wildlife which are listed as endangered species or threatened species * * * or (B) plants * * *'' 16 U.S.C. 1534 (Endangered Species Act of 1973).

''* * * suitable for (1) incidental fish and wildlife-oriented recreational development, (2) the protection of natural resources, (3) the conservation of endangered species or threatened species * * *'' 16 U.S.C. 460k–1 ''* * * the Secretary * * * may accept and use * * * real * * * property. Such acceptance may be accomplished under the terms and conditions of restrictive covenants imposed by donors * * *'' 16 U.S.C. 460k–2 [Refuge Recreation Act (16 U.S.C. 460k–460k–4], as amended).

''* * * for the development, advancement, management, conservation, and protection of fish and wildlife resources * * *'' 16 U.S.C. 742f(a)(4) ''* * * for the benefit of the United States Fish and Wildlife Service, in performing its activities and services. Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude * * *'' 16 U.S.C. 742f(b)(1) (Fish and Wildlife Act of 1956).

''* * * conservation, management, and * * * restoration of the fish, wildlife, and plant resources and their habitats * * * for the benefit of present and future generations of Americans * * *'' 16 U.S.C. 668dd(a)(2) (National Wildlife Refuge System Administration Act).

''* * * so as to provide protection of these areas * * * and to ensure * * * the preservation of their wilderness character * * *'' (Wilderness Act of 1964, Pub. L. 88–577.)

Background

The CCP Process

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act and NEPA.

Significant issues addressed in the Draft CCP/EA include: Habitat fragmentation, fire management, climate change, lack of inventory and monitoring, changing public use attitudes, needs and demands, exotic species control, imperiled species recovery, and administrative resources.

Alternatives

A full description of each alternative is in the Draft CCP/EA. We summarize each alternative below.

Alternative A—No Action Alternative

The Lower Florida Keys refuges have a high diversity of community types and endemic species, with many threatened, endangered, rare, and imperiled species. The primary mission of these refuges is to provide habitat for wildlife. The refuges currently have a small staff and funding source for the inventory and monitoring of natural resources. Much effort has been put into some resources, such as Key deer and their pine rockland habitat, as a result of cooperative partnerships with academic and other research organizations. Certain species, such as great white herons, white-crowned pigeons, reddish egrets, and sea turtles, have been studied over time by refuge biological staff and academic partners. Under this alternative, these studies would continue.

Baseline data have yet to be established for some protected species, species suites, habitats, and cultural resources. The effects of natural catastrophes (e.g., Hurricane Wilma in 2005) on the refuges' resources have not been assessed and the effect of climate change (e.g., sea level rise) is not known.

Threatened and endangered species are protected through a variety of management tools, such as area closures, law enforcement, exotic plant control, etc. Limited research and monitoring of focal species, such as Key deer and Lower Keys marsh rabbit and some migratory birds (e.g., reddish egrets), would continue by utilizing existing staff and partnerships. The National Key Deer Refuge prescribed fire management program would continue with the objectives to reduce fuels and to sustain the pine rockland ecosystem.

The Service would continue habitat conservation through land acquisition within the approved acquisition boundary and cooperative agreements with other agencies for non-refuge lands that support the refuges' missions. Partnerships exist to promote land conservation. Exotic plant control to protect and maintain current habitat would occur at existing levels. Currently, exotic plants are controlled

through partnerships with The Nature Conservancy, the State, and Monroe County. A predator management program has been initiated on National Key Deer Refuge to reduce the effects of feral cat predation on the endangered Lower Keys marsh rabbit.

Ecologically sensitive areas and living resources are protected from disturbance or degradation through the use of closure areas, law enforcement, and the implementation of the Management Agreement for Submerged Lands within the Key West and Great White Heron National Wildlife Refuges. The effects of commercial activities and public uses (both wildlife-dependent and non-wildlife-dependent) have not been fully evaluated and carrying capacities are unknown.

The Service has an active volunteer program to assist in all facets of refuge management. Partnerships for these purposes and research are encouraged and maintained. Under this alternative, the existing level of administrative resources (staffing, facilities and assets, funding, and partnerships) would be maintained. This means some positions may not be filled when vacated if funds need to be reallocated to meet rising costs or new priorities.

Alternative B—Proposed Alternative

This alternative assumes a slow to moderate growth of refuge resources over the 15-year implementation period of the CCP. It proposes a management direction for the enhancement of wildlife populations by promoting a natural diversity and abundance of habitats for native plants and animals, especially Keys' endemic, trust, and keystone imperiled species. Many of the objectives and strategies are designed to maintain and restore native communities, particularly the globally imperiled pine rocklands, salt marsh and freshwater wetlands, and the island beach berm communities. Research and monitoring would provide essential information for implementing an adaptive management approach to ecosystem conservation. This alternative would provide for obtaining baseline data for ecosystem health.

Current ongoing and proposed programs and efforts focus on threatened, endangered, rare, and imperiled species of plants and animals. The need for more comprehensive inventory and monitoring for baseline data is addressed in this alternative, particularly for priority imperiled species and their habitats within the refuges. Habitat carrying capacity for Key deer, by island, would be determined and the feasibility of population management would be considered within the realm of the South Florida Multi-Species Recovery Plan in accordance with the Endangered Species Act.

Habitat enhancement for critically imperiled species, such as the Lower Keys marsh rabbit and Key tree-cactus, would occur to ensure the long-term sustainability of these species. Opportunities for land acquisition from willing sellers would focus on protecting more marsh rabbit habitat. Off-refuge nursery propagation of the Key tree-cactus would be implemented for later translocation to suitable refuge habitats. Research would be initiated to identify causal reasons for the marked, long-term decline in the great white heron nesting population.

Since a primary purpose of the refuges is to provide sanctuary for nesting and migratory birds, greater protection from human disturbance would be provided, particularly at colonial nesting bird rookeries and at beach habitats in the backcountry islands. Additional limitations to public use may be implemented in sensitive beach areas important for shorebirds, terns, sea turtles, and butterflies.

Strategies are proposed to improve the fire-dependent pine rocklands and to enhance habitat features in salt marsh and freshwater wetlands that benefit priority species on the National Key Deer Refuge. Prescribed fire and mechanical or manual vegetation treatments would be used as habitat management tools to reduce wildland fuels and benefit priority species and habitats where appropriate. Predictive modeling and fire effects monitoring would be used on all prescribed-fire treatments in an adaptive management approach to develop site-specific burn prescriptions and to determine whether objectives were met. The National Key Deer Refuge habitat and fire management plans would be revised and implemented accordingly.

Exotic plant control would continue as an ongoing operation within the refuges in order to maintain habitats and prevent new infestations. Cooperative efforts would be sought to control seed sources from private lands and to increase coordinated mapping and monitoring of areas with known infestations. Management of non-native and exotic animals would be implemented as directed by the South Florida Multi-Species Recovery Plan for the benefit of threatened and endangered species.

A primary focus of the visitor services program, as proposed, is to enhance environmental education and outreach efforts substantially to reach larger numbers of students, educators, and visitors. This alternative also focuses on increasing public awareness, understanding, and support for the refuges' conservation mission. It places priority on wildlife-dependent uses, such as wildlife photography and wildlife observation. A Visitor Services' step-down plan would specify program details consistent with the Service's visitor services' program standards. Non-wildlife-dependent forms of recreation would be limited or restricted in sensitive areas and awareness efforts would be stepped-up to inform visitors about protecting Wilderness areas.

The basic administrative and operational needs of the refuges have been addressed. Essential new staffing is proposed through the addition of six permanent full-time staff. Daily operation of the refuge would be guided by the CCP through the development and implementation of eleven step-down management plans. Wilderness and cultural resource protection objectives and strategies would be incorporated within the appropriate step-down management plans. The modest growth in resources would be used for wildlife monitoring and habitat enhancement to better serve the refuges' purposes and the CCP's vision. Existing facilities and vehicles would be maintained with the exception of the new visitor services' facility that is proposed.

Alternative C

This alternative assumes a moderate to substantial growth of the refuges' resources from internal or external sources. It would more fully realize the refuges' missions and address the huge number of imperiled species and habitat types. While Alternative C contains many of the provisions to protect and restore habitats similar to Alternative B, it emphasizes a broader suite of priority species. The long-term ecological inventory and monitoring plan would be expanded to cover more species and species suites. Additional studies on some species would be undertaken and additional biological staffing would be required. The use of captive, off-refuge sources of some species facing potential extirpation (e.g., Lower Keys marsh rabbits) would be explored for reintroduction after a natural catastrophe, such as a major hurricane. In certain habitats, some alternative habitat management techniques would be studied and applied. Education and outreach programs on alternative habitat management tools and strategies are proposed. Studies to monitor the immediate and/or long-term effects of natural, catastrophic events (e.g., hurricanes) and global climate change,

particularly sea level rise, would be initiated.

Under this alternative, the plan anticipates shifts in the Visitor Services' Program if visitation and public use increase. Positions are proposed to add another refuge ranger position to coordinate and enhance volunteerism and to foster relationships with the refuges' friends group and other partners for environmental education and outreach programs.

Resource protection and visitor safety would be greatly enhanced through this alternative, with the addition of two new law enforcement officers. This would allow for more patrol and enforcement of closed areas and for more protection of sensitive areas, especially of Wilderness areas or cultural resource sites. A cultural resources' inventory would be conducted.

The operation of the refuges for meeting their goals and purposes would be more optimally realized under this alternative. Implementation of the plan, including details of refuge operations, would also occur through the development of eleven step-down management plans. New staffing is proposed through the addition of seven permanent full-time staff. These positions are in addition to the six full-time positions proposed in Alternative B, for a total of thirteen full-time positions with Alternative C. New maintenance and staff housing facilities are proposed along with new vehicles and boats to accommodate the staffing increases.

Next Step

After the comment period ends, we will analyze the comments and address them in the form of a final CCP and a Finding of No Significant Impact.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: April 8, 2008.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8–11617 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Agency Information Collection Activities: Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice; request for comments.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements for the ''North American Breeding Bird Survey.'' This notice also provides the public a second opportunity to comment on the paperwork burden of this collection.

DATES: Submit written comments by June 23, 2008.

ADDRESSES: Please submit comments on this information collection directly to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via e-mail: (*OIRA_DOCKET@omb.eop.gov*); or by fax (202) 395–6566; and identify your submission with #1028–0079.

Please also submit a copy of your comments to the Department of the Interior, USGS, via:

- *E-mail: atravnic@usgs.gov*. Use OMB Control Number 1028–0079 in the subject line.
- *Fax:* (703) 648–7069. Use OMB Control Number 1028–0079 in the subject line.
- Mail or hand-carry comments to the Department of the Interior; USGS Clearance Officer, U.S. Geological Survey, 807 National Center, Reston, VA 20192. Please reference OMB Control Number 1028–0079 in your comments.

FOR FURTHER INFORMATION CONTACT: Keith Pardieck at (301) 497–5843. Copies of the full Information Collection Request and the form can be obtained at no cost at *http://www.reginfo.gov* or by contacting the USGS clearance officer at the phone number listed below.

SUPPLEMENTARY INFORMATION:

Title: North American Breeding Bird Survey (BBS).

OMB Control Number: 1028–0079.

Bureau Form Number: None.

Type of Request: Extension of a currently approved collection.

Abstract: The BBS is a long-term, large-scale avian monitoring program to track the status and trends of North American bird population. Volunteers conduct avian point counts once per year during the breeding season (primarily June). Volunteers skilled in avian identification listen for 3 minutes at 50 stops along the route recording all birds seen or heard. Data are submitted electronically via the Internet or on hard copy. These data are used to estimate population trends and abundances at various geographic scales and assist with documenting species distribution.

Frequency: Annually.

Estimated Number and Description of Respondents: Approximately 2,500 volunteer respondents per year.

Estimated Number of Responses: 2,500.

Annual burden hours: 27,500.

Estimated Annual Reporting and Recordkeeping ''Hour'' Burden: We estimate the public reporting burden averages 11 hours per response. This includes the time for driving to/from the survey route locations and scouting route, 50 3-minute data collection periods (one at each sampling station along the route), data submission, and data verification.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We estimate the total ''nonhour'' cost burden to be $126,250. This total includes costs of mileage for conducting the surveys.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) (44 U.S.C. 3501, *et seq.*) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *.'' Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden

on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, on March 19, 2008, we published a **Federal Register** notice (73 FR 14832) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day public comment period, which ended May 19, 2008. We received one comment. The commenter suggested that annual data collection was unnecessary and advocated estimating population size from year to year based upon the assumption that populations are declining 10 percent per year. Additional statements were not specifically relevant to the information collection requirements.

Response: Established in 1966, the BBS program has provided scientifically rigorous national estimates of relative abundance and population trends for hundreds of bird species for over four decades. The information collected by the BBS is central to nongame avian conservation and management efforts in North America, informing science-based avian conservation and management actions by Federal and State agencies and private entities. Analyses of BBS data have identified that not all bird species are declining. In fact, over 40 percent of the bird populations monitored by the BBS are increasing or are stable in numbers. Those that are decreasing are not necessarily decreasing throughout their entire ranges or by as much as 10 percent per year. Thus, through collection of actual population data annually, the BBS is able to identify species in areas most in need of intensive research and management efforts, allowing for efficient targeted use of Federal funds for species conservation and management efforts. The BBS also acts as an early warning system, identifying declining species long before they reach critically low levels. Finally, BBS data are collected by USGS volunteers highly skilled in avian identification making the BBS extremely cost-effective.

USGS Information Collection Clearance Officer: Alfred Travnicek, 703–648–7231.

Dated: May 20, 2008.

Susan D. Haseltine,

Associate Director for Biology.

[FR Doc. E8–11588 Filed 5–22–08; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; Oneida Indian Nation of New York

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Final Agency Determination to Take Land into Trust under 25 U.S.C. 465 and 25 CFR part 151.

SUMMARY: The Deputy Secretary and the Associate Deputy Secretary made a final agency determination to acquire approximately 13,003.89 acres in trust for the Oneida Indian Nation of New York. This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Deputy Secretary by 209 Departmental Manual 2.1 and delegated by the Deputy Secretary to the Associate Deputy Secretary under authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 2162), as amended.

FOR FURTHER INFORMATION CONTACT: James T. Kardatzke, PhD, Branch Manager, Natural Resources, Bureau of Indian Affairs, Eastern Regional Office, 545 Marriott Drive, Suite 700, Nashville, TN 37214; Telephone (615) 564–6830.

SUPPLEMENTARY INFORMATION: This notice is published to comply with the requirement of 25 CFR 151.12(b) that notice be given to the public of the decision by the authorized representative of the Secretary of the Interior to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land into trust for Indian tribes and individuals before transfer of title to the property occurs. On May 19, 2008, the Deputy Secretary and the Associate Deputy Secretary issued a Record of Decision documenting the Department's final determination to accept approximately 13,003.89 acres into trust for the Oneida Indian Nation of New York under authority of Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465. Title to the 13,003.89 acres, described below by the parcel identification numbers assigned by the Oneida Indian Nation of New York and by the tax lot identification numbers assigned by the counties in which the lands are located, shall be acquired in the name of the United States in trust for the Oneida Indian Nation of New York no sooner than 30 days after the date of this notice.

ONEIDA COUNTY, NY

Oneida Nation Parcel No.	Oneida County Tax Lot No.
8	298.000–1–30.3
9	298.000–1–38
10	298.000–1–39
11	310.000–1–15.2
12	310.000–1–27
13	323.000–1–1.3
16	323.000–1–2
17	323.000–1–1.1
19	299.000–1–58.1
20	322.000–2–19
22	322.000–2–28
23	284.000–1–30
24	285.000–1–32
25	284.000–1–29
26	285.000–1–2
27	285.000–1–5
28	285.000–1–8.1
29	284.000–1–27
30	284.000–1–28
31	284.000–1–37
32	297.000–1–3.1
34	310.000–2–1
35	285.000–1–6
36	284.000–1–18
37	270.000–1–34
38	269.000–2–47.1
39	310.000–2–6.2
40	310.000–2–9
41	299.000–1–1
42	286.000–2–83.6
43	286.003–3–42
44	299.000–1–57.2
45	299.000–1–57.3
46	299.000–1–58.3
47	310.000–2–6.1
48	284.000–1–23
49	298.000–1–58
50	284.000–1–25.2
51	299.000–1–58.2
53	298.000–1–57
54	284.000–1–22
55	284.000–1–24
56	284.000–1–20
58	298.000–1–3
59	297.000–1–5.1
59	297.000–1–5.2
60	298.000–1–50.2
61	298.000–1–14
62	298.000–1–50.1
63	298.000–1–56.2
64	298.000–1–50.7
65	298.000–1–69
66	298.000–1–41.1
66	298.000–1–41.2
67	310.000–1–61
68	298.000–1–43
69	299.001–1–35.1
70	299.001–1–35.2
71	299.001–1–35.3
72	298.000–1–42.2
73	298.000–1–42.1
74	299.000–1–56.2
86	299.000–1–55.2
88	299.001–1–36
89	298.002–3–15.1
90	284.000–1–21
91	284.000–1–19
99	286.000–2–83.1
101	299.000–1–27
102	312.000–1–52.1
103	297.001–1–8.1

ONEIDA COUNTY, NY—Continued

Oneida Nation Parcel No.	Oneida County Tax Lot No.
103	297.001–1–8.2
104	312.000–1–65
105	324.013–1–7
106	298.000–1–19
107	298.000–1–18
108	299.001–1–37
109	298.000–1–39
110	311.000–1–18
112	323.012–2–9
113	322.000–1–30
114	299.000–1–2
115	299.000–1–23.1
116	299.000–1–13
117	311.000–2–6.1
118	311.000–1–32
118	311.000–2–10.1
118	311.000–2–11
119	312.000–1–2
122	297.000–1–15
123	324.000–1–71
124	299.000–1–57.1
137	332.000–1–19.2
137	332.000–1–20.1
137	332.000–1–27
143	310.000–1–16
144	298.002–3–15.3
144	298.002–3–16
144	298.002–3–17
147	297.000–1–37.1
148	311.000–2–24.1
148	311.000–2–24.12
148	311.000–2–24.6
148	311.000–2–24.7
149	310.000–1–7
154	311.000–2–26
156	298.000–1–56.1
157	298.000–1–50.3
158	312.000–1–62.2
164	299.000–1–26
165	310.000–2–13
170	324.000–1–70
172	361.000–1–1.2
172	361.000–1–8
175	324.013–1–18
176	297.000–1–16
176	297.000–1–17
176	297.000–1–23
177	310.000–1–22
177	310.000–1–23
177	310.000–1–24
179	310.000–2–8
180	298.002–3–22
181	310.000–2–4
182	310.000–2–3.2
183	323.008–1–1.1
183	323.012–1–39
184	323.000–1–34.3
184	323.000–1–34.5
186	298.000–1–50.11
186	298.000–1–51
187	310.000–1–6
188	310.000–2–5
189	299.000–1–31.2
190	299.000–1–25
190	299.000–1–31.1
192	310.000–2–3.1
193	298.002–3–4.3
194	285.000–1–31
197	310.000–2–2
199	284.000–1–26
201	312.000–1–1

ONEIDA COUNTY, NY—Continued

Oneida Nation Parcel No.	Oneida County Tax Lot No.
202	310.000–2–7
203	298.002–2–1
203	298.002–2–2
220	270.000–1–23
221	270.000–1–33.3
222	270.000–1–35.5
223	285.000–1–9
224	285.000–1–10
225	285.000–1–11
228	271.000–3–55.1
230	297.000–1–37.2
233	299.000–1–50
234	310.000–3–48.1
238	299.000–1–53
240	324.000–1–7.1
240	324.000–1–7.2
242	310.000–1–8
244	312.000–1–62.1
244	312.000–1–63.1
247	298.000–1–17
248	298.002–3–23
252	298.000–1–20
253	298.000–1–15
254	299.000–1–52
257	299.001–1–48.2
259	297.000–1–2
259	297.001–1–5.2
260	299.000–1–45
261	310.000–2–16
262	310.000–2–26.2
263	310.000–2–26.1
263	310.000–2–28
264	271.000–3–58
266	299.000–1–46
267	310.000–2–15.1
268	285.000–1–21
268	285.000–1–22
268	298.000–1–12
268	298.000–1–13.1
268	298.000–1–13.2
269	310.000–2–18
270	310.000–2–27
271	299.000–1–5
272	311.000–1–14.2
273	310.000–2–24
273	310.000–3–52
274	310.000–3–53.3
275	311.000–2–25.2
276	311.000–2–24.14
277	310.000–2–17
278	311.000–2–21.2
278	311.000–2–21.8
279	299.000–1–22.1
280	310.000–2–14
284	299.000–1–49
285	310.000–3–53.3
286	285.000–1–24
287	310.000–2–15.2
292	298.000–1–59.1
293	297.000–1–27.1
294	297.000–1–27.3
294	297.000–1–27.4
295	299.000–1–21
296	298.000–1–34.1
298	311.000–1–13
300	297.000–1–12.1
301	298.000–1–16
302	299.001–1–48.1
303	298.000–1–34.2
306	300.000–3–7.3
312	311.000–1–13

ONEIDA COUNTY, NY—Continued

Oneida Nation Parcel No.	Oneida County Tax Lot No.
316	324.000–1–75.2
316	324.000–1–75.4
320	310.000–2–12
321	284.000–1–32
323	298.000–1–33
328	323.000–1–40
328	323.000–1–45
331	286.003–3–44
331	286.003–3–47
332	284.000–1–17

MADISON COUNTY, NY

Oneida Nation Parcel No.	Madison County Tax Lot No.
2	54.–1–30
3	55.–1–3
4	47.–1–50.1
5	47.–1–50
6	47.–1–46
7	54.–1–14.2
14	47.–1–50.2
15	47.–1–51
18	47.–1–42
21	47.–1–43
126	54.–1–21.11
127	54.–1–32.2
128	54.–1–33
128	55.–1–38
128	55.–1–4.2
128	55.–1–7
129	54.–3–11
129	54.–3–4
130	54.–3–8
131	54.–2–2
131	63.–1–2.1
132	54.–2–5
133	55.–2–5.12
134	55.–2–9
135	55.–2–21.12
151	54.–2–6.1
152	54.–2–3.12
152	54.–2–3.13
152	54.–2–3.62
152	54.–2–6.22
153	54.–2–8.12
155	63.–1–2.2
166	46.–1–4.1
166	46.–1–5.11
167	55.–2–21.11
167	55.–2–22
168	64.–1–17
168	64.–1–18
168	64.–1–2
168	64.–1–24.1
168	64.–1–24.31
168	64.–1–3.1
168	64.–1–3.2
168	64.–1–35
168	64.–1–6
171	74.1–1–17
171	74.–1–16.1
171	74.–1–18
171	74.–1–19
171	74.–1–9
173	83.–1–18
178	54.–1–31
196	63.–1–3
207	54.–1–29.1

MADISON COUNTY, NY—Continued

Oneida Nation Parcel No.	Madison County Tax Lot No.
208	54.–1–32.1
209	55.–1–4.1
210	55.–2–5.11
211	55.–2–7
212	55.–2–8.1
213	64.–1–1
214	64.–1–13.1
227	54.–1–29
282	65.–1–10
283	74.–1–16.5
291	46.–1–62.2
304	54.–3–5.11
304	63.–2–2
315	64.–1–15.2
322	47.–1–61

Dated: May 20, 2008.

James E. Cason,

Associate Deputy Secretary.

P. Lynn Scarlett,

Deputy Secretary.

[FR Doc. E8–11636 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs of the Department of the Interior is providing guidance and direction to Office of Federal Acknowledgment (OFA) staff for managing recurring administrative and technical problems in processing petitions for Federal acknowledgment. This guidance and direction does not amend the acknowledgment regulations at 25 CFR part 83.

DATES: *Effective Date:* The guidance and direction defined by this notice are effective on May 23, 2008.

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment, MS 34B–SIB, 1951 Constitution Avenue, NW., Washington, DC 20240, telephone (202) 513–7650.

SUPPLEMENTARY INFORMATION:

Introduction

The Department publishes this notice in the exercise of authority under 43 U.S.C. 1457, 25 U.S.C. 2 and 9, 5 U.S.C. 552(a), 5 U.S.C. 301, and under the exercise of authority that the Secretary of the Interior delegated to the Assistant Secretary—Indian Affairs (Assistant Secretary) by 209 Department Manual 8.

This notice supplements the notice published in the **Federal Register** (70 FR 16513) on March 31, 2005, entitled ''Office of Federal Acknowledgment, Reports and Guidance Documents, Availability, etc.''

This notice provides the OFA with guidance and direction regarding management of recurring administrative or technical problems in processing petitions for Federal acknowledgment. This guidance and direction is based on interpretation of the acknowledgment regulations. This guidance and direction does not change the acknowledgment regulations, but will assist in making the process more streamlined and efficient, and improve the timeliness and transparency of the process.

The Department developed its Federal acknowledgment regulations, 25 CFR part 83—Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, after notice and substantial public comment, both as to the original regulations and the amended regulations that became effective in 1994. These regulations establish a uniform procedure and fact-based approach to acknowledgment. The Department subsequently published two notices in the **Federal Register** concerning internal procedures for managing and processing petitions. This notice provides additional guidance and direction.

The Department should direct all groups seeking to be acknowledged as Indian tribes to 25 CFR part 83. OFA will provide copies of the regulations and guidelines to any group or individual to assist them in understanding the Department's regulatory process for Federal acknowledgment. If a group does not meet the seven mandatory requirements for Federal acknowledgment as an Indian tribe, then the Department will inform the petitioner of ''alternatives, if any, to acknowledgment'' (such as Congressional legislation) or other means ''through which any of its members may become eligible for services and benefits from the Department as Indians'' (25 CFR 83.10(n)).

In the more than 29 years that the Department's acknowledgment regulations have been in effect, the Department has confronted a number of recurring issues in the administration of the regulations including: the emergence of splinter groups; the administration of technical assistance (TA); requests for expedited processing for uniquely qualified groups, requests for a reduction of the time period for historical evidence; opportunities for streamlining the process through expedited decisions against acknowledgment and decisions against acknowledgment on fewer than all seven criteria; the handling of questionable submissions; and designation of ''inactive'' status.

Guidance and Direction

I. Emergence of Splinter Groups

A. Splinter Groups That Arise After a Petitioner Submits a Letter of Intent and Before the Department Determines the Group Is ''Ready, Waiting for Active Consideration.''

Conflicts within a petitioning group that result in multiple and conflicting claims to leadership hamper the ability of OFA to communicate and conduct its business with the group when OFA cannot identify a single governing body as the point of contact with the group. OFA should deal with the designated leaders of the group as a whole, not the group's various members, and should continue to avoid becoming involved in the internal conflicts of a petitioning group. Disputes are matters that must be handled by the group. When OFA finds that conflicting claims to leadership interfere with its ability to conduct its business with the group, OFA should not devote its expertise and resources to the group's petition.

In order to be able to work with the one duly authorized governing body of a petitioner when these leadership disputes occur, OFA may request the following information from the group:

(1) The current governing document, and all past governing documents;

(2) The current membership list that is certified as accurate as of a specific date, and all past membership lists;

(3) Completed consent forms from every member. A consent form should be signed by each individual and should state that he or she voluntarily wishes to belong to the group. A parent should sign for his or her minor children individually or the legal guardian or representative transacting for that minor child or individual should sign. In the latter instance, the group should submit a copy of the legal document allowing that representation;

(4) Copies of the all minutes of meetings of the group's governing body since the filing of the letter of intent;

(5) Copies of documents reflecting changes in the composition of the governing body since the filing of the letter of intent, such as published election results, minutes, newspaper articles, or newsletters; and

(6) Any court order determining the legitimate leadership of the group.

Until this material is received and the leadership split is resolved, OFA should not expend time on the petitioner. The submissions should be reviewed by the appropriate OFA researchers, when available, recognizing that, under the regulations, the Department's top priority is processing petitions on active consideration, followed by those petitions on the ''Ready, Waiting for Active Consideration'' (''Ready'') list. If an OFA review of the submitted information identifies a governing body agreed upon by the group's members, then OFA may contact the petitioner.

Some petitioning groups attempt to resolve their disputes by splitting into two or more groups, not realizing that, by doing so, neither group may be able to meet the criteria. The Department does not acknowledge parts of an Indian tribe. Therefore, the groups should be encouraged to work together for the long term, recognizing that there may be circumstances in which the separation is appropriate to reflect an actual group that might meet the regulatory criteria.

B. Splinter Groups That Emerge After the Department Determines the Petitioner Is ''Ready, Waiting For Active Consideration.''

If a group on the ''Ready'' list of petitioners experiences internal disputes, then OFA should advise the group that these disputes jeopardize its placement on this ''Ready'' list and its priority position on this list. When a group tries to resolve its disputes by splitting into two or more groups, OFA also should advise the group that the result of dividing into two or more may be that the individual subgroups may not be able to meet the criteria. Again, the Department does not acknowledge parts of an Indian tribe.

OFA should recommend that the group resolve its disputes in a timely manner and submit the requested information, as outlined above in the previous section, in a timely manner. If the information is not received, or if the dispute is not resolved in a timely fashion, OFA, in its discretion in managing its workload, may decide not to move the group to active consideration or may decide to remove it from the ''Ready'' list because it is no longer ready for evaluation. If the leadership dispute still results in two petitioners, OFA may, in its discretion in managing its workload, recommend that the two petitioners be evaluated together if both are ''ready'' to proceed to active consideration or may proceed with one petitioner if the other is not ''ready.'' OFA should not, however, allow itself to be used as leverage by one portion of the petitioning group to further its position with the remainder of the group. Therefore, OFA may determine whether it can proceed with the evaluation.

When and how OFA will respond to a group's leadership disputes and emergence of splinter groups and its submissions will depend entirely on the facts of the situation, availability of OFA's professional staff members, their recommendations, and OFA's pending workload priorities. OFA's priority remains to process petitions on active consideration.

II. Handling Petition Documentation When a Dispute Arises

The Department will treat claimed separate governing bodies within the same petitioner as separate parties for purposes of the disclosures under the Freedom of Information Act (FOIA). The Department will redact or withhold personal information that one governing body submits from the other governing body that may be requesting copies of such documents. Under FOIA, members of the group or members of the public may request in writing copies of documents submitted in relation to the petition. Petition documentation is a public record subject to release under FOIA unless an exemption applies. Certain personal records, such as membership lists and genealogical information, may be protected from disclosure by law. The Department will release copies of all records requested that are not affected by the exemptions under FOIA.

III. Technical Assistance

Under 25 CFR part 83, OFA provides technical assistance (TA) reviews of materials that are submitted by a petitioning group. As part of this TA review, OFA should indicate the time periods under the specific criteria for which there is little or no evidence submitted and set a time period for response. If a petitioning group needs additional time to respond, the group should provide a research plan of action. Under most circumstances, if a timely response is not received, then OFA should designate a petitioner as ''inactive.''

IV. Expedited Processing

If a preliminary review indicates that the group appears to meet criteria 83.7(e), 83.7(f), and 83.7(g), subject to a full review under the criteria on active consideration, OFA should recommend a waiver of the priority provisions in the regulations to move to the top of the ''Ready'' list (1) any group that can show residence and association on a state Indian reservation continuously for the past 100 years, or, (2) any group that voted in a special election called by the Secretary of the Interior under section 18 of the Indian Reorganization Act (IRA) between 1934 and 1936, provided that the voting Indian group did not organize under the IRA. This waiver of the priority provisions should be recommended only if a preliminary review indicates that a predominant portion of the group's current members appears to descend from a representative portion of persons on a 1910 or earlier governmental or tribal list of the residents of the State reservation, or that a predominant portion of the group's current members appears to descend from a representative portion of a list of voters on the IRA. This provision is for purposes of priority placement on the ''Ready'' list and does not revise the required evaluation under the criteria.

V. Reducing the Time Period for Which Petitioners Must Submit Evidence

''First sustained contact'' is defined in part in the regulations as ''the period of earliest sustained non-Indian settlement and/or governmental presence in the local area.'' The purpose of the evaluation under the regulations is to establish that an Indian tribe has existed continuously and is entitled to a government-to-government relationship with the United States. In order to reduce the evidentiary responsibilities of the petitioner, it is reasonable to interpret the regulations as requiring the petitioner to document its claim of continuous tribal existence only since the formation of the United States, the sovereign with which it wishes to establish a government-to-government relationship. The Constitution was ratified March 4, 1789, and provides in Article I, section 8, clause 3, that Congress has the power to regulate commerce with the Indian tribes. Therefore, if the petitioner was an Indian tribe at that time the Constitution was ratified, its prior colonial history need not be reviewed. The date of ''the period of earliest sustained non-Indian settlement and/or governmental presence in the local area,'' thus, should be on or after March 4, 1789, reducing the time period for which petitioners should submit evidence.

VI. Expedited Findings Against Acknowledgment

The Department may issue an expedited proposed finding against Federal acknowledgment under section 83.10(e), prior to placing the group on the Ready list. OFA may prepare an expedited proposed finding as appropriate, once a petitioner has

formally responded to a TA review letter or when a petitioner requests to be placed on the ''Ready'' list or states in writing in a document certified by the petitioner's governing body that the petition is complete or that the Assistant Secretary should proceed with the active consideration of the petition.

VII. Decision Against Acknowledgment Based on Failure To Meet Fewer Than Seven Criteria

If during the evaluation of a petition on active consideration it becomes apparent that the petitioner fails on one criterion, or more, under the reasonable likelihood of the validity of the facts standard, OFA may prepare a proposed finding or final determination not to acknowledge the group on the failed criterion or criteria alone, setting forth the evidence, reasoning, and analyses that form the basis for the proposed decision. This process should be used to increase the speed of the decision-making process and better utilize the time and expertise of OFA professional staff. Thus, this process is most appropriate when the deficiency becomes apparent during the initial stages of active consideration.

If a proposed finding against acknowledgment is issued on fewer than seven criteria and if, following an evaluation of the evidence and argument submitted during the comment period, it is determined that the petitioner meets the criterion or criteria, then the Assistant Secretary will issue an amended proposed finding evaluating all seven criteria.

VIII. Integrity

If OFA suspects that a petitioner may be involved in illegal activities or has submitted fraudulent documents for the Federal acknowledgment process, OFA should continue to refer any such matters to the Office of the Solicitor and Inspector General to seek appropriate action (such as investigation, prosecution, or other action).

IX. ''Inactive'' Status

In order to more accurately gauge its workload, OFA should modify its ''Status Summary'' publication to include only those petitioners that have submitted a documented petition and responded to a TA review letter. The ''register of letters of intent or incomplete petitions'' maintained under § 83.10(d) should be maintained separately and include a category of ''Inactive Petitioners.'' This inactive category should include those petitioners that have not responded in two years to a TA review, have missed suggested deadlines for responding to the TA review, or have missed deadlines in its approved research plan of action. It should also include those petitioners that have submitted only a letter of intent, or are not otherwise ready for the initial TA review.

Dated: May 16, 2008.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

[FR Doc. E8–11603 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–G1–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–16169; AK–964–1410–HY–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 the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to The Aleut Corporation. The lands are in the vicinity of Sand Point, Alaska, and are located in:

Seward Meridian, Alaska

T. 53 S., R. 72 W.,
Secs. 5 to 8, inclusive.
Containing 641.97 acres.

T. 53 S., R. 73 W.,
Secs. 1 to 8, inclusive;
Secs. 10 to 14, inclusive;
Secs. 17, 18, and 23.
Containing 9,044.20 acres.

T. 54 S., R. 73 W.,
Secs. 8, 9, 10, and 15;
Sec. 16.
Containing 1,807.77 acres.

T. 53 S., R. 74 W.,
Secs. 13, 24, and 25.
Containing 1,920 acres.

T. 56 S., R. 74 W.,
Secs. 28, 33, and 34.
Containing 1,920 acres.
Aggregating 15,333.94 acres.

Notice of the decision will also be published four times in the Anchorage Daily News.

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 June 23, 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. E8–11586 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–040–5101–ER–F852; N–79734]

Notice of Availability of the Draft Environmental Impact Statement for the Lincoln County Land Act Groundwater Development and Utility Right-of-Way Project

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 *et seq.*), the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (DEIS) to analyze a proposed grant of rights-of-way for groundwater development and utility facilities in Lincoln County, Nevada, and by this notice invites public comments.

DATES: To assure that they will be considered, BLM must receive written comments on the DEIS within 60 days following the date the Environmental Protection Agency publishes their Notice of Availability in the **Federal Register**. The BLM intends to hold four public meetings in Nevada during the 60-day comment period, one each in Mesquite, Caliente, Carson City and Las Vegas. BLM will announce all public meeting times and locations at least 15 days in advance through public notices, media news releases, and mailings. In addition, information on public meetings may be posted on the Internet at *http://www.blm.gov/nv/st/en.html.*

ADDRESSES: Submit written comments on the DEIS using any of the following methods:

- *Mail:* Penny Woods, BLM Project Manager, P.O. Box 12000, Reno, NV 89520.
- *Fax:* 775–861–6689 (Attention: Penny Woods, Project Manager).
- *E-mail: nvgwprojects@blm.gov.*

FOR FURTHER INFORMATION CONTACT: Penny Woods, BLM Project Manager, P.O. Box 12000, Reno, NV 89520, by fax 775–861–6466 (Attention: Penny Woods), or by e-mail: *nvgwprojects@blm.gov.*

SUPPLEMENTARY INFORMATION: The DEIS describes and analyzes a proposal for groundwater development in the Clover Valley and Tule Desert hydrographic basins as submitted by the Lincoln County Water District (LCWD). The DEIS addresses the proposal as submitted by LCWD; an alternative alignment of pipelines, power lines and facilities; and a no action alternative. Under the proposed action, LCWD would develop and convey groundwater in Tule Desert and Clover Valley hydrographic basins to private land for community development in the Toquop Township (Lincoln County Land Act) tract just north of Mesquite, Nevada. The volume of water to be transported through the proposed facilities could be up to 24,000 acre-feet per year.

The proposed project would be located in unincorporated portions of southeastern Lincoln County, Nevada, and consists of approximately 47 miles of a main transmission pipeline; approximately 54 miles of lateral pipelines; up to 30 production wells; water storage tanks, booster stations, and access roads; 138 kV, 22.8 kV and 4.16 kV power lines and a power substation; a natural gas pipeline; underground telephone lines; and a telemetry system utilizing a fiber optic line.

The water wells and associated facilities would be located primarily within or adjacent to a utility corridor established by the Lincoln County Conservation, Recreation and Development Act of 2004—Public Act 108–424 (LCCRDA). A portion of the pipeline would be constructed outside of the LCCRDA corridor to follow existing roads, which would reduce disturbance by following gentler gradients. Lateral pipelines (up to 12-inch diameter) would connect the transmission pipeline (up to 54-inch diameter) to the production wells. Associated facilities would include overhead power lines, buried fiber optic lines for telemetry, telephone lines, natural gas lines, access roads, and temporary storage areas. The power lines and communication lines would be placed in a permanent right-of-way to provide power and communication for project facilities. Depending on final well sitings, access roads approximately 12 feet wide may be needed from existing public roads to each well site. Temporary work areas up to 1 acre in size would be spaced approximately every mile along the right-of-way. Up to 20, five-acre sites, may also be needed for temporary storage, parking, or construction activities along the right-of-way. All temporary work spaces and ancillary storage sites would be reclaimed following completion of project consultation.

The proposed width of the permanent right-of-way for the main transmission pipeline and connected lateral pipelines is 60 feet. A temporary adjacent right-of-way would also be established to accommodate construction activities and would be 40-feet wide. Where power lines are routed, an additional 100-foot permanent right-of-way would be placed adjacent to the 60-foot pipeline right-of-way.

Scoping of the project occurred from March 31 through May 1, 2006. Comments were received in the following broad categories: NEPA development (38 percent), social impacts (22 percent) and physical resources (40 percent). The DEIS addresses the following issues identified during scoping: NEPA process (consultation/coordination, the proposed action, alternatives, connected actions, cumulative impacts, and data needs/validity); social impacts (aesthetics, cultural resources, competing land uses, recreation, and socioeconomic resources); and physical resources (air quality, biological resources, geology and water resources). Key issues identified by individuals, groups and governmental entities include water supply and use, competing or conflicting land uses, and cumulative impacts and connected actions.

A map of the proposed project is available for viewing at the BLM Nevada State Office, 1340 Financial Blvd., in Reno and at the BLM Ely Field Office, 702 North Industrial Way, Ely, Nevada. Copies of the DEIS or the executive summary are available on request from the BLM Nevada State Office, 1340 Financial Blvd., P.O. Box 12000, Reno, NV 89520, 775–861–6681 or e-mail to *nvgwprojects@blm.gov.* The DEIS is available both in hard copy and on compact disc (CD). The DEIS and summary will be available electronically on the Web site: *http://www.blm.gov/nv/st/en.html.* Copies of the DEIS will be available for public inspection at the following locations:

- Bureau of Land Management, Nevada State Office, 1340 Financial Blvd., Reno, Nevada.
- Bureau of Land Management, Ely Field Office, 702 North Industrial Way, Ely, Nevada.

All public comments, including names and mailing addresses, will be available for public review at the Nevada State Office in Reno during public room hours from 9 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays, and may be published as part of the Final EIS.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Ron Wenker,

State Director.

[FR Doc. E8–11480 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–930–07–1310–DS]

Notice of Availability for the Northeast National Petroleum Reserve—Alaska Supplemental Final Integrated Activity Plan/Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: The Bureau of Land Management (BLM), Alaska State Office, is issuing the Northeast National Petroleum Reserve—Alaska (NPR–A) Supplemental Final Integrated Activity Plan/Environmental Impact Statement (IAP/EIS).

DATES: The Final IAP/EIS is available to the public. After 30 days the BLM will issue a Record of Decision.

ADDRESSES: Requests for information regarding the Final IAP/EIS may be sent to Jim Ducker, Bureau of Land Management, Alaska State Office (931), 222 West 7th Avenue, Anchorage, Alaska 99513–7599. Before including your address, phone number, e-mail address, or other personal identifying information in your correspondence, you should be aware that your entire

correspondence—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. The Final IAP/EIS is available on the BLM-Alaska Web site at *http:www.blm.gov/ak*. CD or paper copies may be requested by calling Jim Ducker, BLM project lead at 907–271–3130.

FOR FURTHER INFORMATION CONTACT: Jim Ducker, BLM Alaska State Office, 907–271–3130.

SUPPLEMENTARY INFORMATION: This Supplemental IAP/EIS supplements the Northeast NPR–A Amended IAP/EIS, which was completed in January 2005 and was followed with a Record of Decision in January 2006. On September 25, 2006, the U.S. District Court for the District of Alaska found the Amended IAP/EIS analysis failed to fully consider the cumulative effects of oil and gas leasing in planning area and in the adjacent Northwest NPR–A planning area and vacated the Record of Decision for the Amended IAP/EIS. The Supplemental IAP/EIS provides the additional analysis necessary to fully address deficiencies noted by the court and updates relevant sections of the document with information that has become available since the completion of the Amended IAP/EIS. Like the Amended IAP/EIS, the Supplemental IAP/EIS considers additional oil and gas leasing opportunities in the same approximately 4.6 million acres in the northeast portion of the National Petroleum Reserve-Alaska. The Supplemental IAP/EIS considers the same issues and almost identical alternatives as were addressed in the Amended IAP/EIS. The Final Supplemental IAP/EIS identifies as the Preferred Alternative a modified version of Alternative D that appeared in the Draft Supplemental IAP/EIS. The primary modification is to defer more than 500,000 acres from leasing for 10 years following the adoption of a decision on the plan.

Dated: March 17, 2008.

Thomas P. Lonnie,

State Director.

[FR Doc. E8–11478 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA 680–08–5101–ER B293; CACA 48902]

West Fry Wind Energy LLC, California Desert District, Notice of Intent To Prepare an Environmental Impact Statement and To Amend the California Desert Conservation Area Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321–4347, the Bureau of Land Management (BLM), Barstow Field Office, Barstow, California, will prepare an Environmental Impact Statement (EIS) for the development and operation of a wind energy farm on public lands in the West Fry Mountains northeast of Lucerne Valley, California to meet the requirements of NEPA. The project and associated ancillary facilities will require one or more BLM right-of-way authorizations. Pursuant to the California Desert Conservation Area (CDCA) Plan, new power generation projects must be evaluated through the planning process. By this notice the BLM is announcing a 45-day period for public scoping of alternatives, issues, the scope of the direct, indirect, and cumulative analysis for this proposal and associated planning criteria. In addition, BLM is requesting the views of other agencies as to the scope and content of the environmental information that is germane to the statutory responsibilities or areas of expertise for your agencies in connection with the proposed project and the analysis of its impacts.

DATES: This notice initiates the public scoping process. Requests for participation in the development of this EIS as a cooperating or participating agency, and comments on issues or alternatives related to this proposal must be received within 45 days of the date of publication of this notice in the **Federal Register**, and may be submitted in writing to the address listed below. Additionally, at least two scoping meetings will be held to encourage public input. The public meetings will be announced through the local news media, newspapers, and the BLM Web site (*http://www.ca.blm.gov/barstow*) at least 15 days prior to the event. Additional opportunities for public participation will be provided upon publication of the draft EIS.

ADDRESSES: Requests for participation in the EIS development by agencies, requests to be added to the mailing list, and comments on the scope and content of the EIS should be sent to Edy Seehafer, Environmental Coordinator, Bureau of Land Management, Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311, by fax at 760–252–6099, or e-mail at *cabaeis@ca.blm.gov*. A follow-up hard copy is requested when comments are sent by fax or e-mail, to assure readability. Documents pertinent to this proposal, including comments with the names and addresses of respondents, will be available for public review Monday through Friday, except holidays, at the BLM Barstow Field Office located at 2601 Barstow Road, Barstow, California, during regular business hours of 7:45 a.m. to 4:30 p.m., and may be published as part of the EIS. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations and 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: *EIS/EIR Process:* Edy Seehafer, 760–252–6021, or *cabaeis@ca.blm.gov*. *Technical Information:* Joan Patrovsky, 760–252–6032, or *jpatrovs@ca.blm.gov*.

SUPPLEMENTARY INFORMATION: West Fry Wind Energy, LLC has applied for a right of way on public lands to construct a wind energy generating facility in the West Fry Mountains in San Bernardino County, California. The 3,100 acre project site is northeast of Lucerne Valley, on public lands managed as the Johnson Valley Off Highway Vehicle area. The proposed project is comprised of (1) A main access road from the northwest (off Camp Rock Road); (2) other internal access roads; (3) up to 34 wind turbine generators, each up to 425 feet tall; (4) associated pad-mounted transformers; (5) an underground electrical collection system; (6) a new 230 kV electrical substation; (7) a 500-ft 230 kV overhead transmission line from the substation to a new switchyard; (8) the new switchyard where the project would interconnect to

Southern California Edison's Pisgah No.2, 230 kV line; (9) an operations and maintenance (O&M) building; (10) underground communication lines; and (11) two permanent meteorological towers. The O&M facility would be on a separate BLM parcel located approximately 7 miles from the wind energy facility. The proposed project would take approximately 7 months to construct.

Issues that are anticipated to be addressed in this EIS and plan amendment include impacts to visual resources, noise, birds, socioeconomics, OHV use, hiking, hunting, electrical transmission capacity, and cumulative impacts. The CDCA Plan (1980, as amended), while recognizing the potential compatibility of wind generation facilities on public lands, requires that all power generating facilities be considered through the planning process. Planning criteria for consideration of a CDCA plan amendment to provide for power generation at this site include:

a. The plan amendment will be completed in compliance with FLPMA, NEPA and all other applicable Federal and State laws, Executive orders, and management policies of the BLM;

b. The plan amendment will recognize and conform to previous site-specific planning decisions from BLM regional and bioregional plans;

c. Where existing planning decisions are still valid, those decisions will remain unchanged;

d. Where appropriate, this EIS will reference the BLM Programmatic Wind EIS (2005);

e. For the purposes of cumulative analysis, past, present, and reasonably foreseeable projects will be those alternative energy projects which have been approved, or for which a draft or final plan of development has been received, or is anticipated prior to the release of the draft or final EIS, within the CDCA;

f. The plan amendment and any rights-of way issued will recognize valid existing rights; and

g. Interagency and Native American Tribal consultations will be conducted in accordance with policy, and will be given due consideration. The planning process will include the consideration of impacts on Indian trust assets, other jurisdictions, and agencies. Copies of the environmental assessment and initial study are not attached. Pursuant to NEPA Departmental Guidelines, in 516 DM 11.4, the Bureau of Land Management has opted to forego preparation of an environmental assessment and proceed directly to a draft EIS.

Dated: May 12, 2008.

Roxie C. Trost,

Field Manager, Barstow Field Office.

[FR Doc. E8–11602 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

30-Day Notice of Submission to the Office of Management and Budget; Opportunity for Public Comment (OMIB34 1024–xxxx, ''Appalachian Trail Management Partners Survey'')

AGENCY: Department of the Interior, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 and 5 CFR Part 1320, Reporting and Recordkeeping Requirements, the National Park Service (NPS) invites public comments on a proposed new collection of information (OMB #1024–xxxx). The 30-Day **Federal Register** Notice for this collection of information that was published on May 13, 2008 (Volume 73, Number 93, Pages 27552–27553) was published in error and should be recognized as an incorrect version. The correct version of this 30-Day **Federal Register** Notice will be published at a later date. If you have any questions or concerns regarding this matter, please contact Leonard E. Stowe, NPS, Information Collection Clearance Officer, 1849 C St., NW., (2605), Washington, DC 20240; or via fax at 202/371–1427; or via e-mail at *leonard_stowe@nps.gov*.

Dated: May 19, 2008.

Leonard E. Stowe,

NPS, Information Collection Clearance Officer.

[FR Doc. E8–11543 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–53–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item: The Nelson Gallery Foundation, Kansas City, MO

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate a cultural item in the possession of The Nelson Gallery Foundation, Kansas City, MO, that meets the definition of ''sacred object'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural item. The National Park Service is not responsible for the determinations in this notice.

The cultural item is a *Prayer Stick* (2002.5.1). It is carved from maple wood, measuring 6 3/4 inches by 1 1/2 inches by 1/4 inches. The central length of the object consists of an elongated, softly curved diamond shape terminating at the upper and lower ends in square configurations, surmounted at the top by a small diamond–shaped projection. Occupying the upper square of the front surface are incised images of a house and four trees. Below, occupying the length of the central panel, are three identical sets of carved symbols. All of these features conform to the classic form of other documented Kickapoo prayer sticks. Printed in ink on the reverse side are old catalogue numbers, E89A and M805A.

In 1939, the prayer stick was collected on the Potawatomi Reservation in Kansas from Martha Jackson, a Kickapoo woman who apparently married into the Potawatomi tribe, by Floyd Schultz, a prominent Clay Center, KS, businessman and civic leader, who was also an amateur archeologist and ethnologist. Research suggests that Mr. Schultz obtained the prayer stick legally and ethically from Mrs. Jackson. Sometime within the ten years following Mr. Schultz's death in 1951, the cultural item was sold by his widow to Pat Read, an Indian trader and art dealer based in Lawrence, KS, as part of a larger ethnographic collection. Mr. Read sold the piece in the mid–1960s to Mr. and Mrs. Larry Frank, Arroyo Hondo, NM. In 2002, The Nelson Gallery Foundation, which also does business as The Nelson–Atkins Museum of Art, purchased the cultural item from Mr. and Mrs. Frank.

During consultation, members of the Kennekuk Church of the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas presented evidence that the prayer stick met NAGPRA's definition as a ''sacred object'' and is needed for the practice of a traditional Native American religion by present–day adherents.

Officials of The Nelson Gallery Foundation have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the one cultural item described above is a

specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present–day adherents. Officials of The Nelson Gallery Foundation also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred object and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred object should contact Gaylord Torrence, Fred and Virginia Merrill Curator of American Indian Art, The Nelson–Atkins Museum of Art, 4525 Oak St., Kansas City, MO 64111, telephone (816) 751–0427, before June 23, 2008. Repatriation of the sacred object to the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas may proceed after that date if no additional claimants come forward.

The Nelson Gallery Foundation is responsible for notifying the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas that this notice has been published.

Dated: April 23, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11576 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Alaska State Office, Bureau of Land Management, Anchorage, AK; Arizona State Museum, University of Arizona, Tucson, AZ; and Museum of the Aleutians, Unalaska, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the Alaska State Office, Bureau of Land Management, Anchorage, AK, and in the possession of the Arizona State Museum, University of Arizona, Tucson, AZ, and Museum of the Aleutians, Unalaska, AK. The human remains were removed from St. Lawrence Island, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Alaska State Office, Bureau of Land Management; Arizona State Museum; Museum of the Aleutians; and Smithsonian Institution professional staff in consultation with representatives of the Native Village of Savoonga.

In 1928, human remains representing a minimum of two individuals were removed from an unknown location on St. Lawrence Island, AK, by the now-deceased Otto Geist. The human remains were reportedly collected from the surface and the condition of the bone indicates exposure to the elements. The human remains were donated to the University of Alaska Museum at an unknown date. In 1941, the human remains were sent to the Arizona State Museum as part of an exchange. No known individuals were identified. No associated funerary objects are present.

At an unknown date in the 1950s or 1960s, human remains representing a minimum of one individual were removed from an unknown location on St. Lawrence Island, AK, by an unknown person. The human remains were probably collected from the surface because the condition of the bone indicates exposure to the elements. The human remains came into the possession of the now–deceased Dr. William Laughlin of the University of Wisconsin at an unknown date and under unknown circumstances. In 1999, the human remains were sent to the Museum of the Aleutians. No known individual was identified. No associated funerary objects are present.

Cranial characteristics of all three sets of human remains are highly consistent with Native American ancestry. The Native Village of Savoonga is located on St. Lawrence Island. Ethnohistorical data indicate a continuity of cultural occupation of St. Lawrence Island from approximately A.D. 300 to the present. Oral tradition presented by representatives of the Native Village of Savoonga supports this evidence of occupation. Based on the provenience and condition of the human remains, the human remains are determined to be Native American and ancestors of the members of the Native Village of Savoonga.

Officials of the Alaska State Office, Bureau of Land Management; Arizona State Museum; and Museum of the Aleutians have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of three individuals of Native American ancestry. Officials of the Alaska State Office, Bureau of Land Management; Arizona State Museum; and Museum of the Aleutians also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Native Village of Savoonga.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. Robert E. King, Alaska State NAGPRA Coordinator, Bureau of Land Management, 222 W. 7th Avenue, Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, before June 23, 2008. Repatriation of the human remains to the Native Village of Savoonga may proceed after that date if no additional claimants come forward.

The Alaska State Office, Bureau of Land Management is responsible for notifying the Native Village of Savoonga that this notice has been published.

Dated: April 7, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11573 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Field Museum of Natural History, Chicago, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary object in the possession of the Field Museum of Natural History, Chicago, IL. The human remains and associated funerary object were removed from New York State.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Field Museum of

Natural History professional staff in consultation with representatives of the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca–Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York (formerly the St. Regis Band of Mohawk Indians of New York); Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York.

At an unknown date prior to 1891, human remains representing a minimum of seven individuals were removed from unidentified locations in New York State. Three individuals represented by Field Museum of Natural History catalog numbers 41800 and 41803 were removed by F.M. Noe from ''New York'' and ''northern New York.'' Mr. Noe was a collector and dealer of natural history specimens and Native American ''relics.'' His correspondence specifically identifies the human remains as Iroquois. Mr. Noe sold the human remains to Franz Boas. The other four individuals represented by Field Museum of Natural History catalog numbers 41804 and 41805 were removed from ''northern New York'' probably by Mr. Boas. Mr. Boas then sold all seven sets of human remains to the Field Museum of Natural History in 1894. No known individuals were identified. The one associated funerary object consists of one small fragment of yellow ochre.

All of the human remains were removed from sites in New York State. Based on the conditions of the skeletal elements and Mr. Noe's correspondence, the human remains date to the historic period. The human remains have been identified as Native American based on craniometric analysis, and the specific cultural and geographic attribution in Field Museum of Natural History records. All seven individuals were identified as ''Iroquois'' in Mr. Noe's and Mr. Boas's notes. Descendants of the Iroquois are the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca–Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York.

Officials of the Field Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of seven individuals of Native American ancestry. Officials of the Field Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the one object described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Officials of the Field Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary object and the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca–Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary object should contact Helen Robbins, Director of Repatriation, Field Museum of Natural History, 1400 South Lake Shore Drive, Chicago, IL 60605–2496, telephone (312) 665–7317, before June 23, 2008. Repatriation of the human remains and associated funerary object to the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca-Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York may proceed after that date if no additional claimants come forward.

The Field Museum of Natural History is responsible for notifying the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca–Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York that this notice has been published.

Dated: April 23, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11570 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Oregon State University Department of Anthropology, Corvallis, OR

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of Oregon State University Department of Anthropology, Corvallis, OR. The human remains were removed from mound sites in Fulton County, IL.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Oregon State University Department of Anthropology professional staff in consultation with representatives of the Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Otoe–Missouria Tribe of Indians, Oklahoma; and Winnebago Tribe of Nebraska.

Between 1963 and 1964, human remains representing a minimum of one individual were removed from an unknown site in Fulton County, IL, by George Karl Neumann, a physical anthropologist working out of Indiana State University, Terre Haute, IN. In 1976, the Oregon State University Department of Anthropology acquired the Neumann Collection from Indiana State University. The human remains are labeled as F85–81, which is believed to indicate they were removed from a mound site in Fulton County, IL. No known individual was identified. No associated funerary objects are present.

Between 1963 and 1964, human remains representing a minimum of two individuals were removed from unknown sites in Fulton County, IL, by George Karl Neumann, a physical anthropologist working out of Indiana State University, Terre Haute, IN. In 1976, the Oregon State University Department of Anthropology acquired the Neumann Collection from Indiana State University. The human remains

are labeled as F85–56 and F85–58, which is believed to indicate they were removed from a mound site in Fulton County, IL. No known individuals were identified. No associated funerary objects are present.

In January of 1935, human remains representing a minimum of one individual were removed from Illinois Mound F14 in Fulton County, IL, by George Karl Neumann, a physical anthropologist working out of Indiana State University, Terre Haute, IN. In 1976, the Oregon State University Department of Anthropology acquired the Neumann Collection from Indiana State University. The human remains are labeled as F14–50, which is believed to indicate they were removed from a Spoon River Focus mound site in Fulton County, IL. No known individual was identified. No associated funerary objects are present.

The Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska have provided both written and oral history of their traditional occupation of Midwest areas east of the Mississippi and have demonstrated land area claims in Illinois. The Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska traditionally occupied areas that have been demonstrated to include sites in Illinois. The tribes at one time constituted a single tribe with shared cultural affiliation. Specific published works cite the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska, as having villages in Illinois that included mound building cultural practices. Based on the preponderance of the evidence, including the primary body of Dr. Neumann's work in Illinois, and collection records, officials of the Oregon State University Department of Anthropology reasonably believe that the human remains are affiliated with the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska.

Officials of the Oregon State University Department of Anthropology have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of four individuals of Native American ancestry. Officials of the Oregon State University Department of Anthropology have also determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. David McMurray, Oregon State University Department of Anthropology, 238 Waldo Hall, Corvallis, OR 97331, telephone (541) 737–4515, before June 23, 2008. Repatriation of the human remains to the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, and Winnebago Tribe of Nebraska may proceed after that date if no additional claimants come forward.

Oregon State University Department of Anthropology is responsible for notifying the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Peoria Tribe of Indians of Oklahoma; Prairie Band of Potawatomi Nation, Kansas; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; and Winnebago Tribe of Nebraska that this notice has been published.

Dated: March 31, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11568 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Oregon State University Department of Anthropology, Corvallis, OR

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of Oregon State University Department of Anthropology, Corvallis, OR. The human remains were removed from a mound site in central Illinois.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Oregon State University Department of Anthropology professional staff in consultation with representatives of the Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Otoe–Missouria Tribe of Indians, Oklahoma; and Winnebago Tribe of Nebraska.

Between 1930 and 1959, human remains representing a minimum of one individual were removed from an unknown mound site in Illinois, by George Karl Neumann, a physical anthropologist working out of Indiana State University, Terre Haute, IN. In 1976, the Oregon State University Department of Anthropology acquired the Neumann Collection from Indiana State University. The human remains are identified in the collection records as a ''Walcolid male.'' No known individual was identified. No associated funerary objects are present.

Dr. Neumann collected human remains from several archeological projects with a focus on archeological mound sites, skeletal characteristics of Native American races, and general human physical variation and skeletal morphology. The culmination of this research is published as ''Archaeology and Race in the American Indian,'' in the 1952 Yearbook of Physical Anthropology Vol. 8. The Walcolid morphology type Dr. Neumann describes in this article references 45 ''undeformed'' specimens he excavated in the Spoon River Focus, central Illinois area that served as the basis for this type. The Neumann Collection contained numerous Native American human remains, the majority of which are from sites associated with Mound Builder cultures. The human remains are determined to be Native American based on skeletal morphology and collection records.

The Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Otoe–Missouria Tribe of Indians,

Oklahoma, and Winnebago Tribe of Nebraska have provided both written and oral history of their traditional occupation of Midwest areas east of the Mississippi and have demonstrated land area claims in Illinois. The Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska traditionally occupied areas that have been demonstrated to include sites in Illinois. The tribes at one time constituted a single tribe with shared cultural affiliation. Specific published works cite the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma; and Winnebago Tribe of Nebraska, as having villages in Illinois that included mound building cultural practices. Based on the preponderance of the evidence, including the primary body of Dr. Neumann's work in Illinois, and collection records, officials of the Oregon State University Department of Anthropology reasonably believe that the human remains are affiliated with the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska.

Officials of the Oregon State University Department of Anthropology have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Oregon State University Department of Anthropology have also determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Otoe–Missouria Tribe of Indians, Oklahoma; and Winnebago Tribe of Nebraska.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. David McMurray, Oregon State University Department of Anthropology, 238 Waldo Hall, Corvallis, OR 97331, telephone (541) 737–4515, before June 23, 2008. Repatriation of the human remains to the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, and Winnebago Tribe of Nebraska may proceed after that date if no additional claimants come forward.

Oregon State University Department of Anthropology, Corvallis, Oregon is responsible for notifying the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Otoe–Missouria Tribe of Indians, Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band of Potawatomi Nation, Kansas; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; and Winnebago Tribe of Nebraska that this notice has been published.

Dated: April 7, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11590 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Oregon State University Department of Anthropology, Corvallis, OR

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of Oregon State University Department of Anthropology, Corvallis, OR. The human remains were removed from mound sites in central Illinois.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Oregon State University Department of Anthropology professional staff in consultation with representatives of the Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Otoe-Missouria Tribe of Indians, Oklahoma; and Winnebago Tribe of Nebraska.

Between 1930 and 1959, human remains representing a minimum of one individual were removed from an unknown mound site in Illinois, by George Karl Neumann, a physical anthropologist working out of Indiana State University, Terre Haute, IN. In 1976, the Oregon State University Department of Anthropology acquired the Neumann Collection from Indiana State University. This individual is referenced in the accession records as N104. No known individual was identified. No associated funerary objects are present.

Dr. Neumann collected human remains from several archeological projects with a focus on archeological mound sites, skeletal characteristics of Native American races, and general human physical variation and skeletal morphology. The culmination of this research is published as ''Archaeology and Race in the American Indian,'' in the 1952 Yearbook of Physical Anthropology Vol. 8. The Neumann Collection contained numerous Native American human remains, the majority of which are from sites associated with Mound Builder cultures. Evidence in the collection records indicates that N104 is Native American and is from one of the mound sites excavated by Dr. Neumann.

The human remains are determined to be Native American based on skeletal morphology and collection records. The Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska have provided both written and oral history of their traditional occupation of Midwest areas east of the Mississippi and have demonstrated land area claims in Illinois. The Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska traditionally occupied areas that have been demonstrated to include sites in Illinois. The tribes at one time constituted a single tribe with shared cultural affiliation. Specific published works cite the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska, as having villages in Illinois that included mound building cultural practices. Based on the preponderance of the evidence, including the primary body of Dr. Neumann's work in Illinois,

and collection records, officials of the Oregon State University Department of Anthropology reasonably believe that the human remains are affiliated with the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, Iowa Tribe of Oklahoma, Otoe–Missouria Tribe of Indians, Oklahoma, and Winnebago Tribe of Nebraska.

Officials of the Oregon State University Department of Anthropology have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Oregon State University Department of Anthropology have also determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Otoe–Missouria Tribe of Indians, Oklahoma; and Winnebago Tribe of Nebraska.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. David McMurray, Oregon State University Department of Anthropology, 238 Waldo Hall, Corvallis, OR 97331, telephone (541) 737–4515, before June 23, 2008. Repatriation of the human remains to the Ho–Chunk Nation of Wisconsin, Iowa Tribe of Kansas and Nebraska, and Winnebago Tribe of Nebraska may proceed after that date if no additional claimants come forward.

Oregon State University Department of Anthropology is responsible for notifying the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Ho–Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Peoria Tribe of Indians of Oklahoma; Prairie Band of Potawatomi Nation, Kansas; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; and Winnebago Tribe of Nebraska that this notice has been published.

Dated: March 31, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11592 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Francisco State University, Department of Anthropology, San Francisco, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of San Francisco State University, Department of Anthropology, San Francisco, CA. The human remains and associated funerary objects were removed from Marin County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by San Francisco State University, Department of Anthropology professional staff in consultation with representatives of the Federated Indians of Graton Rancheria, California.

From 1980 to 1985, human remains representing a minimum of five individuals were removed from CA–MRN–17, De Silva Island, Richardson Bay, Marin County, CA, by San Francisco State University staff under the direction of Gary Pahl. Materials from the excavations were jointly curated by San Francisco State University and Sonoma State University Anthropological Studies Center until 1998, when all excavated materials from CA–MRN–17 were transferred to San Francisco State University. No known individuals were identified. The 17 associated funerary objects are 1 elk bone awl, 3 obsidian flakes, 2 lots of obsidian debitage, 1 chert flake, 1 core, 1 scraper, 2 lots of chert debitage, 2 pieces of ground stone, and 4 carbon samples.

Site CA–MRN–17 is a shell mound that contains hearths and interments. The five individuals described above were found in three burials. One burial was radiocarbon dated to A.D. 65±115. This date is consistent with archeological and linguistic evidence for the presence of ancestors of the Federated Indians of Graton Rancheria, California. A second burial was radiocarbon dated to 3480±145 B.C. This burial represents one of the earliest Native American human remains recorded in the San Francisco Bay area. Archeological and linguistic research does not indicate a clear cultural affiliation for Native American human remains from this early period. However, consultation with tribal representatives indicates that the human remains are culturally affiliated with the Federated Indians of Graton Rancheria, California. Since the archeological and linguistic data are unresolved, and the tribe has stated a desire to repatriate the human remains, it is the opinion of officials of San Francisco State University given the totality of the circumstances, that the human remains from site CA–MRN–17 are reasonably believed to be culturally affiliated with the Federated Indians of Graton Rancheria, California.

At an unknown date prior to 1962, human remains representing a minimum of one individual were removed from the San Anselmo Shellheap site (CA–MRN–74), Marin County, CA. The information on removal is according to Department of Anthropology records. At an unknown date, the human remains were donated to the San Francisco State University Department of Anthropology by an unknown person. No known individual was identified. No associated funerary objects are present.

The age of CA–MRN–74 is unknown. The human remains were removed from a Native American shell midden located within the historically documented territory of the Federated Indians of Graton Rancheria, California. The preponderance of available evidence, indicates that the human remains are culturally affiliated with the Federated Indians of Graton Rancheria, California.

Between 1969 and 1971, human remains representing a minimum of eight individuals were removed from the Miller Creek Site (CA–MRN–138), Marin County, CA, by San Francisco State University staff under the direction of Charles Slaymaker and Michael Moratto. No known individuals were identified. The six associated funerary objects are one obsidian point, one shell bead, and four ochre fragments.

The Miller Creek site is located on the bank of Miller Creek. Radiometric dates on materials removed from the site bracket 700±95 B.C. and A.D. 230±95. Occupation of the site dates from the Middle Archaic to the Upper Emergent Period (circa 1500 B.C.–A.D. 1500).

Between 1972 and 1975, human remains representing a minimum of one individual were removed from the Pacheco Valle site (CA–MRN–152), Marin County, CA, during excavations conducted by the University of San Francisco, College of Marin, and Miwok Archaeological Preserve of Marin, CA, according to San Francisco State University Department of Anthropology records. At an unknown date after 1972, the human remains were donated to the Department of Anthropology, San Francisco State University by unknown individuals. No known individual was identified. No associated funerary objects are present.

The Pacheco Valle site is located on the north bank of the south fork of Ignacio Creek. Radiometric dating and stylistic attributes of the artifact assemblages recovered during the excavations indicate that habitation of the site dates from the Middle Archaic to the Upper Emergent Period (circa 1100 B.C.–A.D. 1500).

In 1963, human remains representing a minimum of 12 individuals were removed from CA–MRN–158, Marin County, CA, by San Francisco State University staff under the direction of A.E. Treganza. No known individuals were identified. The two associated funerary objects are stone flakes.

Site CA–MRN–158 is located on the west bank of the Pachaco–Miller Creek. It is a shell mound and habitation site. The artifact assemblage indicates that site habitation dates from the Middle Archaic to the Upper Emergent Period (circa 1500 B.C.–A.D. 1500).

In 1968, human remains representing a minimum of three individuals were removed from the Pacific Telephone site (CA–MRN–168), Marin County, CA, by San Francisco State University staff under the direction of Charles Slaymaker. No known individuals were identified. The four associated funerary objects are three lots of botanical remains and one cylindrical charmstone.

The Pacific Telephone site is a series of shell mounds on the banks of the Arroyo–San Jose Creek. Stylistic attributes of the artifact assemblage indicate that site habitation dates from the Upper Archaic to the Upper Emergent Period (circa 500 B.C.–A.D. 1500).

Between 1970 and 1972, human remains representing a minimum of 23 individuals were removed from the Ignacio site (CA–MRN–170), Marin County, CA, by San Francisco State University staff under the direction of Charles Slaymaker and Michael Moratto. No known individuals were identified. The 926 funerary objects are 1chert tool, 1 core, 1 scraper, 5 flakes, 3 bone awl fragments, 1 strigil, 1 needle, 1 spatulate tip, 1 piece of worked bone, 1 bear claw, 1 stone pestle, 1 steatite ear plug, 1 pebble tool, 900 olivella beads, 2 haliotis pendants, 1 obsidian blade, 3 modified flakes, and 1 piece of ochre.

The Ignacio site is a shell mound located on the edge of a marsh. Radiometric dating and stylistic attributes of the artifact assemblage indicate that site occupation dates from the Upper Archaic to the Upper Emergent Period (circa 500 B.C.–A.D. 1500).

In 1957, and between 1971 and 1977, human remains representing a minimum of three individuals were removed from the Olompali site (CA–MRN–193), Marin County, CA, by San Francisco State University staff. No known individuals were identified. The two associated funerary objects are one piece of flaked stone and one piece of ground stone.

The Olompali site is located on San Antonio Creek. It is the largest village dating to the time of Euroamerican contact that is known to be culturally affiliated with the Federated Indians of Graton Rancheria, California. Radiometric dating and stylistic attributes of the artifact assemblage indicate that site occupation dates from A.D. 1500 to Euroamerican contact.

In 1967 or earlier, human remains representing a minimum of one individual were removed from the surface of the North Inverness site (CA–MRN–207), Marin County, CA, by San Francisco State University staff under the direction of Rob Edwards. No known individual was identified. No associated funerary objects are present.

The age of the North Inverness site is unknown. It is located within historically documented territory of the Federated Indians of Graton Rancheria, California, and it is most likely that the human remains are culturally affiliated with the Federated Indians of Graton Rancheria, California.

Between 1961 and 1968, human remains representing a minimum of 25 individuals were removed from the Preston Point site (CA–MRN–396), Marin County, CA, by W. Beason, Sacramento State University; Ward Upson, Santa Rosa Junior College, Santa Rosa, CA; and Mrs. Agnes Gerkin of Sacramento, CA. The burials excavated by Ward Upson were curated at San Francisco State University, except for two bones which were curated at the Anthropological Studies Center, California State University, Sonoma, CA. The burials excavated by W. Beason and Mrs. Gerkin, along with the funerary objects excavated by Ward Upson, were curated at the Anthropological Studies Center, California State University, Sonoma, CA. Possession and control of all CA-MRN–396 materials at the Anthropological Studies Center was transferred to San Francisco State University in 1998. No known individuals were identified. The 658 funerary objects are 8 stone sinkers, 54 clamshell beads, 420 olivella beads, 1 clam shell disc bead, 159 bead fragments, 4 obsidian blades, 1 tinkler, 2 points, 1 bone hairpin in fragments, 1 awl, 1 piece of worked bone, 1 steatite ball, 1 piece of polished steatite, 1 chert core, 1 piece of ochre, 1 charmstone fragment, and 1 piece of worked stone.

The Preston Point site is located on Tomales Bay, between Vincent Landing and Preston Point, near the mouth of Walker Creek. Stylistic attributes of the artifact assemblage indicate that site occupation dates from the Upper Emergent Period (circa A.D. 1500 to the time of European contact).

At an unknown time prior to 1970, human remains representing a minimum of two individuals were removed from an unknown location in Marin County, CA, by San Francisco State University staff under the direction of Charles Slaymaker. No known individuals were identified. No associated funerary objects are present.

The age of this site is unknown. Marin County is located within the historically documented territory of the Federated Indians of Graton Rancheria, California, and it is most likely that the human remains are culturally affiliated with the Federated Indians of Graton Rancheria, California.

At an unknown date, human remains representing a minimum of one individual were removed from an unknown location on Tomales Bay, Marin County, CA. The human remains were donated to San Francisco State University by an unknown individual at an unknown date prior to 1996. No known individual was identified. The nine associated funerary objects are olivella shell beads.

The age of the site is unknown. Tomales Bay is located within the historically documented territory of the Federated Indians of Graton Rancheria, California, and it is most likely that the human remains are culturally affiliated with the Federated Indians of Graton Rancheria, California.

Archeological evidence indicates that the Penutian–speaking proto–Miwok people settled in Marin County, CA, circa 2000 B.C.–A.D. 1500. Ancestral Coastal Miwok have been identified on the basis of similarities between the archeological record and historic material culture as early as 500 B.C. Ethnographic records show that the Coast Miwok occupied all of Marin County at the time of European contact. The preponderance of the ethnographic and archeological evidence, along with consultation with representatives of the Federated Indians of Graton Rancheria, California, indicates that all Native American sites in Marin County, CA, are culturally affiliated with descendants of the Coast Miwok. Descendants of the Coast Miwok are members of the Federated Indians of Graton Rancheria, California.

Officials of San Francisco State University have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 85 individuals of Native American ancestry. Officials of the San Francisco State University also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 1,624 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the San Francisco State University have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Federated Indians of Graton Rancheria, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Jeffrey Fentress, Department of Anthropology, San Francisco State University, 1600 Holloway Avenue, San Francisco, CA 94132, telephone (415) 338–2046, before June 23, 2008. Repatriation of the human remains and associated funerary objects to the Federated Indians of Graton Rancheria, California may proceed after that date if no additional claimants come forward.

San Francisco State University is responsible for notifying the Federated Indians of Graton Rancheria, California that this notice has been published.

Dated: April 23, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11569 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Thomas Burke Memorial Washington State Museum, University of Washington, Seattle, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the Thomas Burke Memorial Washington State Museum (Burke Museum), Seattle, WA. The human remains and associated funerary objects were removed from Guss Island, San Juan County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains and associated funerary objects was made by Burke Museum and San Juan Island National Historical Park professional staff in consultation with representatives of the Lummi Tribe of the Lummi Reservation, Washington; Samish Indian Tribe, Washington; and Swinomish Indians of the Swinomish Reservation, Washington.

In 1926, human remains were removed from Guss Island in San Juan County, WA, by A.G. Colley, during an excavation, as part of a museum sponsored expedition and were formally accessioned by the museum (Burke Accn. #2126). The whereabouts of two sets of human remains are unknown. The remaining two sets of human remains were legally transferred to Central Washington University in 1974. National Park Service reasserted control over the human remains upon learning they were removed from National Park Service property in 1996 and 2007. In 2007, the Burke Museum and National Park Service agreed that the removal of the human remains from Guss Island predated the establishment of the San Juan Island National Historical Park, which was created in 1966, and should not have been transferred to the National Park Service. The human remains were placed under the control of the Burke Museum. No known individuals were identified. The six funerary objects are three slate knives and three unmodified stones.

The prehistory of the region, based on archeological research and analysis, indicates continuous habitation from approximately 2,000 years ago through the mid–19th century by Northern Straits peoples who were part of a Central Coast Salish population that were ancestral to the Lummi Tribe. Anthropological research in the late 1940s by Wayne Suttles indicates that the Lummi occupied San Juan Island and other nearby islands in the contact period, including Guss Island. Archeological information in the original field notes indicates that Native American canoe burials were present on Guss Island in the late 1800s. Based upon the geographic, archeological, and accession documentation, the two individuals from Guss Island are of Native American ancestry. Guss Island is within the aboriginal territory of the Lummi Tribe of the Lummi Reservation, Washington. Lummi oral tradition and anthropological data clearly associate the Lummi with San Juan Island and other nearby islands (Suttles 1951, 1990). The evidence indicates that the members of the Lummi Tribe of the Lummi Reservation, Washington are culturally affiliated with the human remains and associated funerary objects from Guss Island.

Officials of the Burke Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Burke Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the six objects described above are reasonably believed to have been place with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Burke Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Lummi Tribe of the Lummi Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dr. Peter Lape, Burke Museum, University of Washington, Box 353010, Seattle, WA 98195–3010, telephone (206) 685–2282, before June 23, 2008. Repatriation of the human remains and associated funerary objects to the

Lummi Tribe of the Lummi Reservation, Washington may proceed after that date if no additional claimants come forward.

The Burke Museum is responsible for notifying the Lummi Tribe of the Lummi Reservation, Washington; Samish Indian Tribe, Washington; and Swinomish Indians of the Swinomish Reservation, Washington that this notice has been published.

Dated: April 29, 2008.

Sherry Hutt,

Manger, National NAGPRA Program.

[FR Doc. E8–11571 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before May 10, 2008. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by June 9, 2008.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

ARIZONA

Maricopa County

Hunt's Tomb, (Pyramidal Monuments in Arizona MPS), 625 N. Galvin Pkwy, Phoenix, 08000526

CALIFORNIA

Los Angeles County

Farpoint Site, Address Restricted, Malibu, 08000527

Santa Cruz County

Sand Hill Bluff Site, Address Restricted, Santa Cruz, 08000528

Sonoma County

Orange Lawn, 645 Charles Van Damme Way, Sonoma, 08000529

MASSACHUSETTS

Barnstable County

Sea Call Farm, 82 Tonset Rd, Barnstable, 08000530

Bristol County

Union Baptist Church, 109 Court St., Bristol, 08000532

Essex County

Macy-Colby, House, 257 Main St., Amesbury, 08000531

Plymouth County

WITCH (catboat), 35 Lydia Island Rd., Plymouth, 08000533

MISSOURI

Cape Girardeau County

Lilly, Edward S. and Mary Annatoile Albert, House, 129 S. Lorimier, Cape Girardeau, 08000535

Jackson County

Inter-State Building, 417 E. 13th St./1300 Locust St., Jackson, 08000534

Jasper County

Olivia Apartments, 320 Moffet, Joplin, 08000536

SOUTH CAROLINA

Beaufort County

Seacoast Packing Company, 100 Dill Dr., Beaufort, 08000537

TEXAS

Dallas County

4928 Bryan Street Apartments, (East and South Dallas MPS), 4928 Bryan Street, Dallas, 08000539

Fayette County

Faison, Nathaniel W., House, 822 South Jefferson, La Grange, 08000538

Hays County

Pettey House, (San Marcos MRA), 714 Burleson St., San Marcos, 08000541

VIRGINIA

Richmond Independent City

Virginia State Library—Oliver Hill Building, 102 Governor St., Richmond (Independent City), 08000542

[FR Doc. E8–11556 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Seton Hall University Museum, Seton Hall University, South Orange, NJ

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Seton Hall University Museum, Seton Hall University, South Orange, NJ, that meet the definition of ''sacred objects'' and ''objects of cultural patrimony'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The Seton Hall University Museum professional staff consulted with representatives of the Onondaga Nation of New York and Tuscarora Nation of New York. Requests for consultation were sent to the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Saint Regis Mohawk Tribe, New York (formerly the St. Regis Band of Mohawk Indians of New York); Seneca–Cayuga Tribe of Oklahoma; Tonawanda Band of Seneca Indians of New York; and Haudenosaunee Standing Committee on Burial Rules and Regulations, non–federally recognized Indian organization representing Indian Nation members of the Haudenosaunee Confederacy, but they did not participate in consultations.

The two cultural items are False Face masks or medicine faces. The first mask was obtained from the Six Nations Reserve in Ontario by Mr. Samuel Tarrant of Newark, NJ (catalog number 2349). It is not known when or how Mr. Tarrant obtained it. The Seton Hall University Museum purchased it from Mr. Tarrant sometime in 1962 or 1963.

The second mask was donated to the Museum in 1992 by Dr. Herbert Kraft, then Director of the Museum (catalog number 92–3–6). It is not known how, when or where Mr. Kraft obtained the mask.

Other than the attribution of one mask to the Six Nations Reserve, and both typologically to the Iroquois (Haudenosaunee), more specific cultural affiliation of the masks to any one particular nation of the Haudenosaunee is not possible by the museum. The Haudenosaunee Confederacy includes the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations. According to Haudenosaunee culture and traditions, the Onondaga Nation is the keeper of the central hearth and fire where the Grand Council of the Confederacy meets. As the keeper of the central fire, the Onondaga Nation is

obligated to care for and return to the appropriate Nation, Haudenosaunee cultural objects that are not specifically affiliated with any one Haudenosaunee Nation. Written evidence of Haudenosaunee oral tradition presented during consultation identifies the False Face masks as being sacred objects needed by traditional Haudenosaunee religious leaders and objects of cultural patrimony that have ongoing historical, traditional, and cultural significance to the group and could not have been alienated by a single individual.

Officials of the Seton Hall University Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the two cultural objects described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present–day adherents. Officials of the Seton Hall University Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(D), the two cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Lastly, officials of the Seton Hall University Museum have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects/objects of cultural patrimony and the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca–Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; and Tuscarora Nation of New York.

Representatives of any other Indian tribe or Nation that believes itself to be culturally affiliated with the sacred objects/objects of cultural patrimony should contact Dr. Thomas W. Kavanagh, Seton Hall University Museum, Seton Hall University, 400 South Orange Ave., South Orange, NJ 07079, telephone (973) 375–5873, before June 23, 2008. Repatriation of the sacred objects/objects of cultural patrimony to the Onondaga Nation of New York may proceed after that date if no additional claimants come forward.

The Seton Hall University Museum is responsible for notifying the Cayuga Nation of New York; Oneida Nation of New York; Oneida Tribe of Indians of Wisconsin; Onondaga Nation of New York; Seneca Nation of New York; Seneca–Cayuga Tribe of Oklahoma; Saint Regis Mohawk Tribe, New York; Tonawanda Band of Seneca Indians of New York; Tuscarora Nation of New York; and Haudenosaunee Standing Committee on Burial Rules and Regulations, a non–federally recognized Indian organization, that this notice has been published.

Dated: April 29, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–11572 Filed 5–22–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Black Mesa and Kayenta Coal Mines, Coal Slurry Preparation Plant and Pipeline, and Coconino Aquifer Water-Supply System, Coconino, Mohave, Navajo, and Yavapai Counties, AZ, and Clark County, NV

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

ACTION: Reopening of comment period for the Black Mesa Project draft environmental impact statement (EIS).

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is reopening the comment period for the proposed Black Mesa Project draft EIS and preferred alternative. Since the close of the extended comment period on the draft EIS on February 6, 2007, the scope of the proposed project has been reduced. The proposed project no longer includes supplying coal to the Mohave Generating Station (MGS). The draft EIS is the same document as previously issued, and comments are solicited on the preferred alternative as described in this notice. Previously submitted comments will be considered in the final EIS and do not need to be resubmitted.

DATES: To ensure consideration in the preparation of the final EIS, written comments must be received by OSM by 4 p.m., m.d.t., on July 7, 2008.

ADDRESSES: The draft EIS is available for review on OSM's Internet Web site at *http://www.wrcc.osmre.gov/WR/BlackMesaEIS.htm*. Paper and computer compact disk (CD) copies of the draft EIS are also available for review at the Office of Surface Mining, Western Region, 1999 Broadway, Suite 3320, Denver, Colorado 80202–5733.

Comments on the Black Mesa Project draft EIS and preferred alternative may be submitted in writing or by e-mail over the Internet. At the top of your letter or in the subject line of your e-mail message, indicate that the comments are ''BMP Draft EIS Comments.'' Include your name and return address in your letter or e-mail message.

- E-mail comments should be sent to *BMKEIS@osmre.gov*. If you do not receive a confirmation from the system that OSM has received your e-mail comment, contact the person identified in **FOR FURTHER INFORMATION CONTACT** below.
- Written comments sent by first-class or priority U.S. Postal Service should be mailed to: Dennis Winterringer, Leader, Black Mesa Project EIS, OSM Western Region, P.O. Box 46667, Denver, Colorado 80201–6667.
- Comments delivered by U.S. Postal Service Express Mail or by courier service should be sent to: Dennis Winterringer, Leader, Black Mesa Project EIS, OSM Western Region, 1999 Broadway, Suite 3320, Denver, Colorado 80202–5733.

FOR FURTHER INFORMATION CONTACT: Dennis Winterringer, Leader, Black Mesa Project EIS, OSM Western Region, by telephone at (303) 293–5048, or by e-mail at *BMKEIS@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Reopening of the Comment Period
II. Background on the Black Mesa Project EIS
III. Public Comment Procedures

I. Reopening of the Comment Period

On November 22 and December 1, 2006, OSM and the Environmental Protection Agency respectively published in the **Federal Register** notices announcing availability of the Black Mesa Project draft EIS for comment (71 FR 67637 and 71 FR 69562).

On January 16 and 19, 2007, OSM and EPA respectively published in the **Federal Register** notices extending the comment period (72 FR 1764 and 72 FR 2512). The extended comment period closed on February 6, 2007.

Because of events that have occurred since the close of the comment period for the draft EIS, OSM is reopening the comment period. Previously submitted comments will be considered in the final EIS and do not need to be resubmitted.

The draft EIS identified Alternative A, which contemplated continued coal supply to the MGS, as the proposed project and preferred alternative. In letters dated February 25 and April 30, 2008, Peabody Western Coal Company (Peabody) notified OSM that it no longer intended to supply coal to MGS because it believed the reopening of MGS is remote, but it would continue to supply coal to the Navajo Generating Station.

Peabody also stated its intention to amend the pending permit revision application for the Black Mesa Mine Complex to remove proposed plans and activities that supported supplying coal to MGS. By amending the permit revision application, the proposed project would be reduced to permitting the Black Mesa Complex mining operations as described and analyzed as Alternative B of the draft EIS. Alternative B is now the preferred alternative.

II. Background on the Black Mesa Project EIS

Pursuant to the National Environmental Policy Act of 1969 (NEPA), OSM prepared a draft EIS analyzing the effects of the proposed Black Mesa Project. It analyzed effects of the following three alternatives.

Alternative A

- Approval of Peabody's life-of-mine permit revision for the Black Mesa Mine Complex (Black Mesa and Kayenta Mines), including mining of coal to supply the Mohave Generating Station, a new coal wash plant and associated coal waste disposal, and construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;
- Approval of Black Mesa Pipeline's existing coal-slurry preparation plant and rebuilding the 273-mile-long coal-slurry pipeline to the Mohave Generating Station; and
- Approval of a new Coconino Aquifer water-supply system, including a 108-mile-long pipeline to convey the water to the minesite.

Alternative B

- Conditional approval of Peabody's life-of-mine permit revision, including incorporation of the Black Mesa Mine surface facilities and coal deposits into the Kayenta Mine permit area and construction, use, and maintenance of a haul road between mine areas on the southern ends of Peabody's coal leases;
- No approval for coal mining at the Black Mesa Mine to supply the Mohave Generating Station;
- No approval to reconstruct the coal-slurry pipeline; and
- No approval to construct the Coconino Aquifer water-supply system.

Alternative C

- Disapproval of Peabody's life-of-mine permit revision.
  - No approval for mining coal at the Black Mesa Mine to supply the Mohave Generating Station but continued operation of mining at the Kayenta Mine to supply coal to the Navajo Generating Station, because Peabody already has an approved permit for this mine and has the right of successive permit renewals;
  - No incorporation of Black Mesa Mine surface facilities and coal deposits into the Kayenta Mine permit area;
- No approval to reconstruct the coal-slurry pipeline; and
- No approval to construct the Coconino Aquifer water-supply system.

At the time the draft EIS was released, the purpose of the proposed project was to continue to supply coal to MGS and to the Navajo Generating Station, and Alternative A in the draft EIS described the proposed project. In letters dated February 25 and April 30, 2008, Peabody notified OSM that it did not intend to continue to supply coal to MGS in the future because it believed the reopening of MGS is remote. Peabody would continue to supply coal to the Navajo Generating Station and stated its intention to amend the pending permit revision application for the Black Mesa Mine Complex to remove proposed plans and activities that supported supplying coal to MGS. Specifically, the pending permit revision application would be amended to (1) remove the plans for a coal wash plant and coal waste disposal site, (2) modify the probable hydrologic consequences section of the application to indicate use of 1,236 ac-ft/yr of Navajo aquifer water for domestic and mine-related uses instead of the initially proposed long-term average of about 2,000 ac-ft/yr for mine-related uses and as a backup water supply to the proposed new Coconino aquifer water supply, and (3) remove the plan for a new road between the southern parts of its coal leases. By amending the permit revision application, the proposed project is reduced to permitting the Black Mesa Complex mining operations as described and analyzed as Alternative B of the draft EIS, except that the new road that was included in Alternative B is no longer being proposed. In the analysis of alternative B in the draft EIS, OSM had considered the impacts of the proposed new road that would have disturbed 127 acres. With elimination of the plans for a new proposed road, the impacts would be less than those identified in the draft EIS for Alternative B.

More information about the project and EIS can be found on OSM's Internet Web site at *http://www.wrcc.osmre.gov/WR/BlackMesaEIS.htm*.

III. Public Comment Procedures

Written Comments: If you submit written comments, they should be specific, confined to issues pertinent to the draft EIS, and explain the reason for any recommended changes. Please indicate the chapter, page, paragraph, and sentence of the draft EIS your comments pertain to.

We will make every attempt to log all comments into the record for this draft EIS; however, we cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to a location other than those listed above (see **ADDRESSES**) will be included in the record and considered.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: May 6, 2008.

Allen D. Klein,

Regional Director, Western Region.

[FR Doc. E8–11265 Filed 5–22–08; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–598]

In the Matter of Certain Unified Communications Systems, Products Used With Such Systems, and Components Thereof; Notice of Commission Decision to Reverse-in-Part and Modify-in-Part a Final Initial Determination Finding a Violation of Section 337 and Termination of the Investigation With a Finding of No Violation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to reverse-in-part and modify-in-part a final initial determination (''ID'') of the presiding administrative law judge (''ALJ''). The Commission has determined that there is no violation of section 337 in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for

inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 26, 2007, based on a complaint filed by Microsoft Corporation (''Microsoft'') of Redmond, Washington. 72 FR 14138–9. The complaint, as amended and supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain unified communications systems, products used with such systems, and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 6,421,439 (''the '439 patent''); 6,430,289; 6,263,064 (''the '064 patent''); and 6,728,357. The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named Alcatel-Lucent (''ALE'') of Paris, France as the only respondent.

On April 20, 2007, Microsoft moved to amend the complaint to: (1) Substitute Alcatel Business Systems for Alcatel-Lucent as respondent in this investigation, and (2) add allegations of infringement of claims 8, 28, 38, and 48 of the '439 patent, and claim 20 of the '064 patent. Respondent and the Commission investigative attorney (''IA'') did not oppose the motion.

On May 17 and September 20, 2007, respectively, the Commission determined not to review IDs, issued by the presiding ALJ, granting Microsoft's motions to amend the complaint and to terminate the investigation in part based on Microsoft's withdrawal of certain claims. On October 23 and October 26, 2007, respectively, the Commission determined not to review IDs, issued by the presiding ALJ, granting Microsoft's motion to terminate the investigation in part based on Microsoft's withdrawal of certain claims and granting ALE's motion to amend the complaint.

On January 28, 2008, the ALJ issued his final ID and recommended determinations on remedy and bonding. The ALJ found a violation of section 337 based on his findings that the respondent's accused products infringe claims 1 and 28 of the '439 patent, and that those claims were not proven invalid and that the domestic industry and importation requirements of section 337 were met as to those claims. On February 11, 2008, all parties, including the IA, filed petitions for review of the final ID. On February 19, 2008, all parties filed responses to the petitions for review.

On March 14, 2008, the Commission determined to review-in-part the final ID. Particularly, the Commission determined to review: (1) The ALJ's construction of the claim term ''current activity of subscribers on the computer network;'' (2) the ALJ's determination that ALE's OXE system directly and indirectly infringes the '439 patent; (3) the ALJ's determination that ALE's OXO system does not infringe the '439 patent; (4) the ALJ's determination that claims 1 and 28 of the '439 patent are not invalid in view of U.S. Patent No. 6,041,114 (''the '114 patent'') or U.S. Patent No. 5,652,789 (''the '789 patent''); (5) the ALJ's determination that claim 38 of the '439 patent is invalid in view of the '114 patent; and (6) the ALJ's determination that claim 38 is not invalid in view of the '789 patent.

With respect to violation, the Commission requested written submissions from the parties relating to the following issues:

(1) The ALJ's finding that the ''current activity of the user on the computer network'' as found in the '439 patent ''can consist of both user-selected indicators based on user activity (e.g., 'conditional processing' as per the '439 specification) and the transfer of data between the computer and telephone networks while the user is engaged in a VoIP phone call'' (ID at 47), and the implications of this finding for the infringement and invalidity analyses;

(2) What is the exact demarcation between the '439 patent claim terms ''telephone network'' and ''computer network'' as it relates to claim construction, invalidity using the '114 and '789 patents, and the infringement analysis for a Voice-over-IP (VoIP) communication system;

(3) Whether the PBX and telecommute server of the '114 patent, functioning together, can be considered to disclose the ''network access port'' and ''controller'' limitations of claim 1 of the '439 patent to anticipate this claim;

(4) To what extent, if any, does anticipation of claims 1 and 28 of the '439 patent depend on a finding that the claim limitations are inherently disclosed by the '114 and '789 patents; and

(5) Please comment on Microsoft's argument that the ALJ, when construing the term ''current activity'' to mean ''either the status of the user or subscriber at the present time or the most recent status of a user or subscriber,'' did so in a manner inconsistent with Federal Circuit precedent. Complainant Microsoft's Contingent Petition for Review at 9. In addressing this argument, please address *Free Motion Fitness, Inc.* v. *Cybex Int'l, Inc.,* 423 F.3d 1343 (Fed. Cir. 2005) (''[u]nder *Phillips,* the rule that 'a court will give a claim term the full range of its ordinary meaning,' * * * does not mean that the term will presumptively receive its broadest dictionary definition or the aggregate of multiple dictionary definitions * * * '') and *Impax Labs, Inc.* v. *Aventis Pharms, Inc.* 468 F.3d 1368, 1374 (Fed. Cir. 2006) (''claim is unpatentable under the preponderance of evidence, burden-of-proof standard, giving each term its broadest reasonable construction consistent with the specification'').

73 FR 15005–07.

Further, the Commission requested written submissions on the issues of remedy, the public interest, and bonding. *Id.*

On March 24 and March 31, 2008, respectively, the complainant Microsoft, the respondent ALE, and the IA filed briefs and reply briefs on the issues for which the Commission requested written submissions.

Having reviewed the record in this investigation, including the final ID and the parties' written submissions, the Commission has determined to reverse-in-part and modify-in-part the ID. Particularly, the Commission has modified the ALJ's claim construction of the term ''current activity of the user on the computer network'' in claims 1, 28, and 38 of the '439 patent to be ''the current status of the user on the computer network'' where ''current status'' includes ''either the status of a user or subscriber at the present time or the most recent status of a user or subscriber.'' Further, the Commission has reversed the ALJ's ruling of infringement of the '439 patent by ALE's OXE system and determined that this system does not infringe claims 1, 28, and 38 under at least the Commission's modified claim construction of ''current activity of the user on the computer network.'' The Commission has also affirmed the ALJ's ruling of non-infringement of the '439 patent by ALE's OXO system. In addition, the Commission has reversed the ALJ's finding that claims 1 and 28 are not invalid in view of the '114 patent or the '789 patent, reversed the ALJ's finding that claim 38 is not invalid in view of the '789 patent, and affirmed the ALJ's finding that claim 38 is invalid in view of the '114 patent. Particularly, the Commission has determined that claims 1, 28, and 38 are invalid in view of the

'114 patent, and are also invalid in view of the '789 patent.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.45 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.45, 210.50).

Issued: May 19, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–11578 Filed 5–22–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–08–014]

Government in the Sunshine Act Meeting Notice; Change of Time for Government in the Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

DATE OF MEETING: May 28, 2008 at 11 a.m.

ORIGINAL TIME OF MEETING: 11 a.m.

NEW TIME OF MEETING: 10:45 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

ACTION: In accordance with 19 CFR 201.37, public notice is hereby given that the Commission has determined to change the time of the Government in the Sunshine Act Meeting scheduled for May 28, 2008 from 11 a.m. to 10:45 a.m.

Earlier announcement of this action was not possible.

Issued: May 20, 2008.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. E8–11657 Filed 5–22–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0016]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for the Grantees from the Transitional Housing 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. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 53, pages 14487 and 14488 on March 18, 2008, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until June 23, 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 Grantees of the Transitional Housing Assistance Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0016. 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 120 grantees of the Transitional Housing Assistance Grant Program (Transitional Housing Program) whose eligibility is determined by statute. This discretionary grant program provides transitional housing, short-term housing assistance, and related support services for individuals who are homeless, or in need of transitional housing or other housing assistance, as a result of fleeing a situation of domestic violence, dating violence, sexual assault, or stalking, and for whom emergency shelter services or other crisis intervention services are unavailable or insufficient. Eligible applicants are States, units of local government, Indian tribal governments, and other organizations, including domestic violence and sexual assault victim services providers, domestic violence or sexual assault coalitions, other nonprofit, nongovernmental organizations, or community-based and culturally specific organizations, that have a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.

(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 120 respondents (grantees) approximately one hour to complete the semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities that grantees may engage in and the different types of grantees that receive funds. A Transitional Housing 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 240 hours, that is 120 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, Deputy 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: May 20, 2008.

Lynn Bryant,

Department Clearance Officer, United States Department of Justice.

[FR Doc. E8–11641 Filed 5–22–08; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0003]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Annual Progress Report for the STOP Formula Grants 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. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register**, Volume 73, Number 53, pages 114486 on March 18, 2008, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until June 23, 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:* Annual Progress Report for the STOP Violence Against Women Formula Grants Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0003. U.S. Department of Justice, Office on Violence Against Women (OVW).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the 56 STOP state administrators (from 50 states, the District of Columbia and five territories and commonwealths (Guam, Puerto Rico, American Samoa, Virgin Islands, Northern Mariana Islands)) and their subgrantees. The STOP Violence Against Women Formula Grants Program was authorized through the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000) and by the Violence Against Women Act of 2005 (VAWA 2005). Its purpose is to promote a coordinated, multi-disciplinary approach to improving the criminal justice system(s response to violence against women. The STOP Formula Grants Program envisions a partnership among law enforcement, prosecution, courts, and victim advocacy organizations to enhance victim safety and hold offenders accountable for their crimes of violence against women. The OVW administers the STOP Formula Grant Program. The grant funds must be distributed by STOP state administrators to subgrantees according to a statutory formula (as amended by VAWA 2000 and by VAWA 2005).

(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 56 respondents (STOP administrators) approximately one hour to complete an annual progress report. It is estimated that it will take approximately one hour for roughly 2500 subgrantees [1] to complete the relevant portion of the annual progress report. The Annual Progress Report for the STOP Formula Grants Program is divided into sections that pertain to the different types of activities that subgrantees may engage in and the different types of subgrantees that receive funds, i.e. law enforcement agencies, prosecutors' offices, courts, victim services agencies, etc.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the annual progress report is 2556 hours.

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: May 20, 2008.

Lynn Bryant,

Department Clearance Officer, United States Department of Justice.

[FR Doc. E8–11642 Filed 5–22–08; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0007]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for the Grantees from the Legal Assistance for Victims 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. The proposed information collection is published to obtain comments from the public and affected agencies. This

[1] Each year the number of STOP subgrantees changes. The number 2,500 is based on the number of reports that OVW has received in the past from STOP subgrantees.

proposed information collection was previously published in the **Federal Register**, Volume 73, Number 53, page 14487 on March 18, 2008, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment June 23, 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 Grantees of the Legal Assistance for Victims Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0007. 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 200 grantees of the Legal Assistance for Victims Grant Program (LAV Program) whose eligibility is determined by statute. In 1998, Congress appropriated funding to provide civil legal assistance to domestic violence victims through a set-aside under the Grants to Combat Violence Against Women, Public Law 105–277. In the Violence Against Women Act of 2000 and again in 2005, Congress statutorily authorized the LAV Program. 42 U.S.C. 3796gg–6. The LAV Program is intended to increase the availability of legal assistance necessary to provide effective aid to victims of domestic violence, stalking, or sexual assault who are seeking relief in legal matters arising as a consequence of that abuse or violence. The LAV Program awards grants to law school legal clinics, legal aid or legal services programs, domestic violence victims' shelters, bar associations, sexual assault programs, private nonprofit entities, and Indian tribal governments. These grants are for providing direct legal services to victims of domestic violence, sexual assault, and stalking in matters arising from the abuse or violence and for providing enhanced training for lawyers representing these victims. The goal of the Program is to develop innovative, collaborative projects that provide quality representation to victims of domestic violence, sexual assault, and stalking.

(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 200 respondents (LAV 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 that grantees may engage in and the different types of grantees that receive funds. An LAV 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 400 hours, that is 200 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: May 20, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–11643 Filed 5–22–08; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on May 16, 2008, an electronic version of a proposed consent decree was lodged in the United States District Court for the Central District of California in *United States* v. *Riverton Properties, Inc., et al.*, No. CV 08–03196 ABC (MANx). The consent decree settles the United States' claims against Riverton Properties, Inc. (''Riverton'') and the Joan W. Gregg Revocable Trust (the ''Trust'') under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA''), as amended, 42 U.S.C. 9607, in connection with the Preservation Aviation, Inc. site located at 10800 Burbank Boulevard and 5543 Riverton Avenue, North Hollywood, California. The consent decree also resolves potential CERCLA counterclaims against the United States Defense Logistics Agency (''DLA'').

Under the terms of the proposed consent decree, DLA will pay $2 million to compensate EPA's response costs, and Riverton and the Trust jointly will pay $1,868,000. EPA's total response costs are $6.5 million.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Riverton Properties, Inc., et al.*, No. CV 08–03196 ABC (MANx) and DOJ #90–11–2–08809.

The consent decree may be examined at the Office of the United States Attorney for the Central District of California, 300 North Los Angeles Street, Room 7516, Los Angeles, California 90012. During the public comment period, the consent decree may also be examined on the following

Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood, *tonia.fleetwood@usdoj.gov*, Fax No. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $9.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Henry Friedman,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–11575 Filed 5–22–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Second Consent Decree Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on May 15, 2008, a proposed Second Consent Decree in *United States of America and the State of New Hampshire* v. *City of Dover, et al.*, Civil Action No. 1:92–cv–406–M, was lodged with the United States District Court for the District of New Hampshire.

The proposed Second Consent Decree is between Plaintiffs the United States of America and the State of New Hampshire, and Defendants the City of Dover, BFI Waste Systems of North America, LLC, CVS Pharmacy, Inc., ElectroCraft New Hampshire, Inc., Town of Madbury, Moore Wallace North America, Inc., Leonard Rosen, Siebe Inc., Wentworth-Douglass Hospital, Bayhead Products Corporation, Cleary Cleaners, Dover Technologies International, Inc., Electric Motor Servicenter, Inc., J&E Specialty, Inc., General Electric Company, George J. Foster & Company, Inc., Northeast Container Corporation, Portland Glass, Public Service of New Hampshire, United Parcel Service, Inc., Varney's Cleaners and Laundercenter, Verizon New England, Inc., Waste Management of Maine, Inc., and Waste Management of New Hampshire, Inc. (collectively, the ''Settling Defendants''). The Second Consent Decree amends an original settlement of the United States' claims against the Settling Defendants under Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9606, 9607(a), and Section 7003 of the Resource Conservation and Recovery Act, as amended (''RCRA''), 42 U.S.C. 6973, and the State of New Hampshire's claims against the Settling Defendants under Section 107 of CERCLA, 42 U.S.C. 107, Section 7003 of RCRA, 42 U.S.C. 6973, New Hampshire RSA 147–B, and the New Hampshire common law of nuisance.

Pursuant to the Second Consent Decree, nine Settling Defendants, referred to in the Second Consent Decree as ''Work Settling Defendants,'' will finance and perform the selected source control and groundwater remedies at the Site, estimated to cost $19.4 million. In addition, the Work Settling Defendants will reimburse the United States for all past and future response costs, with the exception of the first $100,000 in future response costs incurred by the United States and the first $25,000 in future response costs incurred by the United States in connection with a contingent groundwater remedy, if this contingent remedy is performed. Further, the Work Settling Defendants will reimburse the State of New Hampshire for all future response costs. The remaining Settling Defendants, referred to as ''Cash-Out Settling Defendants'' made a financial contribution toward the Site cleanup pursuant to the original settlement, and are not required to make a further payment under the Second Consent Decree.

The Second Consent Decree includes a covenant not to sue by the United States under Sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606, 9607(a), and Section 7003 of RCRA, 42 U.S.C. 6973, and a covenant not to sue by the State of New Hampshire under Section 107(a) of CERCLA, 42 U.S.C. 107(a), Section 7003 of RCRA, 42 U.S.C. 6973, New Hampshire RSA 147–A:9 and 147–B:10, and the New Hampshire common law of nuisance.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Second Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America and the State of New Hampshire* v. *City of Dover, et al.*, Civil Action No. 1:92–cv–406–M, D.J. Ref. 90–11–2–735. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The proposed Second Consent Decree may be examined at the Office of the United States Attorney, District of New Hampshire, 53 Pleasant Street, Concord, New Hampshire 03301, and at the United States Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100, Boston, Massachusetts 02114–2023. During the public comment period, the proposed Second Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. If requesting a copy by mail from the Consent Decree Library, please enclose a check in the amount of $211.00 ($0.25 per page reproduction cost) payable to the United States Treasury or, if requesting by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address. If requesting a copy exclusive of exhibits and the parties' signature pages, please enclose a check in the amount of $25.50 ($0.25 per page reproduction cost) payable to the United States Treasury.

Maureen M. Katz,

Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–11584 Filed 5–22–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Federal Bureau of Prisons

Notice of the Availability of the Finding of No Significant Impact for the Proposed Federal Correctional Institution—Hazelton, WV

AGENCY: U.S. Department of Justice, Federal Bureau of Prisons.

ACTION: Finding of No Significant Impact/Final Environmental Assessment.

SUMMARY: The U.S. Department of Justice, Federal Bureau of Prisons (BOP) announces the availability of the Finding of No Significant Impact (FONSI) for the proposed development of a Federal Correctional Institution (FCI) to be located in Hazelton, Preston County, West Virginia.

The BOP is seeking to expand the facilities that currently exist at BOP's USP Hazelton facility due to a growing population of federal inmates and an increased demand in the Mid-Atlantic region for facilities to house the growing inmate population.

Background Information

Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 and the Council of Environmental Quality Regulations (40 CFR Parts 1500–1508), BOP has prepared a Draft Environmental Assessment (EA) for a medium-security FCI to house approximately 1,200 adult male inmates in Hazelton, West Virginia.

USP Hazelton occupies 915 acres and is currently comprised of a high-security penitentiary housing approximately 1,608 male inmates, a Secured Female Facility (SFF) housing approximately 623 female inmates and a Federal Prison Camp (FPC) housing approximately 124 low-security inmates. Environmental studies were conducted before the construction of the USP Hazelton and the FPC in 1999, and the SFF in 2000. It is the intent of the BOP to construct the FCI on a portion of the existing 915 acres currently owned by BOP. The EA was prepared in accordance with NEPA and published on February 29, 2008 for a 30-day comment period.

Project Information

The proposed action in Hazelton, West Virginia, is part of the BOP's comprehensive expansion effort to accommodate an increasing federal inmate population and reduce system-wide inmate crowding. The proposed action would consist of construction and operation of a medium-security FCI at the existing USP Hazelton facility. The principal function of the correctional facility would be to provide a safe, secure and humane environment for the care and custody of federal inmates, primarily from the Mid-Atlantic region of the country. Upon activation, the facility would have a staff of approximately 250 full-time employees who would provide 24-hour supervision. Development of the proposed facility will occur on 250 acres of the 915 acres comprising the existing USP Hazelton facilities.

An Environmental Impact Statement (EIS) was prepared for the original development of the 915-acre site in 1999, and additional environmental studies were prepared for further development of the site in 2000. The current EA was undertaken to evaluate current environmental, cultural and socioeconomic resources and potential impacts of the proposed FCI. The previous NEPA documents included the area currently being evaluated in this EA.

The impacts of the proposed build alternatives were considered in an EA published on February 29, 2008. The EA evaluated the effects of the development of the FCI Hazelton site. Review of the EA with the necessary mitigation has led to a FONSI, as that phrase is defined pursuant to NEPA. The proposed build alternative would result in negligible impacts to environmental resources within the community. There would be no significant adverse impacts to surrounding land uses, utility systems, traffic patterns or other community considerations. No significant adverse on-site impacts as defined pursuant to NEPA are anticipated as a result of the Action alternative. After review of the comments received from interested agencies and local citizens concerning the EA, the BOP signed the FONSI for the Action alternative.

Notice of Availability

The BOP provided written notices of the availability of the EA in three local newspapers and the **Federal Register**. The BOP also distributed approximately 135 copies of the EA to federal and state agencies, state and local governments, elected officials, interested organizations, and individuals.

Availability of the Finding of No Significant Impact

The FONSI along with the Final EA and other information regarding this project are available upon request. To request a copy of the Finding of No Significant Impact, please contact: Pamela J. Chandler, Chief, or Issac J. Gaston, Site Selection Specialist, Site Selection and Environmental Review Branch, Federal Bureau of Prisons, 320 First Street, NW., Washington, DC 20534, Tel: 202–514–6470, Fax: 202–616–6024/E-mail: *pchandler@bop.gov or igaston@bop.gov*.

Copies of the Finding of No Significant Impact and the Final Environmental Assessment are available for public viewing at:

Preston County Courthouse, 101 West Main Street, Room 101, Kingwood, WV 26537.

Kingwood Public Library, 205 West Main Street, Kingwood, WV 26537.

Terra Alta Public Library, 701B East State Avenue, Terra Alta, WV 26764.

FOR FURTHER INFORMATION CONTACT: Pamela J. Chandler, or Issac J. Gaston, Federal Bureau of Prisons.

Dated: May 12, 2008.

Issac J. Gaston,

Site Specialist, Site Selection and Environmental Review Branch.

[FR Doc. E8–11123 Filed 5–22–08; 8:45 am]

BILLING CODE 4410–05–P

MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Proposed Collection

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), the U.S. Merit Systems Protection Board (MSPB) announces that an Information Collection Request (ICR) is to be forwarded to the Office of Management and Budget (OMB) for review and approval in accordance with the procedures prescribed in 5 CFR 1320.12. This is a request for a new collection. The ICR describes the nature of the information collection and its estimated burden and cost. On March 6, 2008 (**Federal Register** Volume 73, Number 45, page 12220), MSPB sought comments on this ICR pursuant to 5 CFR 1320.8(d). MSPB received only one comment.

DATES: Comments must be received on or before June 23, 2008.

ADDRESSES: Submit written comments on the collection of information to the Office of Management and the Budget, care of Brenda Aguilar at *baguilar@omb.eop.gov* or by fax at (202) 395–6974. You may also submit comments to the MSPB via e-mail to *sharon.roth@mspb.gov* (please include *Employee Surveys* in the subject line). You also may mail or fax comments to Sharon Roth, U.S. Merit Systems Protection Board, Suite 500, 1615 M Street, NW., Washington, DC 20419. Fax: (202) 653–7211.

FOR FURTHER INFORMATION CONTACT: Sharon Roth by phone on 202–653–6772, ext. 1340, by FAX on 202–653–7211, or by e-mail at *sharon.roth@mspb.gov*. You may contact Ms. Roth via V/TDD at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Proposed Project: *Disciplinary Process within Agencies*. As part of its purpose, MSPB is responsible for conducting studies of the Federal civil service to ensure that all Federal government agencies follow merit systems practices and avoid prohibited personnel practices. To support this research agenda, MSPB

periodically conducts surveys of samples of Federal employees on a variety of topics. To obtain insight into the perspectives of management and management advisors regarding Federal disciplinary processes, MSPB is requesting OMB approval to conduct surveys of two groups. All surveys will be completed within two years.

MSPB originally proposed sending surveys to (1) proposing officials for discipline, (2) deciding officials for discipline, and (3) human resources advisors on disciplinary actions. However, as discussed below, MSPB has determined that a survey for human resources advisors for this topic will not be an efficient use of resources. The surveys of proposing and deciding officials will ask respondents to share their experiences conducting suspensions of 14 days or less and removal actions, including their level of involvement in decisions made, their use of alternative discipline, the nature of the conduct that led to the action, the role of performance in conduct based actions, and the quality of related training they received. Respondents will be selected based upon disciplinary and adverse actions recorded in the Central Personnel Data File (CPDF).

The single commenter recommended that the MSPB include a survey of agency legal counselors, as these individuals interact with proposing officials, deciding officials, and human resources advisors. We agree that agency legal advisors may frequently play an important role in the process of disciplining employees. Human resources advisors also play an important role. For this reason, both the proposing and deciding official surveys will include questions regarding the respondent's interactions with human resources as well as interactions with a legal advisor when such an advisor was used. However, as the focus of this study is the experience of the proposing and deciding officials, we have determined that surveying human resources and legal advisors would not be an optimal use of resources. In past studies on similar topics, such as agencies' use of the probationary period, the MSPB has used focus groups of human resources specialists to obtain additional insight into management activities beyond that provided by the supervisors who respond to the survey. If MSPB determines it is warranted for this study, one or more focus groups of human resources specialists, attorney advisors, or both, may be utilized.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.50 hours per respondent.

Respondents/Affected Entities: Participants will be randomly drawn from multiple agencies that conducted a large number of removal actions in the years preceding the sample being drawn. Both removal actions and suspensions of 14 days or less will be the subject of the surveys. For each personnel action, there will be two respondents (the proposing official and the deciding official).

Estimated Number of Respondents: 5400.

Frequency of Response: Once for most respondents. (If a party was involved in implementing multiple disciplinary or adverse actions, there is a potential to receive more than one survey.)

Estimated Total Annual Hour Burden: 2,700.

William D. Spencer,

Clerk of the Board.

[FR Doc. E8–11611 Filed 5–22–08; 8:45 am]

BILLING CODE 7400–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meetings

May 12, 2008.

TIME AND DATE: 10 a.m., Thursday, June 5, 2008.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the matter of *Secretary of Labor* v. *Twentymile Coal Company,* Docket No. WEST 2007–892–E. (Issues include whether the Secretary properly interpreted the breathable air provisions of section 316 of the Mine Act and whether the MSHA District Manager erred in refusing to approve the operator's emergency response plan unless it provided for a refuge chamber in the main entry.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. E8–11545 Filed 5–22–08; 8:45 am]

BILLING CODE 6735–01–M

NATIONAL SCIENCE FOUNDATION

Committee on Equal Opportunities in Science and Engineering (CEOSE); Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Committee on Equal Opportunities in Science and Engineering (1173).

Dates/Time: June 16, 2008, 8:30 a.m.–5:30 p.m. and June 17, 2008, 8:30 a.m.–2 p.m.

Place: National Science Foundation (NSF), 4201 Wilson Boulevard, Arlington, VA 22230.

Building entry badges must be obtained at the above address; the meeting will be held in Room 1235 of the National Science Foundation Building located at 4201 Wilson Boulevard in Arlington, Virginia.

Type of Meeting: Open.

Contact Person: Dr. Margaret E.M. Tolber, Senior Advisor and Executive Liaison, CEOSE Office of Integrative Activities, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone Number: (703) 292–8040. *mtolbert@nsf.gov.*

Minutes: May be obtained from the Executive Liaison at the above address.

Purpose of Meeting: To provide advice and recommendations concerning broadening participation in science and engineering.

Agenda

Monday, June 16, 2008

Welcome and Opening Statement by the CEOSE Chair
Introductions

Presentations and Discussions:

✓ The American Community Survey
✓ Reports on NSF Advisory Committee Meetings by CEOSE Liaisons
✓ Broadening Participation in the CISE (Computer and Information Science and Engineering) Community
✓ Concurrent Meetings of the CEOSE *Ad Hoc* Subcommittees
✓ Discussion with the Director of the National Science Foundation
✓ Report of the CEOSE *Ad Hoc* Subcommittee on Accountability, Evaluation, and Communications
✓ Report of the CEOSE *Ad Hoc* Subcommittee on Broadening Participation

Tuesday, June 17, 2008

Opening Statement by the CEOSE Chair

Presentations and Discussions:

✓ Report of the CEOSE *Ad Hoc* Subcommittee on Strategic Planning

✓ Broadening Participation: Selected Programs of the NSF Directorate for Education and Human Resources
✓ The NSF Broadening Participation Report
✓ The Legal History of CEOSE
✓ Completion of Unfinished Business

Dated: May 20, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–11553 Filed 5–22–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATES: Week of May 26, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

ADDITIONAL MATTERS TO BE CONSIDERED:

Week of May 26, 2008

Wednesday, May 28, 2008

9:25 a.m.—Affirmation Session (Public Meeting) (Tentative)

a. AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), Docket No. 50–219–LR, Citizens' Petition for Review of LBP–07–17 and Other Interlocutory Decisions in the Oyster Creek Proceeding (Tentative)

b. Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee License Renewals, Docket Nos. 50–219–LR, 50–247–LR, 50–286–LR, 50–293–LR, 50–271–LR, Petition to Suspend Proceedings (Tentative)

c. U.S. Department of Energy (High Level Waste Repository: Pre-Application Matters), Docket No. PAPO–00 '' The State of Nevada's Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders and The State of Nevada's Motion to File a Limited Reply (Tentative)

This meeting will be Web cast live at the Web address—*http://www.nrc.gov*.

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* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

ADDITIONAL INFORMATION: Affirmation of ''a. AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), Docket No. 50–219–LR, Citizens' Petition for Review of LBP–07–17 and Other Interlocutory Decisions in the Oyster Creek Proceeding (Tentative)'' and ''b. Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee License Renewals, Docket Nos. 50–219–LR, 50–247–LR, 50–286–LR, 50–293–LR, 50–271–LR, Petition to Suspend Proceedings (Tentative)'' tentatively scheduled for Friday, May 16, 2008, at 8:55 a.m. have been tentatively rescheduled on Wednesday, May 28, 2008, at 9:25 a.m.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*.

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–415–2279, TDD: 301–415–2100, or by e-mail at *Rohn.Brown@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: May 20, 2008.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. 08–1295 Filed 5–21–08; 10:25 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Report to Congress on Abnormal Occurrences, Fiscal Year 2007; Dissemination of Information

Section 208 of the Energy Reorganization Act of 1974 (Pub. L. 93–438) defines an abnormal occurrence (AO) as an unscheduled incident or event which the U.S. Nuclear Regulatory Commission (NRC) determines to be significant from the standpoint of public health or safety. The Federal Reports Elimination and Sunset Act of 1995 (Pub. L. 104–68) requires that AOs be reported to Congress annually. During Fiscal Year 2007, eleven events that occurred at facilities licensed or otherwise regulated by the NRC and/or Agreement States were determined to be AOs. The report describes five events at NRC-licensed facilities. The first NRC-licensee event involved radiation exposure to an embryo/fetus. The other four NRC-licensee events were medical events, as defined in Title 10, Part 35, of the Code of Federal Regulations (10 CFR part 35). All five NRC-licensee events occurred at medical institutions. The report also describes six events at Agreement State-licensed facilities. [Agreement States are those States that have entered into formal agreements with the NRC pursuant to Section 274 of the Atomic Energy Act (AEA) to regulate certain quantities of AEA licensed material at facilities located within their borders.] Currently, there are 34 Agreement States. All six events that occurred at Agreement State-licensed facilities were medical events, as defined in 10 CFR Part 35, and occurred at medical institutions. As required by Section 208, the discussion for each event includes the date and place, nature and probable consequences, the cause or causes, and the actions taken to prevent recurrence. Each event is also being described in NUREG–0090, Vol. 30, ''Report to Congress on Abnormal Occurrences: Fiscal Year 2007.'' This report is available electronically at the NRC Web site *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/*.

I. For All Licensees

A. Human Exposure to Radiation From Licensed Material

During this reporting period, one event at an NRC-licensed and regulated facility was significant enough to be reported as an abnormal occurrence (AO).

NRC07–01 Human Exposure to Radiation at Washington University Medical Center in St. Louis, Missouri

Date and Place—May 29, 2007, St. Louis, Missouri.

Nature and Probable Consequences—Washington University Medical Center (the licensee) reported that cancer treatment to a 22 year old patient using iodine-131 resulted in a dose to an embryo/fetus. On May 29, 2007, the treatment was conducted at Barnes Jewish Hospital, the affiliated teaching hospital of Washington University School of Medicine, using 4.64 GBq (126 mCi) of iodine-131. Prior to that

treatment, the patient saw her prescribing physician on May 22, 2007, for a related consultation. In addition, because hospital procedures require a pregnancy test within 1 week before the therapy is administered, the licensee conducted a pregnancy test on the patient on the same day. That test yielded a negative result and the patient was advised not to get pregnant prior to the treatment. Moreover, before treatment on May 29, 2007, the patient signed a statement that, to the best of her knowledge, she was not pregnant. However, on May 30, 2007, the patient performed a home pregnancy test, which yielded a positive result. Consequently, the licensee performed another pregnancy test the same day, and the results indicated that the patient had been pregnant for 4–5 weeks at the time of the iodine-131 administration. The patient and the referring physician were informed of this event. As an approximation for the dose equivalent received by the embryo/fetus, the licensee's staff calculated an annual total effective dose equivalent to the patient's uterus, which was estimated to be 250–340 mSv (25–34 rem).

The NRC-contracted medical consultant confirmed the licensee's dose estimate and determined that the most likely result would be delivery of a normal infant (with regard to thyroid function) because the iodine-131 was administered at such an early stage in the pregnancy; however, the risk of childhood cancer may be slightly increased. The possible effects of the event have been discussed with the patient.

Cause(s)—The causes of this event were the false negative pregnancy test and the patient's lack of awareness that she might be pregnant.

Actions Taken To Prevent Recurrence

Licensee—Because the causes of this event were beyond the licensee's control, the licensee determined that no corrective action was necessary to prevent recurrence.

NRC—There were no violations identified by the NRC.

II. Commercial Nuclear Power Plant Licensees

During this reporting period, no events at commercial nuclear power plants in the United States were significant enough to be reported as AOs.

III. Events at Facilities Other Than Nuclear Power Plants and All Transportation Events

C. Medical Licensees

During this reporting period, four events at NRC-licensed or regulated facilities and six events at Agreement State-licensed facilities were significant enough to be reported as AOs.

NRC07–02 Medical Event at St. Luke's Hospital of Kansas City, Missouri

Date and Place—October 23–26, 2006, Kansas City, Missouri.

Nature and Probable Consequences—On October 27, 2006, St. Luke's Hospital of Kansas City (the licensee) notified the NRC of a medical event that occurred during a high dose-rate (HDR) remote afterloader, using a 144 GBq (3.9 Ci) iridium-192 source, brachytherapy procedure to treat breast cancer.

The authorized user physician developed a written directive that prescribed 10 fractionated doses, to be administered to the patient's left breast using a balloon catheter technique, with each dose consisting of 3.4 Gy (340 rad), for a total dose of 34 Gy (3,400 rad). The first fractionated dose was administered to the patient on October 23, 2006. On October 26, 2006, after the seventh fraction and prior to administering the eighth fraction to the patient, the chief physicist noted a discrepancy. The investigation into the discrepancy revealed that the catheter length entered into the treatment planning computer was 93.0 cm (36.6 in), rather than 95.0 cm (37.4 in). This error resulted in delivering an unplanned dose of 100 Gy (10,000 rad), 1.0 cm (0.4 in) from the treatment site and proximal from the balloon. The area proximal from the balloon would have received an intended dose of 24.5 Gy (2,450 rad), had the treatment been delivered as prescribed by the authorized user physician. Moreover, because the prescribed dosage was not delivered to the correct location, the patient also received an under dosage to the distal side of the balloon. Specifically, the area intended to be treated received a dose in the range of 7 Gy to 10 Gy (700 rad to 1,000 rad) rather than the prescribed dosage of 34 Gy (3,400 rad). The patient and the referring physician were informed of this event. The authorized user physician did not expect any acute adverse medical effects to the patient as a result of the medical event, but indicated that surgery may be required in the future. The authorized user physician discontinued further treatments and plans to follow-up on the patient clinically.

The NRC-contracted medical consultant expects some necrosis to fatty tissue in the overexposed region of the breast, within 2–4 months.

Cause(s)—The medical event was caused by the dosimetrist's failure to enter the correct catheter length in preparing the treatment plan parameters for the HDR brachytherapy treatment. In addition, the licensee's written procedures for implementing HDR treatment plans did not require verification of the treatment plan parameters to ensure that they were correct.

Actions Taken To Prevent Recurrence

Licensee—The licensee initiated several immediate and long-term corrective actions to prevent recurrence. Specifically, those corrective actions included (1) Revising the procedures for HDR treatments to include verification of the catheter length and input to the treatment planning computer by both the medical physicist and the authorized user physician, (2) revising the treatment plan record to require that the authorized user physician and the medical physicist document the verification of the catheter length, and (3) conducting in-house training to ensure that staff are aware of the new procedural steps and to ensure that the prescribing authorized user physician and the medical physicist actively participate in the training.

NRC—On March 14, 2007, the NRC issued a Notice of Violation related to this event.

NRC07–03 Medical Event at Hackley Hospital in Muskegon, Michigan

Date and Place—January 8, 2007, Muskegon, Michigan.

Nature and Probable Consequences—On January 8, 2007, Hackley Hospital (the licensee) notified the NRC of a medical event that occurred during a brachytherapy seed implant procedure to treat prostate cancer. The written directive prescribed a total dose of 120 Gy (12,000 rad) to the patient's prostate using 41 iodine-125 seeds as permanent implants. According to the licensee, because the patient moved, only 7 of the prescribed 41 seeds were delivered to the prostate (the intended site), and the other 34 seeds were delivered to an unintended site located approximately 4 cm (1.6 in) inferior to the prostate. As a result, the prostate received a dose of approximately 13 Gy (1,300 rad) rather than the prescribed dose of 120 Gy (12,000 rad) (~90% less than the prescribed dose). In addition, the unintended site received a dose of approximately 110 Gy (11,000 rad) and the patient's skin around the

unintended site received a dose of approximately 2.4 Gy (240 rad). The patient and the referring physician were informed of this event. The patient will require further treatment via external beam therapy in order to deliver the appropriate dose to the prostate.

The NRC-contracted medical consultant agreed with the licensee's dose estimate and concluded that the risk for impotence is somewhat increased by the additional radiation dose to the unintended site as a result of the medical event. There may also be some risk of perineal tissue fibrosis and skin irritation, although the risk may not be significant enough to cause clinical concerns.

Cause(s)—The licensee determined the root cause of the event was a failure to identify the patient's movement before continuing with the procedure. In addition, the NRC inspector determined that the licensee failed to develop adequate written procedures to provide high confidence that each brachytherapy administration was in accordance with the authorized user physician's written directive, as required by 10 CFR 35.41. Specifically, the licensee's procedures did not include appropriate steps or guidance to ensure that radioactive sources were positioned in the patient in accordance with the written directive and treatment plan.

Actions Taken To Prevent Recurrence

Licensee—The licensee's corrective actions to prevent recurrence included revising its written procedure to ensure that sources are positioned in the patient in accordance with the written directive, and ensuring that the staff implements those revisions.

NRC—On June 20, 2007, the NRC issued a Notice of Violation related to this event.

* * * * *

NRC07–04 Medical Event at Kennedy Memorial Hospital in Turnersville, New Jersey

Date and Place—October 25, 2006 (identified on December 8, 2006), Turnersville, New Jersey.

Nature and Probable Consequences—Kennedy Memorial Hospital (the licensee) reported that a patient was prescribed a brachytherapy treatment of 145 Gy (14,500 rad) to the prostate gland for prostate cancer using 104 iodine-125 seeds, but instead received a dose of 145 Gy (14,500 rad) to an unintended treatment site. The brachytherapy seeds were implanted under ultrasound guidance; however, a post-treatment computed tomography scan showed that the implanted seeds were displaced inferior to the intended position, resulting in a dose of approximately 8 Gy (800 rad) delivered to the intended treatment site. The patient and the referring physician were informed of this event, and additional external beam radiation treatment was recommended.

The NRC staff conducted a reactive onsite inspection on December 12, 2006. The NRC-contracted medical consultant reviewed the case and agreed with the licensee's analysis and conclusions, stating that no significant adverse health effect to the patient is expected.

Cause(s)—The medical event was caused by the licensee's failure to accurately identify the position of the prostate during the intraoperative ultrasound guidance procedure.

Actions Taken to Prevent Recurrence

Licensee—The licensee revised its procedures, including the use of a contrast medium in the Foley catheter balloon to more clearly identify the bladder/prostate interface, and use of fluoroscopic imaging to confirm anatomical positioning and verify seed placement.

NRC—There were no violations identified by the NRC.

NRC07–05 Medical Event at the University of Virginia at Charlottesville, Virginia

Date and Place—February 2–4, 2007, Charlottesville, Virginia.

Nature and Probable Consequences—University of Virginia at Charlottesville (the licensee) reported that a patient was prescribed a brachytherapy treatment of 30 Gy (3,000 rad) for treatment of cancer of the cervix using cesium-137 sources. Instead, the patient received 7.7 Gy (770 rad) to the cervix and small volumes of the rectum and vaginal mucosa received doses greater than intended, ranging from 14.14 Gy to 26.77 Gy (1,414 rad to 2,677 rad). Upon removal of the implant, the licensee discovered that the applicator had been loaded with a plastic radioactive source carrier insert that was approximately 4 cm (1.6 in) shorter than the intended 24 cm (9.5 in) insert, which caused the sources to be displaced from the intended position. The patient and the referring physician were informed of this event, and additional external beam radiation treatment was recommended.

The NRC staff conducted a reactive onsite inspection on February 12, 2007. The NRC-contracted medical consultant reviewed the case and agreed with the licensee's analysis and conclusions, stating that no significant adverse health effect to the patient is expected.

Cause(s)—The medical event was caused by the licensee's failure to ensure that the insert was of the correct length before preloading the cesium-137 sources.

Actions Taken To Prevent Recurrence

Licensee—The licensee revised its procedures, including measuring the length of the insert before loading the source, and limiting the supply of inserts in the source loading room to inserts of the length used for standard applicator treatments. The licensee also implemented additional staff training.

NRC—On May 7, 2007, the NRC issued a Notice of Violation related to this event.

AS07–01 Medical Event at St. James Hospital and Health Center in Olympia Fields, Illinois

Date and Place—November 29, 2006—December 20, 2006, Olympia Fields, Illinois.

Nature and Probable Consequences—St. James Hospital and Health Center (the licensee) reported that a 75-year-old female patient received a dose to an unintended area of approximately 4 cm^2 (0.6 in^2) of 20 Gy (2,000 rad), which was prescribed to supplement surgery and external radiation treatments for cancer of the uterus. The treatment used a high dose-rate (HDR) afterloader containing an iridium-192 source with an activity of 370 GBq (10 Ci). The source stopped 20 cm (7.9 in) short of the intended position; thus, the patient received none of the prescribed dose to the correct location. The patient and the referring physician were informed of this event. Over the next 4 weeks, the patient was treated for wet desquamation on both of her inner thighs, surrounded by a halo of erythema and the licensee continues to monitor the patient.

Cause(s)—The medical event was caused by human error. The licensee entered an incorrect initial value into the treatment system, and the treatment plan was not reviewed by an authorized medical physicist during the subsequent three weekly treatment sessions. The error was identified during a chart audit before the next similar HDR treatment was planned.

Actions Taken To Prevent Recurrence

Licensee—The licensee reviewed previous administrations to confirm that this event was an isolated incident. The licensee also developed new procedures requiring additional quality assurance steps, including the presence of a medical physicist during treatments. In addition, licensee personnel received additional training on the revised treatment procedures.

State—The State conducted an investigation on January 8, 2007, and

issued a Notice of Violation. On March 8, 2007, the NRC-contracted medical consultant investigated the matter for the State and supported the licensee's conclusions. The State accepted the licensee's corrective actions on April 12, 2007.

AS07–02 Medical Event at Aroostook Medical Center of Presque Isle, Maine

Date and Place—January 16, 2007, Presque Isle, Maine.

Nature and Probable Consequences—Aroostook Medical Center (the licensee) reported that a patient received 148 MBq (4 mCi) of iodine-131 for a whole body scan, instead of the prescribed 5.6 MBq (0.151 mCi) for a thyroid uptake scan. On March 6, 2007 during a follow-up visit with an endocrinologist, it was recognized that the wrong scan was performed. The patient and the referring physician were informed of this event. Using the methodology in NUREG–CR–6345, ''Radiation Dose Estimates for Radiopharmaceuticals'', the licensee estimated that the administration of 148 MBq (4 mCi) resulted in a thyroid dose of 51.22 Sv (153.7 rem). The licensee concluded that no significant adverse health effect to the patient is expected.

Cause(s)—The medical event was caused by human error. The licensee failed to verify the prescribed dosage for a specific patient directly with the referring physician. In addition, a written directive was not completed for this procedure.

Actions Taken To Prevent Recurrence

Licensee—Corrective actions taken by the licensee included revising procedures to improve communication with referring physicians, to allow the certified nuclear medicine technologist to speak directly with the referring physician or authorized user to confirm the type of test to be conducted. Also, written directives will be required for all administrations of iodine-131 in quantities greater than 1.11 MBq (30 μCi).

State—The State Radiation Control Program (RCP) performed an onsite investigation on May 24, 2007, and requested that the licensee take corrective actions to prevent recurrence. The RCP initially reviewed and accepted the licensee's proposed corrective actions during this investigation. The RCP issued a Notice of Violation on November 1, 2007, and awaits the licensee's response.

AS07–03 Medical Event in New York

Date and Place—March 7, 2007; (Licensee) New York.

Nature and Probable Consequences—The licensee reported a brachytherapy medical event to the New York State Department of Health. The event involved a 31-year-old female patient with a history of vaginal cancer. The treatment involved the use of both cesium-137 and iridium-192 seeds. Each ribbon contained 8 seeds with an activity of 1.855 milligram radium equivalent (118 MBq or 3.19 mCi). The patient was to be administered a total dose of 25 Gy (2,500 rad) via interstitial brachytherapy, to be delivered to the 0.5 Gy (50 rad) isodose line for a total treatment time of 50 hours.

On March 6, 2007, the iridium-192 seeds and the cesium-137 seeds were placed into the patient. Late in the morning of March 7, 2007, the medical physicist performed a manual check of the treatment plan calculations, and discovered that the hand calculations indicated a significantly higher dose rate than was generated using the treatment planning software. The ensuing investigations revealed that the original treatment plan was in error. On March 7, 2007, after 27 hours of treatment, the seeds were removed from the patient.

The patient received an estimated dose of 45.9 Gy (4,590 rad) to the treatment site, rather than the intended 25 Gy (2,500 rad). The rectal dose was 73 Gy (7,300 rad). The radiation oncologist disclosed that the patient is at risk for radiation cystitis, rectal proctitis, and more importantly, fistula formation between the rectum and the vagina. The patient and the referring physician were informed of this event. The patient will be monitored closely over the next year by both her gynecologic oncologist and the radiation oncologist. The patient is being treated with broad spectrum antibiotics, along with daily treatments in a hyperbaric oxygen chamber.

Cause(s)—The primary cause was the use of an inappropriate Dose Rate Factor (DRF) in the treatment planning system. The value used corresponded to the DRF for air kerma, however, the seed strength entered was in milligram radium equivalent. Other causes and contributing factors included failure to check the treatment pre-plan before the seeds arrived although there was time to do so; failure to double-check the calculations either prior to the implant or shortly thereafter; use of a treatment planning system that underwent acceptance testing for cesium-137 and iodine-125, but not iridium-192; and lack of recent experience preparing a treatment plan using iridium-192. Neither the physicist nor the radiation oncologist had prepared a treatment plan using iridium-192 in 6 years.

Actions Taken To Prevent Recurrence

Licensee—The licensee changed its policy and procedures to require a check of calculations for any single-fraction brachytherapy treatment.

State—The State plans to follow-up on the licensee's implementation of their new procedures during the next regularly scheduled inspection.

AS07–04 Medical Event at Memorial Mission Hospital of Asheville, North Carolina

Date and Place—April 24, 2007, Asheville, North Carolina.

Nature and Probable Consequences—Memorial Mission Hospital (the licensee) reported that a 19-year-old female patient was prescribed a dose of 1.24 MBq (33.4 μCi) of iodine-131 for a diagnostic scan to assess the health of her thyroid, however, she was administered a dose of 1235.8 MBq (33,400 μCi) on April 24, 2007. The licensee discovered the event when the patient returned the next day for her uptake scan. The patient was placed on a gamma camera and given a whole body scan. The spectrum was identified as iodine-131 and the uptake was concentrated in the patient's neck area, consistent with a thyroid uptake. As a result, the patient received a dose to the thyroid of approximately 287.3 Gy (28,728 rad). The patient and the referring physician were informed of this event.

The patient received an ablative quantity of radioactive iodine and initially showed classic signs of thyroidoitis, including inflammation, swelling, pain, and difficulty swallowing. The patient has recently started taking a synthetic thyroid hormone.

Cause(s)—The radiopharmacy provided the hospital an incorrect and mislabeled dose. The hospital failed to conduct a proper and accurate receipt survey on the package when it arrived in the hospital's nuclear medicine department. The nuclear medicine technologist, who performed the package receipt survey, failed to investigate the higher-than-expected dose rate off the transport container to determine if anything unusual was present. The nuclear medicine technologist assigned to the patient failed to correctly and accurately assay the dose in the dose calibrator. A second nuclear medicine technologist who is supposed to perform a quality assurance (QA) check of the dose calibrator reading, taken by the nuclear medicine technologist assigned to the patient, failed to correctly and accurately read the dose calibrator. The nuclear

medicine technologist assigned to the patient failed to recognize that the number of counts obtained from the neck phantom used for the uptake scan baseline was unusually high for the quantity of radioactive material prescribed for the patient.

Actions Taken To Prevent Recurrence

Licensee—The licensee ceased purchasing radiopharmaceuticals from the radiopharmacy that provided the incorrect and mislabeled dose. The licensee set aside a designated area for receiving shipments of radiopharmaceuticals and posted a list of expected dose rates per shipment (based upon contents of the shipment). The licensee redesigned the patient administration log to serve as a check list for QA, instituted procedural changes to include a one-meter survey of each diagnostic capsule while it is being counted in the neck phantom prior to administration, and implemented updated training to acquaint all nuclear medicine technologists with these new policies.

State—The State radiation control agency conducted an investigation into this incident assisted by the State board of pharmacy. The licensee's actions to prevent recurrence will be inspected at their next regularly scheduled inspection.

AS07–05 Medical Event at University of Washington Harborview Gamma Knife of Seattle, Washington

Date and Place—November 16, 2006, Seattle, Washington.

Nature and Probable Consequences—University of Washington Harborview Gamma Knife (the licensee) reported that a patient who was prescribed to receive 18 Gy (1,800 rad) during a gamma knife treatment actually received 28 Gy (2,800 rad). The gamma knife contained 267.7 TBq (7,236 Ci) of cobalt-60. The patient and the referring physician were informed of this event. The licensee concluded that no significant adverse health effect to the patient is expected.

Cause(s)—The cause of the incident was determined to be human error. The prescribing physician prescribed 18 Gy (1,800 rad) and erroneously entered 28 Gy (2,800 rad). The physician entered the prescribed value into the computer treatment planning system, rather than having the medical physicist enter the value as is the usual procedure, resulting in a failure to follow an established procedure.

Actions Taken To Prevent Recurrence

Licensee—Corrective actions taken by the licensee included a verification process to ensure that the prescribed treatment value is transferred from the treatment planning computer to the gamma knife computer prior to patient therapy. Also, a treatment plan signed by the treating oncologist, physicist, and neurosurgeon is now required. In addition, the treating oncologist and physicist will verify and initial the prescribed dose and isodose treatment parameters prior to patient therapy.

State—The State reviewed the licensee's corrective actions and determined that the procedures were adequate to ensure that this type of event should not happen in the future.

AS07–06 Medical Event at Physician Reliance of Fort Worth, Texas

Date and Place—August 22, 2007, Fort Worth, Texas.

Nature and Probable Consequences—Physician Reliance (the licensee, dba Texas Oncology at Klabzuba) reported that a patient who was being treated for lung cancer, with a high dose-rate (HDR) afterloader and an iridium-192 source, received 2,500 cGy (2,500 rad) during the first fraction, instead of the prescribed dose of 500 cGy (500 rad). The patient was prescribed to receive five fractions with 500 cGy (500 rad) per fraction over five weeks. The incident was discovered following an independent physicist's review of the treatment plan. The patient and the referring physician were informed of this event. The patient's pulmonologist concluded that no significant adverse health effect to the patient is expected.

Cause(s)—The incident occurred as a result of the incorrect isodose line being chosen and entered into the treatment planning system. The oncologist signed and approved the treatment plan and the radiation safety office performed a second calculation to check the treatment plan. The treatment planning system then normalized the calculations to the incorrect isodose line and delivered the resulting treatment. The calculation error was identified by an independent physicist prior to administration of the second fraction.

Actions Taken To Prevent Recurrence

Licensee—The licensee's corrective action was to change their procedure to include a second check by a licensed medical physicist of all treatment plans.

State—The State issued two violations related to this event: (1) A violation of 25 Texas Administrative Code (TAC) 289.256(p)(4)(A) and (B) was cited because the procedure as implemented was insufficient to ensure that a second check of the printed output of the treatment plan was performed to verify the accuracy of the planned treatment factors prior to treatment; and (2) a violation of 25 TAC 289.256(o)(1) and 289.256(p)(1) was cited because the instructions of obtaining the authorized physician's signed and dated written directive for each therapeutic administration were not followed. In addition, the State reviewed the licensee's corrective action of changing their procedures to include a second check by a licensed medical physicist of all treatment plans.

Dated at Rockville, Maryland, this 19th day of May 2008.

For the U.S. Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–11666 Filed 5–22–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57829; File No. SR–Amex–2007–107]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change, as Modified by Amendment Nos. 3 and 4 Thereto, Relating to Section 31 Related Fees

May 16, 2008.

On October 2, 2007, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposal to allow member firms to voluntarily submit, during a six-month period after the effective date of this proposal, funds previously accumulated by the member firms pursuant to Rule 393. In addition, the proposed rule change would allow the Exchange to use accumulated funds to pay its current section 31 fees or, to the extent of any surplus, offset other Exchange regulatory costs. The Amex filed Amendment No. 2 to the proposed rule change on March 19, 2008.[3] The Amex filed Amendment No. 3 to the proposed rule change on April 7, 2008.[4] The proposed rule change was published for comment in the **Federal**

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Amex previously filed and withdrew Amendment No. 1 to the proposed rule change.

[4] Amendment No. 3 replaced all previous amendments in their entirety, added new effective dates of the proposed rule change, would eliminate non-substantive and extraneous text from proposed Commentary .01 to Rule 393.

Register on April 16, 2008.[5] The Amex filed Amendment No. 4 to the proposed rule change on May 15, 2008.[6] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change, as modified.

Pursuant to section 31 of the Act[7] and Rule 31 thereunder,[8] national securities exchanges and associations (collectively ''SROs'') are required to pay a transaction fee to the Commission that is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To offset this obligation, the Amex assesses its clearing and self-clearing members a regulatory fee in accordance with Rule 393, which mirrors section 31 in both scope and amount. Clearing members may in turn seek to charge a fee to their customers or correspondent firms. Any allocation of the fee between a clearing member and its correspondent firm or customer is the responsibility of the clearing member.

Reconciling the amounts reported to the Amex and the amounts collected from the customers historically had been difficult for member firms, causing surpluses to accumulate at some member firms (referred to as ''accumulated funds''). These accumulated funds were not remitted to the Amex by certain members, despite the fact that these charges may have been previously identified as ''Section 31 Fees'' or ''SEC Fees'' by the firms.[9] In addition, since the Amex uses a ''self-reporting'' methodology for its members to report and remit amounts payable pursuant to Rule 393, the Amex has and continues to accumulate amounts in excess of the amounts paid by the Amex to the Commission pursuant to section 31 and Rule 31 (''Exchange accumulated funds'').

The Exchange is proposing a new Commentary to Rule 393 that will allow firms, on a one-time-only basis, voluntarily to remit historically accumulated funds to the Exchange. These funds then would be used to pay the Exchange's current Section 31 fees in conformity with prior representations made by member firms. In addition, a member or member organization may designate all or part of the Exchange-accumulated excess held by the Exchange and allocated to such member be used by the Exchange in accordance with the new Commentary to Rule 393. Finally, to the extent the payment of these historically accumulated funds or Exchange accumulated funds is in excess of the Section 31 fees due the Commission from the Amex, such surplus shall be used by the Exchange to offset regulatory costs.

The Amex proposes that the effective date of the proposed rule change would be the date the Commission Order approving the proposed rule filing is published in the **Federal Register** and the effectiveness of Commentary .01 to Rule 393, once approved, would be for a period of six months.

After carefully considering the proposal, 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] The Commission previously found a similar proposal from another SRO to be consistent with the Act.[11] The Commission is not aware of any issue that should cause it to revisit that finding or preclude the Commission from approving the Amex proposal on the same basis. The Commission notes that, because the program is voluntary, it imposes no obligation on any Amex member that believes that accumulated funds should be retained or disposed of in another manner.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change (File No. SR–AMEX–2007–107), as modified by Amendment Nos. 3 and 4 thereto, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11522 Filed 5–22–08; 8:45 am]

BILLING CODE 8010–01–P

[5] Securities Exchange Act Release No. 57641 (April 9, 2008), 73 FR 20724.

[6] Amendment No. 4 makes minor changes, discussed in Amendment No. 3, to the proposed rule text to reflect that the date of effectiveness of the proposed rule change would be the date the Commission order approving the proposed rule change is published in the **Federal Register** and that the effectiveness of Commentary .01 to Rule 393, once approved, would be for a period of six months. Amendment No. 4 is a technical amendment not subject to notice and comment.

[7] 15 U.S.C. 78ee.

[8] 17 CFR 240.31.

[9] The Commission stated in its release adopting new Rule 31 and Rule 31T that ''it is misleading to suggest that a customer or [SRO] member incurs an obligation to the Commission under section 31.'' Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060, 41072 (July 7, 2004). In response to this statement, the Exchange issued a notice to members regarding its Rule 393 Fee and the Commission's ''Section 31 Fee,'' and provided guidance for members and member organizations that choose to charge their customers fees. *See* Amex Notice REG 2004–42 Finance (October 29, 2004).

[10] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] *See* Securities Exchange Act Release No. 55886 (June 8, 2007), 72 FR 32935 (SR–NASD–2007–027).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–57820; File No. SR–FINRA–2008–017]

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Section 1(a) of Article III of the FINRA By-Laws

May 15, 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 May 7, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by FINRA. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Section 1(a) of Article III of the FINRA By-Laws, to interpret the reference to a ''registered broker'' in Section 1(a) of Article III of the FINRA By-Laws to include any bank exempted from the definition of ''broker'' under Section 3(a)(4)(E) of the Act[3] as of the date of filing of the proposed rule change. The proposed rule change is submitted in furtherance of the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. (''NYSE Regulation''). There are no changes to the text of FINRA rules as a result of the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78c(a)(4)(E).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. FINRA 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

On July 30, 2007, NASD and NYSE Regulation consolidated their member firm regulation operations into a combined organization, FINRA.[4] To achieve the consolidation's goal to eliminate duplicative member firm regulation and enable FINRA to meet its new regulatory responsibilities, the NYSE amended NYSE Rule 2(b) to require FINRA membership as a condition of being an NYSE member organization (''Mandatory FINRA Membership filing'').[5] Moreover, in furtherance of the consolidation, FINRA adopted NASD IM–1013–1 to enable eligible NYSE member organizations to become FINRA members through an expedited process.[6]

NYSE Rule 2(b) expressly permits entities that are exempt from registration as brokers or dealers pursuant to the Act to become NYSE member organizations.[7] In contrast, Section 1(a) of Article III of the FINRA By-Laws addresses those ''registered'' brokers, dealers, municipal securities brokers or dealers, or government securities brokers or dealers that are eligible to become members of FINRA. Accordingly, in furtherance of the consolidation, the proposed rule change would allow FINRA to treat any NYSE member organization that, as of the date of filing of the proposed rule change, is a bank exempt from the definition of broker under Section 3(a)(4)(E) of the Act as a registered broker for purposes of the FINRA By-Laws, thereby allowing any such bank to be eligible to become a FINRA member.[8]

FINRA believes this interpretation is necessary notwithstanding the prohibitions of Section 15A(g)(1) of the Act,[9] which requires a registered securities association to deny membership to any person who is not a registered broker or dealer. The Commission has already recognized the important benefits of eliminating duplicative member firm regulation through the consolidation of the member firm regulatory operations of NASD and NYSE Regulation. Interpreting the reference to registered broker in Section 1(a) of Article III of the FINRA By-Laws to include any bank exempted from the definition of ''broker'' under Section 3(a)(4)(E) of the Act for the narrow purposes of FINRA membership will allow FINRA to consider all NYSE members for membership and to assume responsibility for member firm regulation of such entities.

Any bank becoming a FINRA member pursuant to this interpretation, and its associated persons, would be required to comply with the FINRA By-Laws, Schedules to the By-Laws, and all applicable FINRA rules,[10] excluding the following: (a) The bank would not be required to be a registered broker-dealer; and (b) as long as the bank remains subject to bank capital adequacy requirements, FINRA would not require it to comply with capital requirements of either the NASD or the consolidated FINRA rules. FINRA would provide any such bank 180 days following approval of its membership application in which to achieve compliance with the NASD rules governing member conduct. FINRA also would require the bank to file a Form BD for FINRA purposes only[11] and the information provided on the form would be available via BrokerCheck pursuant to NASD IM–8310–2.[12] The bank, as part of the application process, also would be required to submit an amended Form U4 for each associated person denoting any registration categories that are recognized jointly by FINRA and NYSE (*e.g.*, General Securities Representative (Series 7)).

Any bank applying for FINRA membership pursuant to this interpretation would not be eligible to rely on the waive-in process set forth in NASD IM–1013–1, since that process was primarily designed for those NYSE member organizations whose business activities are limited to ''permitted floor activities'' as defined in NASD IM–1013–1. Rather, a bank applying for FINRA membership pursuant to this interpretation would be required to apply for and receive approval pursuant to the application process described in NASD Rule 1013 (New Membership Application and Interview). FINRA recognizes that NYSE has a comprehensive membership application and review process based on similar principles and standards to that of FINRA, and thus would work expeditiously to consider for approval any application pursuant to this interpretation.

In addition, similar to those NYSE member organizations that become FINRA members pursuant to the waive-in process, any bank relying on this interpretation would not be assessed the fee set forth in Section 4(b)(1) to Schedule A of the FINRA By-Laws for any initial Form U4 filed by the applicant with FINRA for the registration of any representative or principal associated with the firm at the time it submits its application for FINRA membership. Also, the bank would not be assessed the membership application fee set forth in Section 4(e) to Schedule A of the FINRA By-Laws. FINRA believes these fee waivers are appropriate, since NYSE mandated FINRA membership in furtherance of the consolidation and because the application review process will not require the same resources as when a new applicant that is not already a member of NYSE seeks membership.

[4] On July 26, 2007, the Commission approved amendments to the NASD By-Laws to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation. *See* Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (Aug. 1, 2007) (File No. SR–NASD–2007–023). The Commission also approved a plan by FINRA and NYSE Regulation to allocate regulatory responsibility relating to the NYSE member firm regulation rules to FINRA. *See* Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (Aug. 1, 2007) (File No. 4–544).

[5] *See* Securities Exchange Act Release No. 56654 (Oct. 12, 2007), 72 FR 59129 (Oct. 18, 2007) (File No. SR–NYSE–2007–67); Securities Exchange Act Release No. 56953 (Dec. 12, 2007), 72 FR 71990 (Dec. 19, 2007) (extending grace period for NYSE-only member organizations to apply for and be approved as FINRA members to June 30, 2008). *See also* Securities Exchange Act Release No. 56751 (Nov. 6, 2007), 72 FR 64098 (Nov. 14, 2007) (File No. SR–FINRA–2007–19).

[6] *See* Securities Exchange Act Release No. 56653 (Oct. 12, 2007); 72 FR 59127 (Oct. 18, 2007) (File No. SR–NASD–2007–056).

[7] *See also* NYSE Rule 346(a).

[8] This category of NYSE member organizations is limited to one entity.

[9] 15 U.S.C. 78o–3(g)(1).

[10] The FINRA rulebook currently consists of the NASD rules and certain incorporated NYSE rules. The incorporated NYSE rules apply solely to those members of FINRA that are also members of NYSE on or after July 30, 2007, until such time as FINRA adopts a consolidated rulebook applicable to all of its members.

[11] FINRA understands that a bank relying on Section 3(a)(4)(E) of the Act is not required to file Form BD with the Commission.

[12] FINRA will need to implement certain systems changes to accommodate the filing of a Form BD by any bank that becomes a member of FINRA pursuant to this interpretation.

The effective date of the proposed rule change would be the date of Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b) of the Act, including Section 15A(b)(6), which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will further facilitate the consolidation of the member firm regulation functions of FINRA and NYSE Regulation, resulting in more effective and efficient regulation of all brokers, thereby enhancing investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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. 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–FINRA–2008–017 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–FINRA–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, 100 F Street, NW., 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 FINRA. 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–FINRA–2008–017 and should be submitted on or before June 13, 2008.

IV. Commission Findings

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.[13] As such, the Commission finds the proposal to be consistent with the objectives of Section 15A of the Act,[14] in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and in general, to protect investors and the public interest. The proposed rule change furthers the purposes of the consolidation by recognizing the unique status of any NYSE member organization that is exempt from the definition of broker under Section 3(a)(4)(E) of the Act. Moreover, the proposed rule change does not propose any substantive amendments to existing rules.

The Commission also finds good cause for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register**. Accordingly, the Commission believes good cause exists, consistent with Sections 15A(b)(5) and 19(b) of the Act to approve the proposed rule change on an accelerated basis.

[13] In approving this rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78*o*–3(b)(6).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–FINRA–2008–017) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon

Deputy Secretary.

[FR Doc. E8–11529 Filed 5–22–08; 8:45 am]

BILLING CODE 8010–01–P

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57831; File No. SR–ISE–2008–39]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Schedule of Fees To Establish Fees for Transactions in Options on Five Premium Products

May 16, 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 May 9, 2008, International Securities Exchange, LLC (''ISE'' 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 have been prepared by ISE. The Exchange has designated this proposal as one establishing or changing a member due, fee, or other charge imposed by ISE under section 19(b)(3)(A)(ii) of the Act [3] 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

ISE is proposing to amend its Schedule of Fees to establish fees for transactions in options on five Premium Products.[5] The text of the proposed rule

[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] Premium Products is defined in the Schedule of Fees as the products enumerated therein.

change is available at *http://www.ise.com,* the principal offices of the Exchange, and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ISE 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. ISE 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 its Schedule of Fees to establish fees for transactions in options on the CurrencyShares℠ Australian Dollar Trust (''FXA''), the CurrencyShares℠ British Pound Sterling Trust (''FXB''), the CurrencyShares℠ Euro Trust (''FXE''), the CurrencyShares℠ Japanese Yen Trust (''FXY'')[6] and the iShares MSCI Taiwan Index Fund (''EWT'').[7] The Exchange represents that FXA, FXB, FXE, FXY and EWT are eligible for options trading because they constitute ''Exchange-Traded Fund Shares,'' as defined by ISE Rule 502(h).

All of the applicable fees covered by this filing are identical to fees charged by the Exchange for all other Premium Products. Specifically, the Exchange is proposing to adopt an execution fee and a comparison fee for all transactions in options on FXA, FXB, FXE, FXY and EWT.[8] The amount of the execution fee and comparison fee for products covered by this filing shall be $0.15 and $0.03 per contract, respectively, for all Public Customer Orders[9] and Firm Proprietary orders. The amount of the execution fee and comparison fee for all ISE Market Maker transactions shall be equal to the execution fee and comparison fee currently charged by the Exchange for ISE Market Maker transactions in equity options.[10] Finally, the amount of the execution fee and comparison fee for all non-ISE Market Maker transactions shall be $0.37 and $0.03 per contract, respectively.[11] Further, since options on FXA, FXB, FXE, FXY and EWT are multiply-listed, the Exchange's Payment for Order Flow fee shall apply to all these products. The Exchange believes the proposed rule change will further the Exchange's goal of introducing new products to the marketplace that are competitively priced.

Further, the Exchange proposes to remove IXK from its Schedule of Fees.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of section 6 of the Act,[13] in general, and furthers the objectives of section 6(b)(4),[14] 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 proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to section 19(b)(3)(A)(ii) of the Act[15] and Rule 19b–4(f)(2)[16] thereunder, because it establishes or changes a due, fee, or other charge imposed on members by ISE. Accordingly, the proposal is effective upon filing with the Commission. 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:

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[6] CurrencyShares℠ Australian Dollar Trust, CurrencyShares℠ British Pound Sterling Trust, CurrencyShares℠ Euro Trust, and CurrencyShares℠ Japanese Yen Trust are service marks of their respective owner(s). Rydex Distributors, Inc., an affiliate of Rydex Investments and Rydex Specialized Products, is the distributor of Rydex funds. Rydex Specialized Products LLC, d/b/a Rydex Investments (''Rydex''), is the sponsor of the CurrencyShares℠ Australian Dollar Trust (''FXA''), the CurrencyShares℠ British Pound Sterling Trust (''FXB''), the CurrencyShares℠ Euro Trust (''FXE'') and the CurrencyShares℠ Japanese Yen Trust (''FXY''). Rydex has not licensed or authorized ISE to (i) engage in the creation, listing, provision of a market for trading, marketing, and promotion of options on FXA, FXB, FXE and FXY or (ii) to use and refer to any trademarks or service marks in connection with the listing, provision of a market for trading, marketing, and promotion of options on FXA, FXB, FXE and FXY or with making disclosures concerning options on FXA, FXB, FXE and FXY under any applicable federal or state laws, rules or regulations. Rydex does not sponsor, endorse, or promote such activity by ISE, and is not affiliated in any manner with ISE.

[7] iShares® is a registered trademark of Barclays Global Investors, N.A. (''BGI''), a majority owned subsidiary of Barclays Bank PLC. ''MSCI Taiwan Index'' is a service mark of Morgan Stanley Capital International (''MSCI'') and has been licensed for use for certain purposes by BGI. All other trademarks and service marks are the property of their respective owners. iShares MSCI Taiwan Index Fund (''EWT'') is not sponsored, endorsed, issued, sold or promoted by MSCI. BGI and MSCI have not licensed or authorized ISE to (i) engage in the creation, listing, provision of a market for trading, marketing, and promotion of options on EWT or (ii) to use and refer to any of their trademarks or service marks in connection with the listing, provision of a market for trading, marketing, and promotion of options on EWT or with making disclosures concerning options on EWT under any applicable federal or state laws, rules or regulations. BGI and MSCI do not sponsor, endorse, or promote such activity by ISE, and are not affiliated in any manner with ISE.

[8] These fees will be charged only to Exchange members. Under a pilot program that is set to expire on July 31, 2008, these fees will also be charged to Linkage Principal Orders (''Linkage P Orders'') and Linkage Principal Acting as Agent Orders (''Linkage P/A Orders''). The amount of the execution fee charged by the Exchange for Linkage P Orders and Linkage P/A Orders is $0.24 per contract side and $0.15 per contract side, respectively. *See* Securities Exchange Act Release No. 56128 (July 24, 2007), 72 FR 42161 (August 1, 2007) (SR–ISE–2007–55).

[9] Public Customer Order is defined in Exchange Rule 100(a)(39) as an order for the account of a Public Customer. Public Customer is defined in Exchange Rule 100(a)(38) as a person or entity that is not a broker or dealer in securities.

[10] The execution fee is currently between $.21 and $.12 per contract side, depending on the Exchange Average Daily Volume, and the comparison fee is currently $.03 per contract side.

[11] The amount of the execution and comparison fee for non-ISE Market Maker transactions executed in the Exchange's Facilitation and Solicitation Mechanisms is $0.16 and $0.03 per contract, respectively.

[12] This Premium Product was recently delisted and no longer trades on the Exchange. Thus, the Exchange proposes to remove it from its fee schedule.

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

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–ISE–2008–39 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–ISE–2008–39. 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 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 publicly available. All submissions should refer to File Number SR–ISE–2008–39 and should be submitted on or before *June 13, 2008*.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11523 Filed 5–22–08; 8:45 am]

BILLING CODE 8010–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57833; File No. SR–NYSE–2008–35]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Amend Section 703.21 of the Listed Company Manual Relating to Equity-Linked Debt Securities

May 19, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 2, 2008, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is granting accelerated approval to the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 703.21 of the Listed Company Manual (''Manual'') to clarify the application of Rule 19b–4(e) under the Act[3] to the listing of equity-linked debt securities (''ELDS''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *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. The text of these statements may be examined at the places specified in Item III below. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(e).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 703.21 of the Manual provides that the Exchange will consider listing ELDS that meet the criteria of Section 703.21. ELDS are non-convertible debt of an issuer where the value of the debt is based, at least in part, on the value of another issuer's common stock, non-convertible preferred stock, common units of a master limited partnership, or any other common equity security of a type classified for trading as stocks by the Exchange.

The Exchange proposes to make explicit that Rule 19b–4(e) under the Act applies to the listing of ELDS that meet the criteria of paragraphs (A) through (D) of Section 703.21 of the Manual. The Exchange states that these criteria, therefore, constitute ''generic'' listing criteria for ELDS, and the Exchange would file an appropriate Form 19b–4(e) with the Commission within five days of listing a series of ELDS under the generic listing criteria. The proposed rule change would also provide that the Exchange may submit a rule filing pursuant to Section 19(b)(2) of the Act[4] to permit the listing and trading of ELDS that do not otherwise meet the standards set forth in paragraphs (A) through (D) of Section 703.21 of the Manual.

The Exchange also proposes to amend paragraph (D) of Section 703.21 to refer to the Commission's Division of Trading and Markets.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[5] of the Act, in general, and furthers the objectives of Section 6(b)(5),[6] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the proposed rule change clarifies the application of Rule 19b–4(e) under the Act to the listing of ELDS. This facilitates the listing and trading of such securities on the Exchange, thereby

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

enhancing competition among market participants, to the benefit of investors and the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE 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 written comments on the proposed rule change.

III. 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 (*www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2008–35 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–2008–35. 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–NYSE–2008–35 and should be submitted on or before June 13, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

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.[7] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[8] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds good cause for approving this proposal before the 30th day after the publication of notice thereof in the **Federal Register**. The proposal seeks to clarify that the Exchange's listing and trading of ELDS under Section 703.21 of the Manual is subject to Rule 19b–4(e) under the Act. The proposal also clarifies the process for listing and trading ELDS that do not meet the standards of paragraphs (A) through (D) of Section 703.12 of the Manual. The Commission does not believe that these clarifications raise any novel regulatory issues.

Therefore, the Commission believes that accelerating approval of this proposal is appropriate and would ensure that the Exchange's rules clearly reflect the standards for listing and trading of ELDS and conform the NYSE's rules to those of other exchanges without delay.[9]

[7] In approving this 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).

[8] 15 U.S.C. 78f(b)(5).

[9] *See e.g.*, Chicago Board Options Exchange Rule 31.5(I) and NYSE Arca Rule 5.2(j)(2).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSE–2008–35), be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11550 Filed 5–22–08; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57827; File No. SR–NYSEArca–2008–49]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change Relating to Rule 10.12 (Minor Rule Plan) and Underlying Rules

May 15, 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 May 14, 2008, NYSE Arca, Inc. (''NYSE Arca'' 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 have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 10.12 (Minor Rule Plan) (''MRP'') and other related rules that underlie the minor rules violations, including Rules 9.2(c) (Customer Records), 11.1 (Adherence to Law), and 11.18 (Supervision).

The text of the proposed rule change is available at NYSE Arca's principal office, the Commission's Public Reference Room, and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE Arca included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Minor Rule Plan fosters compliance with applicable rules and also helps to reduce the number and extent of rule violations committed by Options Trading Permit (''OTP'') Holders, OTP Firms, and associated persons. The Exchange's enforcement staff has found that the MRP is particularly useful in reducing both the number and extent of rule violations because Rule 10.12 enables staff to promptly impose a limited but meaningful financial penalty soon after the violations are detected. The prompt imposition of a financial penalty helps to quickly educate and improve the conduct of OTP Holders, OTP Firms, and associated persons that have engaged in inadvertent or otherwise minor violations of the Exchange's rules, particularly those parties who may not pay attention to mere warnings that they are violating Exchange rules. By promptly imposing a meaningful financial penalty for such violations, the MRP focuses on correcting conduct before it gives rise to more serious enforcement action.

The Exchange has observed that new and altered patterns of activity by OTP Holders and Firms as well as numerous additions and amendments to other Exchange rules have created the need for revisions to the MRP as well as the underlying rules, which are described in greater detail below. The changes are designed to update Rule 10.12 to encompass new types of violations as well as update or otherwise correct existing MRP provisions and further clarify the circumstances when use of the MRP is appropriate.

The MRP will continue to be used for inadvertent and occasional rule violations. Serious violations of Exchange rules will continue to be addressed through formal enforcement action.

Rule 10.12—Minor Rule Plan

Rule 10.12(e)—Minor Rule Plan

The Exchange proposes to clarify that any person or organization found in violation of a minor rule under Rule 10.12 is not required to report such violation on SEC Form BD or Form U–4.

Rule 10.12(h)—Minor Rule Plan: Options Floor Decorum and Minor Trading Rule Violations

The Exchange proposes to amend Rule 10.12(h) to reflect recent changes in options trading requirements, remove obsolete rule references, and create consistency with other exchanges in the imposition of fines.

In particular, the proposals include:

- (h)(2)—Amended to reflect that the violation includes all of Rule 6.67.
- (h)(9)—Amended to reflect that OTP Holders and Firms are no longer required to be physically present on the trading floor.
- (h)(12)—Amended to reflect that Rule 6.2 Commentary .02 is not related to the use of hand signals and also to remove an obsolete reference to Rule 6.67.
- (h)(13)—Amended to reflect reference to Rule 6.2(h) relating to registration of telephones on the trading floor.
- (h)(14)—Amended to remove the reference to Rule 6.69 because it is no longer relevant to the violation.
- (h)(15)—Removed because the provision is redundant with subsection (16).
- (h)(16)—Amended to consolidate certain violations of Rule 6.2.
- (h)(18)—Removed because the provision is redundant with subsection (16).
- (h)(20)—Amended to remove an obsolete rule reference due to all orders being electronically stamped.
- (h)(21)—Amended to include position and exercise limit violations.
- (h)(22)—Amended to remove the violation because it is incorporated in subsection (21).
- (h)(23)—Amended to remove reference to Rule 6.38(c) because the rule no longer exists.
- (h)(28)—Amended to remove reference to Rule 6.37(d) because the rule no longer relates to Market Makers' obligations to trade or update an existing market.
- (h)(29)—Amended to include failure to comply with certain trade-through provisions.
- (h)(30)—Amended (i) to delete a reference to the Trading Crowd/LMM Questionnaire, which is no longer administered by the Exchange and (ii) to include violations of Authorized Trader Rules as contained in Rules 6.34 and 6.34A.
- (h)(34)—Amended to include order exposure requirement violations.
- (h)(35)—Amended to include unlocking or uncrossing a market violations.
- (h)(36)—Amended to clarify present rule and reflect correct rule reference.
- (h)(37)—Amended to reflect that Market Makers no longer have a one-month grace period prior to applying for a primary appointment and reflect current rule.
- (h)(38)—Amended to reflect correct rule text and expand scope of violation.
- (h)(39)—Amended to reflect correct rule text.
- (h)(40)—Amended to reflect correct rule reference.
- (h)(42)—Amended to reflect correct rule reference.
- (h)(43)—Amended to remove obsolete rule.

Exchange systems now have a filter that electronically prevents Market Makers from entering quotes in issues outside their primary appointment.

- (h)(45)—Amended to reflect the addition of proposed Rule 11.1(b) and to remove obsolete rule text.
- (h)(46)—Amended to reflect correct rule reference.

Rule 10.12(j)—Minor Rule Plan: Record Keeping and Other Minor Rule Violations

The Exchange proposes to amend Rule 10.12(j) to add several minor violations related to record keeping and other violations. Exchange staff frequently encounters inadvertent or otherwise minor violations of Rules 2.17, 2.23, 2.25, 9.2(a)–(c), 9.17, 11.3, 11.18(a)–(c), and 11.19. Such minor violations do not give rise to formal enforcement action. However, staff believes that it can further enhance compliance with these rules by imposing MRP fines, which will draw OTP Holders' and Firms' attention to the need for improved compliance by promptly imposing meaningful, but limited financial penalties for violations.

10.12(k)—Minor Rule Plan: Recommended Fine Schedule

The Exchange proposes to change the procedure set forth in the MRP fine schedules to escalate MRP fine levels in cases involving multiple instances of the same offense.

This change will enhance the fair administration of the MRP in the context of higher speed and volume of

electronic trading on the NYSE Arca Marketplace.

Currently, the MRP Recommended Fine Schedule sets forth an initial MRP fine for a ''First Violation,'' as well as a higher level for a ''Second Violation'' and a still higher level for a ''Third Violation.''

This escalation plan, which predates the widespread use of electronic trading on the Exchange, has led to several difficulties when applied to the much greater speed and volume of electronic trading.

While the fine escalation is meant to deter repeat offenses, it often fails to deliver this effect, because OTP Holders and Firms engaged in the high speed and volume of electronic trading can frequently incur ''second'' and ''third'' offenses before they are sanctioned or even notified of the initial violation.

For the same reason, these OTP Holders and Firms complain that it is unfair for them to incur escalated fine levels for second and third violations before they learn of their first violations.

Additionally, the current fine schedule does not allow an MRP sanction for any more than three violations. In some cases, this is appropriate, but in other cases, it makes sense to impose an MRP fine for the fourth violation as for the first three.

The MRP can best assist the Exchange's regulatory and enforcement efforts if it provides Exchange officials with discretion to determine how to address particular instances of multiple violations, rather than implicitly requiring formal enforcement action whenever there are more than three violations.

To address these concerns, the Exchange proposes to modify the Recommended Fine Schedules in NYSE Arca Rule 10.12(k) so that MRP fines are escalated based not on the number of ''violations,'' but upon the number of times the Exchange has imposed one or more MRP fines upon a Permit Holder for the violation of a particular rule. The three current column headers in the Fine Schedules that specify different fine levels for first, second, and third ''violations'' will be replaced with ''First Level,'' ''Second Level,'' and ''Third Level.''

With this change, the Fine Schedule will continue to specify the fine to be imposed for each violation, but the first time a Permit Holder is fined under the MRP for the violation of a given rule, the fine for each violation will be imposed at the ''First Level,'' whether there is one or more than one such violation.

Example:

Due to a newly-employed floor broker's misunderstanding the requirements of NYSE Arca Rule 6.47 and not being corrected for an entire afternoon, the employing OTP Holder, which has no previous rules violations, executes three cross transactions that afternoon on the Exchange that do not satisfy all the requirements of NYSE Arca Rule 6.47. Under the current MRP Fine Schedule in NYSE Arca Rule 10.12(i)(3), the OTP Holder would be charged under the MRP with a first violation fine of $1,000, a second violation fine of $2,500, and a third violation fine of $3,500, for a total MRP fine of $7,000. The escalation for the second and third offenses would be imposed under the current Fine Schedule even though all the violations occurred in the same afternoon, and the second and third violations occurred before the OTP Holder became aware of the first violation.

By contrast, under the change in the Fine Schedule proposed here, the fines no longer escalate based upon the number of offenses, but instead based on the number of times the OTP Holder has been fined for the same offense. Because the OTP Holder here had not previously been fined for violations of Rule 6.47, the OTP Holder would receive the ''First Level'' of $1,000 per violation for each of the three violations, for a total MRP fine of $3,000.

If the OTP Holders and Firms were later fined again under the MRP for more such violations, the fine for each violation would then be $2,500. This proposed new procedure for escalating MRP fines is largely the same as the escalation procedure specified by the New York Stock Exchange LLC (''NYSE'') in its ''List of Exchange Rule Violations and Fines'' for imposing summary fines pursuant to NYSE Rule 476A.

It will continue to be the case that nothing in the MRP will require the imposition of a MRP fine when Exchange enforcement officials believe that repeat violations or other aggravating factors warrant formal enforcement action.

Other Changes to Rule 10.12(k)

The fines for the current and proposed minor rule violations in subsections (h) and (j) are reflected in the Recommend Fine Schedule in Rule 10.12(k). The Exchange staff believes that the proposed fines are fair in relation to the scope and occurrence of the MRP violation by OTP Holders and Firms.

The Exchange has also proposed to amend Rules 10.12(k)(i) and 10.12(k)(iii) to include new footnotes 1 and 3 respectively. Rules 6.94(a) and (c) require OTP Holders to avoid violations of the trade-through rules and, where such violation is unavoidable, to provide satisfaction orders. Proposed footnote 1 enables the Exchange to require that violators of these rules not only pay the specified MRP fine amounts for such violations, but also disgorge any quantifiable monetary gains attributable to these violations. The Exchange has based this proposed amendment on a very similar provision of the Boston Stock Exchange's MRP for violation of trade-through rules, which was recently approved by the Commission.[3]

NYSE Arca Rule 2.23 (employee registration) requires OTP Holders and Firms to continually disclose to the Exchange through the registration process personnel who are responsible for trading decisions on behalf of the OTP Holders or Firms. By requiring such disclosure, Rule 2.23, like the trade-through rules, substantially protects the Exchange's ability to regulate its marketplace and help ensure marketplace integrity. Exchange staff proposes to include the back-payment of registration fees in addition to a MRP fine so that the MRP can effectively deter OTP Holders and Firms from trying to save money and effort by not registering their appropriate personnel, in the same way that the Boston Stock Exchange's MRP revision in SR–BSE–2006–11[4] deters trade-through violations by requiring the violator to pay not only the specified fine amount, but also any quantifiable monetary gain resulting from the violation. Specifically, the Exchange proposes footnote 3 to enable the Exchange to require violators of Rule 2.23 to pay not only the specified MRP fine amount, but also to remit all fees that should have been paid to the Exchange pursuant to compliance with Rule 2.23.

In addition to the changes proposed to the MRP, the Exchange also proposes the following related changes.

Rule 9.2(c)—Customer Records

The Exchange proposes to change Rule 9.2(c) by adding the single word ''current,'' to clarify and reiterate the obligation that firms with customer accounts must not only keep records of their customer accounts, but also keep them current.

[3] *See* Securities Exchange Act Release No. 55606 (April 10, 2007), 72 FR 19221 (April 17, 2007) (approving SR–BSE–2006–11).

[4] *See id.*

Rule 11.1—Adherence to Law and Good Business Practices

The Exchange proposes to clarify the language of the newly designated Rule 11.1(a) by substituting the word ''just'' for ''fair.''

The Exchange also proposes to add a new Rule 11.1(b) that will require all OTP Holders and Firms, their associated persons, and other participants to adhere to the principles of good business practice in the conduct of their business operations. This filing also proposes to make violations of Rule 11.1(b) eligible for MRP disposition.

The proposed new Rule 11.1(b) is patterned on the current NYSE Rule 401(a). Like NYSE Rule 401(a), it encompasses miscellaneous conduct that is inconsistent with the maintenance of a fair and orderly marketplace or that otherwise violates good business practices without also showing the bad faith or unethical conduct that have been found to be essential elements of ''conduct inconsistent with just and equitable principles of trade,'' as that standard has been clarified in decisions such as *In re. Calvin David Fox.*[5]

Rule 11.18—Supervision

The Exchange proposes to amend Rule 11.18 to remove language that limits the reach of its supervisory rules. The current language of Rule 11.18(b) provides that only OTP Holders and Firms for whom the Exchange is the Designated Examining Authority (''DEA'') are subject to its supervisory requirements. The amendment removes the language limiting the scope of the rule so that all OTP Holders and Firms, regardless of DEA, are subject to maintaining systems to supervise activities of their associated persons and the operations of their business.

As noted above, this filing also proposes to make minor violations of Rule 11.18 eligible for disposition through an MRP fine. Exchange Market Regulation frequently encounters ''minor'' supervisory failures by OTP Holders and Firms, *i.e.*, supervisory failures whose consequences have not yet risen to a level justifying formal enforcement action, but which could have serious consequences if not remedied. By making such failures eligible for MRP fines, Exchange Market Regulation and Enforcement will have a greater ability to encourage OTP Holders and Firms to correct their supervisory problems before they lead to more serious violations.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Section 6(b)(5) of the Act,[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would 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 NYSE Arca 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–NYSEArca–2008–49 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–2008–49. 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 Arca. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–49 and should be submitted on or before June 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11530 Filed 5–22–08; 8:45 am]

BILLING CODE 8010–01–P

[5] *See* Securities Exchange Act Release No. 48731, 81 SEC Docket 1511–31 (October 31, 2003).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57834; File No. SR–Phlx–2008–33]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Equity Linked Notes

May 19, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 2, 2008, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Exchange. On May 16, 2008, the Exchange submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is granting accelerated approval to the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 803(h) to clarify that the listing and trading of Equity Linked Notes (''ELNs'') on the Exchange is subject to Rule 19b–4(e) under the Act.[3] The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.phlx.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, Phlx included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below. Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange states that the purpose of the proposed rule change is to clarify that the listing and trading of ELNs on the Exchange is subject to Rule 19b–4(e) under the Act. Rule 19b–4(e) under the Act permits an exchange to list and trade a new derivative securities product, such as an ELN, without filing a proposed rule change on Form 19b–4, if the exchange has, among other things, listing standards for the product class.[4] Rule 19b–4(e) further provides that an exchange shall file Form 19b–4(e) within five business days after commencement of trading a new derivative securities product. Therefore, upon the acceptance of an ELN for listing and trading on the Exchange pursuant to the listing standards in Rule 803(h), Phlx will file a Form 19b–4(e) with the Commission within five business days after the commencement of trading.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) [5] of the Act, in general, and furthers the objectives of Section 6(b)(5),[6] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest, by clarifying that the listing and trading of ELNs on the Exchange is subject to Rule 19b–4(e) under the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. 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–Phlx–2008–33 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2008–33. 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–Phlx–2008–33 and should be submitted on or before June 13, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(e).

[4] *See* 17 CFR 240.19b–4(e)(1). Phlx Rule 803(h) contains the listing standards for ELNs.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

a national securities exchange.[7] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[8] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds good cause for approving this proposal before the 30th day after the publication of notice thereof in the **Federal Register**. The proposal seeks to clarify that the Exchange's listing and trading of ELNs under Rule 803(h) is subject to Rule 19b–4(e) under the Act. The Commission does not believe that this clarification raises any novel regulatory issues. Therefore, the Commission believes that accelerating approval of this proposal is appropriate and would ensure that the Exchange's rules clearly reflect the standards for listing and trading of ELNs and conform the Phlx's rules to those of other exchanges without delay.[9]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change, as amended (SR–Phlx–2008–33), be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–11531 Filed 5–22–08; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11247 and #11248]; Alabama Disaster #AL–00014

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of ALABAMA dated 05/15/2008.

Incident: Severe Storms and Tornadoes.

Incident Period: 05/11/2008.

DATES: *Effective Date:* 05/15/2008.

Physical Loan Application Deadline Date: 07/14/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 02/16/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cleburne

Contiguous Counties:

Alabama: Calhoun, Cherokee, Clay, Randolph, Talladega

Georgia: Carroll, Haralson, Polk

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.687
Businesses With Credit Available Elsewhere	8.000
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11247 C and for economic injury is 11248 0.

The States which received an EIDL Declaration # are Alabama, Georgia.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: May 15, 2008.

Steven C. Preston,

Administrator.

[FR Doc. E8–11547 Filed 5–22–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11251]

Alaska Disaster # AK–00013 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of ALASKA, dated 05/16/2008.

Incident: Increased Power Costs Due to Avalanche.

Incident Period: 04/16/2008 and continuing.

DATES: *Effective Date:* 05/16/2008.

EIDL Loan Application Deadline Date: 02/16/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for economic injury disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: City and Borough of Juneau.

Contiguous Counties:

Alaska: Chatham Reaa, Haines Borough.

The Interest Rate is: 4.000.

The number assigned to this disaster for economic injury is 112510.

The State which received an EIDL Declaration # is Alaska.

(Catalog of Federal Domestic Assistance Number 59002)

Dated: May 16, 2008.

Steven C. Preston,

Administrator.

[FR Doc. E8–11557 Filed 5–22–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11245 and #11246]

New Mexico Disaster #NM–00006

AGENCY: U.S. Small Business Administration.

[7] In approving this 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).

[8] 15 U.S.C. 78f(b)(5).

[9] *See e.g.,* Chicago Board Options Exchange Rule 31.5(I) and NYSE Arca Rule 5.2(j)(2).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of NEW MEXICO dated 05/15/2008.

Incident: Trigo Fire.

Incident Period: 04/15/2008 and continuing.

DATES: *Effective Date:* 05/15/2008.

Physical Loan Application Deadline Date: 07/14/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 02/16/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Torrance

Contiguous Counties:

New Mexico: Bernalillo, San Miguel, Valencia, Guadalupe, Santa Fe, Lincoln, Socorro

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.500
Homeowners Without Credit Available Elsewhere	2.750
Businesses With Credit Available Elsewhere	8.000
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11245 5 and for economic injury is 11246 0.

The State which received an EIDL Declaration # is New Mexico.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: May 15, 2008.

Steven C. Preston,

Administrator.

[FR Doc. E8–11548 Filed 5–22–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

National Small Business Development Center Advisory Board

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time and agenda for the next meeting of the National Small Business Development Center (SBDC) Advisory Board.

DATES: The meeting will be held on Tuesday, June 10, 2008 at 3 p.m. EST.

ADDRESSES: This meeting will be held at the Small Business and Technology Development Center, 5 West Hargett Street, Suite 600, Raleigh, North Carolina.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) of the Federal Advisory Committee Act (5 U.S.C. Appendix 2), SBA announces the meeting of the National SBDC Advisory Board. This Board provides advice and counsel to the SBA Administrator and Associate Administrator for Small Business Development Centers.

The purpose of this meeting is to discuss following issues pertaining to the SBDC Advisory Board:

—Role of the Small Business and Technology Development Center (SBTDC);

—Discussion on Board roles, responsibilities, and expectations;

—Counselor Certification;

—SBA Update from AA/OSBDCs;

—White Paper discussion.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public however advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the Board must contact Alanna Falcone by Tuesday, May 27, 2008, by fax or e-mail in order to be placed on the agenda. Alanna Falcone, Program Analyst, 409 Third Street, SW., Washington, DC 20416, Phone, 202–619–1612, Fax 202–481–0134, e-mail, *alanna.falcone@sba.gov*.

Additionally, if you need accommodations because of a disability or require additional information, please contact Alanna Falcone at the information above.

Cherylyn H. Lebon,

Committee Management Officer.

[FR Doc. E8–11558 Filed 5–22–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 6210]

Notice of Renewal of Advisory Committee on International Law Charter

Summary: The Department of State has renewed the Charter of the Advisory Committee on International Law. Through this Committee, the Department of State will continue to obtain the views and advice of a cross-section of the country's outstanding members of the legal profession on significant issues of international law. The Committee's consideration of these legal issues in the conduct of our foreign affairs provides a unique contribution to the creation and promotion of U.S. foreign policy. The Under Secretary for Management has determined the Committee is necessary and in the public interest.

The Committee is comprised of all former Legal Advisers of the Department of State and up to 20 individuals appointed by the current Legal Adviser. The Committee follows the procedures prescribed by the Federal Advisory Committee Act (FACA). Meetings will be open to the public unless a determination is made in accordance with section 10(d) of the FACA and 5 U.S.C. 552b(c) that a meeting or portion of the meeting should be closed to the public. Notice of each meeting will be published in the **Federal Register** at least 15 days prior to the meeting, unless there are extraordinary circumstances that require shorter notice.

For further information, please contact Sharla Draemel, Executive Director, Advisory Committee on International Law, Department of State, at 202–776–8436 or *draemels@state.gov.*

Dated: May 19, 2008.

Sharla Draemel,

Attorney-Adviser, Office of Claims and Investment Disputes, Office of the Legal Adviser, Executive Director, Advisory Committee on International Law, Department of State.

[FR Doc. E8–11626 Filed 5–22–08; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2008–20]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before June 12, 2008.

ADDRESSES: You may send comments identified by Docket Number FAA–2008–0496 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Annette K. Kovite, (425) 227–1262, Transport Airplane Directorate, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98057–3356, or Frances Shaver, (202) 267–9681, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on May 19, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2008–0496.
Petitioner: Alenia Aeronautica S.p.A.
Section of 14 CFR Affected:
§ 25.841(a), and (b)(6).
Description of Relief Sought: Alenia seeks relief for the C–27J JCA airplane from the requirements for: (1) Not exceeding a cabin pressure altitude of 8000 feet for pressurized cabins and compartments during normal operation, (2) not exposing occupants to cabin pressures in excess of 15,000 feet after any probable failure condition of the pressurization system, and (3) providing a warning indication if cabin pressure altitude exceeds 10,000 feet.

[FR Doc. E8–11665 Filed 5–22–08; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–33 (Sub–No. 235X)]

Union Pacific Railroad Company—Abandonment Exemption—in Calhoun and Webster Counties, IA

Union Pacific Railroad Company (UP) has filed a verified notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon the Roelyn Industrial Lead from milepost 5.28 near Roelyn to milepost 8.05 near Somers, a distance of 2.77 miles in Calhoun and Webster Counties, IA. The line traverses United States Postal Service Zip Codes 50566 and 50586.

UP has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements of 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on June 25, 2008, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by June 2, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by June 12, 2008, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to UP's representative: Mack H. Shumate, Jr., 101 North Wacker Drive, Room 1920, Chicago, IL 60606.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

UP has filed a combined environmental and historic report addressing the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by May 30, 2008. Interested persons may obtain

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,300. *See* 49 CFR 1002.2(f)(25).

a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP's filing of a notice of consummation by May 23, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: May 19, 2008.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–11513 Filed 5–22–08; 8:45 am]

BILLING CODE 4915–01–P

UNITED STATES INSTITUTE OF PEACE

Notice of Meeting

Date/Time: Friday, June 6, 2008, 9:30 a.m.–1:30 p.m.

Location: 1200 17th Street, NW., Suite 200, Washington, DC 20036–3011.

Status: Open Session—Portions may be closed pursuant to Subsection (c) of Section 552(b) of Title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

Agenda: June 6, 2008 Board Meeting; Approval of Minutes of the One Hundred Twenty-Ninth Meeting (January 10, 2008) of the Board of Directors; Chairman's Report; President's Report; Selection of National Peace Essay contest winners; Other General Issues.

Contact: Tessie F. Higgs, Executive Office, Telephone: (202) 429–3836.

Dated: May 16, 2008.

Patricia P. Thomson,

Executive Vice President, United States Institute of Peace.

[FR Doc. E8–11544 Filed 5–22–08; 8:45 am]

BILLING CODE 6820–AR–P

Corrections

Federal Register

Vol. 73, No. 101

Friday, May 23, 2008

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

Correction

In notice document E8–11129 appearing on page 28810 in the issue of Monday, May 19, 2008, make the following correction:

On page 28810, in the first column, under the **DATES** heading, in the second and third lines, ''June 18, 2008'' should read ''July 18, 2008''.

[FR Doc. Z8–11129 Filed 5–22–08; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57802; File No. SR–FICC–2008–02]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change to Require Demand Processing for Blind–Brokered Repo Trades

May 8, 2008.

Correction

In notice document E8–10725 beginning on page 27873, in the issue of Wednesday, May 14, 2008, make the following correction:

On page 27873, in the first column, the heading is corrected to include the date ''May 8, 2008.

[FR Doc. Z8–10725 Filed 5–22–08; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Friday,
May 23, 2008

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 413, and 417
Medicare Program; Provider Reimbursement Determinations and Appeals; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 413, and 417

[CMS–1727–F]

RIN 0938–AL54

Medicare Program; Provider Reimbursement Determinations and Appeals

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: Subpart R of 42 CFR part 405 consists of regulations governing Medicare reimbursement determinations, and appeals of those determinations, by health care providers. (For the sake of simplicity, throughout this final rule, we use ''reimbursement'' to refer to Medicare payment under both the reasonable cost and prospective payment systems.) Under section 1878 of the Social Security Act (the Act) and the subpart R regulations, the Provider Reimbursement Review Board (the Board) has the authority to adjudicate certain substantial reimbursement disputes between providers and fiscal intermediaries (intermediaries). Board decisions are subject to review by the CMS Administrator, and the final agency decision of the Board or the Administrator, as applicable, is reviewable in Federal district court. In addition, under the subpart R regulations, intermediaries have the authority to hold hearings and adjudicate certain other payment and reimbursement disputes with providers. This final rule updates, clarifies, and revises various provisions of the regulations governing provider reimbursement determinations, appeals before the Board, appeals before the intermediaries (for lesser disputes), and Administrator review of decisions made by the Board.

DATES: *Effective Date:* These regulations are effective August 21, 2008.

Applicability Date: These regulations are applicable to all appeals pending as of, or filed on or after August 21, 2008, except as noted in sections II.Y. and III.Y. of this final rule.

FOR FURTHER INFORMATION CONTACT: Morton Marcus, (410) 786–4477; Donald Romano, (410) 786–1401.

SUPPLEMENTARY INFORMATION: To help readers locate information in this final rule, we are providing the following Table of Contents.

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B. Medicare Modernization Act Requirements for Issuance of Regulations
II. Provisions of the Proposed Rule and Public Comments and Responses
A. Definitions of Entities That Review Intermediary Determinations or Decisions by Such Entities; Definition of Reimbursement (§ 405.1801(a))
B. Calculating Time Periods and Deadlines (§ 405.1801(a) and § 405.1801(d))
C. Providers Under Subpart R; Limited Applicability to Non-Provider Entities (§ 405.1801(b))
D. Provider Hearing Rights (§ 405.1803(d), § 405.1811, and § 405.1835)
1. Provider Dissatisfaction With Medicare Reimbursement; Revised Self-Disallowance Policy
2. Audits of Self-Disallowed Items
3. Determining Timeliness of Hearing Requests (§ 405.1811 and § 405.1835)
4. Contents of Hearing Request
E. Provider Requests for Good Cause Extension of Time Period for Requesting Hearing (§ 405.1813 and § 405.1836)
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H. Group Appeals (§ 405.1837)
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L. Parties to Proceedings in a Board Hearing or Intermediary Hearing (§ 405.1843 and § 405.1815)
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Q. Board Actions in Response to Failure to Follow Board Rules (§ 405.1868)
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I. ICRs Regarding Expedited Judicial Review (§ 405.1842)
V. Regulatory Impact Statement
VI. Regulation Text

I. Background

A. Legislative and Regulatory History and Development

Section 1878(a) of the Social Security Act (the Act) allows providers to appeal to the Board final determinations made by a fiscal intermediary under section 1861(v)(1)(A) of the Act (reasonable cost reimbursement), as well as certain determinations by the Secretary involving payment under section 1886(d) (inpatient hospital prospective payment) and section 1886(b) (commonly known as the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) payment system) of the Act. In addition, by regulation, providers are given the right to appeal to the Board or fiscal intermediary certain other determinations. A brief discussion of the original cost reimbursement, TEFRA, and prospective payment systems (PPS), and some of the types of determinations that are appealable, follows.

For cost reporting years beginning before October 1, 1983, all providers were reimbursed for Part A (hospital insurance) covered items and services they furnished to Medicare beneficiaries on the basis of reasonable cost. (Reasonable cost is defined at section 1861(v)(1)(A) of the Act and implementing regulations at 42 CFR, part 413.) In 1982, the Congress determined that the reasonable cost reimbursement system should be modified to provide hospitals with better incentives to render services more efficiently. Accordingly, in TEFRA, Public Law 97–248, the Congress amended the Act by imposing a ceiling on the rate of increase of inpatient operating costs recoverable by a hospital under Medicare.

The Social Security Amendments of 1983, Public Law 98–21, added section 1886(d) to the Act, which, effective with cost reporting periods beginning on or after October 1, 1983, changed the method of payment for inpatient hospital services under Medicare Part A for short-term acute care hospitals. The method of payment for these hospitals was changed from a cost-based

retrospective reimbursement system to a system based on prospectively set rates; that is, a PPS. Under Medicare's inpatient hospital PPS, payment is made at a predetermined specific rate for each hospital discharge (classified according to a list of diagnosis-related groups (DRGs)), excluding certain costs that continue to be reimbursed under the reasonable cost-based system.

Other statutory changes expanded the types of providers that are subject to a PPS. The Balanced Budget Act of 1997 (BBA), Public Law 105–33, established a PPS for home health agencies (HHAs), for rehabilitation hospitals, and for all skilled nursing facilities (SNFs). The Balanced Budget Refinement Act of 1999, Public Law 106–113, provided for the establishment of a PPS for long term care hospitals (LTCHs). Although many types of providers are now paid on a prospectively-determined basis, some types of providers (for example, hospices, psychiatric hospitals, and children's hospitals) continue to be paid on a reasonable cost basis.

Payments to providers are ordinarily made through private organizations, known as fiscal intermediaries, under contracts with the Secretary. (The term ''intermediary'' includes both fiscal intermediaries and Medicare Administrative Contractors for the purpose of this final rule.) For covered items and services reimbursed on a reasonable cost basis, the intermediary pays a provider during a cost reporting year interim payments that approximate the provider's actual costs. Under a PPS, providers are generally paid for each discharge after each bill is submitted.

Regardless of whether the provider is paid under reasonable cost or under a PPS, the provider files an annual cost report after the cost year is completed. The intermediary then reviews or audits the cost report, determines the aggregate amount of payment due the provider, and makes any necessary adjustments to the provider's total Medicare reimbursement for the cost year. This year-end reconciliation of Medicare payment for the provider's cost reporting period constitutes an intermediary determination, as defined in § 405.1801(a). Under § 405.1801(a)(1), § 405.1801(a)(2), and § 405.1803, the intermediary must render the provider with written notice of the intermediary determination for the cost period in a notice of amount of program reimbursement (NPR). The NPR is an appealable determination.

In addition to the NPR, other determinations made by the intermediary or CMS for hospitals and other providers are appealable to the intermediary or Board (depending on the amount in controversy). These include: A denial of a hospital's request for an adjustment to, or an exemption from, the TEFRA rate of increase ceiling (see § 413.40); a denial of an HHA's or SNF's request for an adjustment to, or an exemption from, the routine cost limits that were in effect prior to a PPS for these providers (see § 413.30); a denial of certain hospice payments (see § 418.311); or a denial of a PPS hospital's request to be classified as a sole community hospital (see § 412.92) or rural referral center. Also, some health care entities (for example, end-stage renal dialysis (ESRD) facilities, rural health clinics (RHCs) and Federally qualified health centers (FQHCs)) are treated as ''providers'' for purposes of subpart R and have appeal rights before the intermediaries and the Board. Thus, for example, a renal dialysis facility may appeal to the intermediary or the Board a CMS denial of its request for an exception to its composite payment rate (see § 413.194(b)).

If a provider is dissatisfied with some aspect of an appealable intermediary or CMS determination, it may request a hearing before the intermediary or the Board, depending on the amount in controversy. For an amount in controversy that is at least $1,000 but less than $10,000, the provider may request an intermediary hearing before the intermediary hearing officer(s) under § 405.1811. If the amount in controversy is at least $10,000, the provider may request a hearing before the Board under section 1878(a) of the Act and § 405.1835 of the regulations. Alternatively, the provider may request a Board hearing with one or more additional providers under section 1878(b) of the Act and § 405.1837, if the amount in controversy is, in the aggregate, at least $50,000. (This type of appeal is known as a group appeal.) (Note that under section 1878(f)(1) of the Act, any appeal to the Board by providers under common ownership or control must be brought by these providers as a group regarding any matter involving an issue common to these providers. We interpret this provision to apply only where the amount in controversy for the common issue is at least $50,000.) Decisions by the intermediary hearing officer(s) or the Board are subject to further review. Prior to the implementation of this final rule, intermediary hearing officers' decisions have been subject to review by a CMS reviewing official pursuant to section 2917 of the *Provider Reimbursement Manual* (PRM), Part 1. Now, § 405.1834 provides for this review. Also, under this final rule, no provisions remain for judicial review of a final decision of the intermediary hearing officer(s) or CMS reviewing official, as applicable. Board decisions are subject to review by the Administrator or the Deputy Administrator of CMS, under section 1878(f)(1) of the Act and § 405.1875. (The Secretary's review authority under section 1878(f)(1) of the Act has been delegated to the Administrator, and redelegated to the Deputy Administrator, of CMS. For ease of use, throughout this proposed rule, we use the term ''Administrator'' to refer to either the Administrator or Deputy Administrator, and the term ''Administrator review'' to review by either official.) A final decision of the Board, or any reversal, affirmance, or modification of a final Board decision by the Administrator, is subject to review by a United States District Court with venue under section 1878(f)(1) of the Act and § 405.1877 of the regulations.

Most of the central provisions of the regulations governing provider reimbursement determinations and appeals are more than 30 years old. On May 27, 1972, we published a final rule (37 FR 10722), which provided for the intermediary determination, NPR, intermediary hearing, and reopening of both intermediary determinations and intermediary hearing decisions. Five months later, the Congress added section 1878 to the Act, which established the Board and provided for review of Board decisions by the Secretary, as well as for judicial review. (See Social Security Amendments of 1972, Pub. L. 92–603, section 243(a), 86 Stat. 1420 (October 30, 1972).) We then, on September 26, 1974, published a final rule (39 FR 34514) that implemented the 1972 amendments to the Act, and revised and redesignated the preexisting rules governing the intermediary determination, NPR, intermediary hearing, and reopening. These regulations were redesignated as Subpart B of Part 405 of Title 42 of the CFR (Subpart R) on September 30, 1977 (42 FR 52826). We have revised these regulations on several occasions, largely in response to various amendments to section 1878 of the Act.

For several reasons, we believe it is necessary and appropriate to revise many of the subpart R regulations governing provider reimbursement determinations and appeals. As noted previously, the principal provisions of the regulations are more than 30 years old. In the intervening period, various issues have arisen regarding provider reimbursement determinations and

appeals. Important parts of the regulations have been the subject of extensive litigation, the results of which indicate a need for reexamination of the rules. Also important is the development of a huge backlog of cases before the Board (which, at the present time, is approximately 6,800 cases). Experience gained through long use of the regulations indicates that revisions to the regulations would lead to a more effective and efficient appeal process. We recognize that the Board's inventory of pending cases is dependent in some ways on factors outside of its control (for example, the number of hearing requests filed). However, we believe that the revisions made in this final rule will help the Board reduce the case backlog (or at least forestall substantial additions to it), and will also reflect changes in the statute, clarify our policy on various issues, and eliminate outdated material. The Board's instructions for providers and intermediaries, as well as the Board's decisions on specific cases brought before it, are available on the CMS Web site, which, as of the date of publication of this final rule, is *http://www.cms.hhs.gov/PRRBReview.*

B. Medicare Modernization Act Requirements for Issuance of Regulations

Section 902 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) amended section 1871(a) of the Act and requires the Secretary, in consultation with the Director of the Office of Management and Budget, to establish and publish regular timelines for the publication of Medicare final regulations based on the previous publication of a Medicare proposed or interim final regulation. Section 1871(a)(3)(B) of the Act, as amended by section 902 of the MMA, also states that the timelines for these regulations may vary but shall not exceed 3 years after publication of the preceding proposed or interim final regulation, except under exceptional circumstances. Section 1871(a)(3)(B) of the Act further provides that if the Secretary intends to vary such a timeline with respect to the publication of a final regulation, the Secretary shall publish in the **Federal Register** notice of the different timeline by not later than the timeline previously established with respect to such regulation. On June 22, 2007, a notice was published in the **Federal Register** extending by one year (or until June 25, 2008) the timeframe for publishing this final rule (see 72 FR 34425). Therefore, this final rule has been published within the time limit imposed by section 902 of the MMA.

II. Provisions of the Proposed Rule and Public Comments and Responses

On June 25, 2004, we published a proposed rule in the **Federal Register** (69 FR 35716) that set forth proposed regulations seeking to update, clarify, and revise various provisions of the regulations governing provider reimbursement determinations, appeals before the intermediary hearing officers and the Board, and Administrator review of decisions made by the Board. For purposes of the summary of the proposed provisions and for the comments and responses, we are using the same lettering sequence that appeared in the proposed rule. In each lettered section, we provide a description of our proposals and a summary of the changes from the proposed rule that we have made in this final rule. A more extensive description of the proposals is contained in the proposed rule, and a brief summary of the changes appears at section III.

A. Definitions of Entities That Review Intermediary Determinations or Decisions by Such Entities; Definition of Reimbursement (§ 405.1801(a))

We proposed definitions for ''intermediary hearing officer''; ''CMS reviewing official''; ''CMS Reviewing official procedure''; ''Administrator review''; and ''reviewing entity.'' We received no comments on these proposed definitions and we are adopting them without change. We note that we incorrectly stated that we were proposing a definition for ''reimbursement.''

B. Calculating Time Periods and Deadlines (§ 405.1801(a) and § 405.1801(d))

We proposed specific provisions to address the timeframes for appealing determinations, including those for determining the beginning and end of a specific appeal period. Generally, we proposed to calculate the beginning period of an appeal as the date a party receives a triggering notice, and the end period for an appeal as the date by which a reviewing entity must receive the party's submission. We proposed a definition for ''date of receipt'' with respect to the method we would use to determine the date a document or other material is received by: (1) A party or non-party involved in proceedings before a reviewing entity and (2) a reviewing entity. Specifically, we proposed a rebuttable presumption whereby the receipt date of documents sent by a reviewing entity to providers, intermediaries and other entities would be 5 days after the postmark date. For materials submitted to a reviewing entity, we proposed the establishment of a presumption that the receipt date is the date the reviewing entity stamps the document ''Received.'' We also proposed that, where a reviewing entity could not conduct business due to extraordinary circumstances beyond its control, the designated time period would resume on the next work day the reviewing entity was again able to conduct business. Finally, we proposed that the last day of a designated time period would be excluded if it fell on a Saturday, Sunday, or Federal legal holiday.

We are amending our proposed definition of ''Date of Receipt'' in § 405.1801(a) to provide that, where a request for an intermediary or Board hearing, a request to add issues to a Board or intermediary hearing, or any other document or material is transmitted to a reviewing entity by a nationally-recognized, next-day courier service (for example, the U.S. Postal Service Express Mail, Federal Express, UPS, or DHL), the ''Date of Receipt'' is presumed to be the date of delivery noted by the courier, unless it can be shown by clear and convincing evidence that the materials were received on a different date. We are also amending the definition of ''Date of Receipt'' to provide that, where a nationally-recognized, next-day courier service is not employed to deliver materials to a reviewing entity, the ''Date of Receipt'' is presumed to be the date stamped ''Received'' by the reviewing entity, unless it can be shown by clear and convincing evidence that the materials were received by some other date. The reviewing entity's determination of whether the presumption of the correctness of the date of delivery, or the date stamp, is overcome by clear and convincing evidence is final and binding (that is, it is not subject to further administrative or judicial review).

Comment: One commenter supported our proposal that the timeframe for requesting an intermediary hearing or a Board hearing should run from the date of receipt of the appealable decision. Another commenter agreed that the ''5-day presumption'' gave an accurate determination of the date of receipt of a document. One commenter suggested that the ''5-day presumption'' should be used by a reviewing entity when it sends and receives materials.

Three commenters suggested the rule should offer some reassurance that the reviewing entity would, in fact, stamp ''Received'' on the document on the day of arrival. One of these commenters also suggested using ''date of mailing'' as a

measure of timeliness. Another commenter stated that date stamps are unverifiable and suggested that the Board should consider an electronic docket system that would allow parties to view the actual dates of receipt of filings and Board actions via the Internet. Another commenter suggested the use of a reliable ''intermediary'' (for example, the United States Postal Service, because it would provide a single source of date verification) instead of relying solely on the determination of the Board. This commenter suggested that the current ''mailbox rule'' be retained.

Response: After reviewing all of the comments received regarding the calculation of the various time periods and deadlines set for appealing final determinations, we have decided to adopt our proposals as final, with the modifications noted below, regarding the receipt of documents by a reviewing entity. We continue to believe that the best and most consistent way to establish a beginning and ending date for purposes of determining the various appeal periods is through the use of ''date of receipt.'' (We also note that employing a ''date of mailing'' can present some practical problems, such as unreadable postmark dates.) With respect to the situation in which a party (or interested non-party) to a proceeding receives a document from a reviewing entity or from another party, we have established a 5-day presumption for receipt of that document. The presumption may be rebutted if a preponderance of the evidence establishes that the document was actually received on a later date. The 5-day presumption does not apply in the case where the reviewing entity is on the receiving end of a document from a party (or non-party) to the proceeding. Except as noted below, the receipt date in this instance is the date the reviewing entity date stamps the document as ''Received.'' We have decided not to include a 5-day presumption for the receipt of documents by reviewing entities because there is a presumption of administrative regularity in agency action. This doctrine presumes that an arm of a Federal agency, such as the Board, will act responsibly, fairly, and legally in its duty to provide an appeals forum for providers of Medicare services. Thus, it is reasonable to presume that the actual receipt date of a document submitted to a reviewing entity is the date the reviewing entity stamps ''Received'' on the document. Nonetheless, although we believe that materials will be timely and accurately stamped ''Received'' by the Office of Hearings, we wish to avoid any confusion or possible prejudice to a provider, as well as any protracted disputes as to when a document was received. We also recognize the importance of the timeframes for both requesting a Board or intermediary hearing and for requesting that issues be added prior to a Board or intermediary hearing. Therefore, we are amending our definition of ''Date of Receipt'' in § 405.1801, to provide that, where a request for hearing or a request to add issues prior to a hearing, or any other document or material is delivered to a reviewing entity by a nationally-recognized next-day courier service, the ''Date of Receipt'' shall be presumed to be the date of delivery as noted by that courier service, unless it can be shown by clear and convincing evidence that the material was received on a different date. Further, in order to strongly encourage the use of next-day couriers (especially for requests for appeal and for requests to add issues), we are amending the definition of ''Date of Receipt'' to provide that, where a nationally-recognized next-day courier service is not employed to deliver materials to the reviewing entity, the ''Date of Receipt'' shall be presumed to be the date stamped ''Received'' by the reviewing entity, unless it is established by clear and convincing evidence that the materials were actually received on a different date. In order to prevent collateral litigation, the reviewing entity's determination as to whether clear and convincing evidence exists to establish that the materials were received on a date different from the delivery date or the date stamped ''Received'' is not subject to further administrative or judicial review. (We considered requiring, upon penalty of refusal to accept, that any request for a hearing or request to add issues be delivered by a next-day courier service.)

Finally, we note that, although it is not feasible at this time for the Office of Hearings to administer an electronic docket system, such a system may be implemented in the future.

Comment: One commenter suggested that the 5-day presumption for receipt of documents from a reviewing entity be five business days instead of five calendar days because of weekends.

Response: We believe that five calendar days is a sufficient period of time (and we note that mail is picked up and delivered on Saturdays).

Comment: One commenter stated that reviewing entities should accept filings via facsimile (fax), with originals to follow, and use the date indicated on the fax as the date of receipt.

Response: The Office of the Attorney Advisor, which assists in the Administrator review process, has allowed parties to submit fax copies. This practice reflects the short timeframes for Administrator review and the small number of appeals that are pending in the office at any one time. In contrast, the Office of Hearings, which assists the Board in its review, has declined to allow fax transmissions of provider requests for Board hearings and other relevant documents. The Office of Hearings' practice reflects the voluminous number of appeals pending in that office and the large number of documents submitted (several of which may be due on the same date), making the acceptance of facsimile transmissions impractical. We are not limiting either the Office of the Attorney Advisor or the Office of Hearings in determining the best office practice for the receipt of documents. Additionally, there may be future technological innovations that will make other modes of submission feasible, which these offices may wish to have the flexibility to adopt. Therefore, we decline to specify in regulations whether the Office of Hearings or Office of Attorney Advisor may or must accept fax transmissions, or hand delivery, or other modes of submission, and, consistent with present practice, will leave it to the discretion of these offices as to the additional types of submission they will accept.

Comment: One commenter requested that we clarify the types of relevant evidence (for example, a provider date stamp) that would prove that materials sent by a reviewing entity were received by a provider beyond the 5-day presumption period.

Response: We decline to specify types of evidence that will necessarily establish that a document was received more than five days after the postmark date. Rather, whether a piece of evidence (for example, an affidavit from the party or a date stamp from the party) is persuasive that a document was received more than 5 days after the postmark date would be determined in context with any other relevant evidence in a particular case.

Comment: One commenter believed that providers should be allowed to request extensions of timeframes for appeal in situations involving employee strikes or extended absence due to illness or maternity leave.

Response: In section II.E. of this final rule, regarding ''Provider Requests for Good Cause Extension of Time Period for Requesting Hearing,'' we state the rule that an appeal period may be extended for ''good cause'' only in cases

where a provider can establish that it could not reasonably have been expected to submit a hearing request within 180 days due to extraordinary circumstances beyond its control.

C. Providers Under Subpart R; Limited Applicability to Non-Provider Entities (§ 405.1801(b))

We proposed to amend § 405.1801(b)(1) to recognize as a provider under Subpart R each entity recognized under the Act for purposes of provider reimbursement determinations and appeals. In accordance with the definition of ''provider of services'' in section 1861(u) of the Act, we proposed to recognize specifically a hospital, critical access hospital, SNF, comprehensive outpatient rehabilitation facility, HHA, and hospice program. Also, a RHC and a FQHC would be included in accordance with section 1878(j) of the Act, and an ESRD facility would be recognized under section 1881(b)(2)(D) of the Act. Our proposed revision to § 405.1801(b)(1) would also recognize as a provider any other entity treated as a provider under the Act, in order to ensure recognition in subpart R of any other entity that may qualify as a provider under the Act for purposes of provider reimbursement determinations and appeals. We received no comments on this section and are adopting our proposals without change.

D. Provider Hearing Rights (§ 405.1803(d), § 405.1811, and § 405.1835)

Under section 1878(a) of the Act, and § 405.1835 and § 405.1841 of the regulations, a provider may obtain a Board hearing if it meets three jurisdictional requirements: (1) The provider is dissatisfied with its Medicare reimbursement for a cost reporting period; (2) the amount in controversy is at least $10,000 (at least $50,000 for a group appeal); and (3) the provider files a timely request for a hearing to the Board. The same jurisdictional requirements govern provider requests for an intermediary hearing under § 405.1811, except that the amount in controversy requirement is at least $1,000 but less than $10,000. In this section of the proposed rule, we proposed changes regarding the first and third jurisdictional requirements; that is, provider dissatisfaction with Medicare reimbursement and the timeliness of hearing requests. We are making several changes to the proposed rule.

Under § 405.1811(a)(1), and § 405.1835 (a)(1), a provider has a right to an intermediary or Board hearing, as a single provider appeal, for specific items claimed for a cost reporting period covered by an intermediary or Secretary determination, if the provider preserves its right to claim dissatisfaction with the amount of Medicare payment for the specific item(s) at issue. The provider can preserve this right either by claiming the cost on its cost report or, if the provider seeks payment that it believes may not be allowable or may not be in accordance with Medicare policy (for example, if the intermediary lacks discretion to award the reimbursement the provider seeks for the item(s)), by ''self-disallowing a specific item(s) by following the applicable procedures for filing a cost report under protest.'' We have amended § 405.1811(a)(1) and § 405.1835(a)(1) to be effective for cost reporting periods that end on or after December 31, 2008. This revision will be beneficial to both providers and intermediaries. The delay in the effect of the requirement will benefit providers because they will have additional time to evaluate whether they wish to file a cost report item under protest. This change will also eliminate the transitional administrative burden that intermediaries otherwise would have faced under the proposal, which would have necessitated that providers file requests to amend previously filed cost reports to explicitly file cost report items under protest.

In response to comments, we have clarified § 405.1811(b) and § 405.1835(b) to provide that, where required information is not submitted with the hearing request, the intermediary hearing officer or Board, as applicable, may dismiss with prejudice the appeal, or take any other remedial action that the reviewing entity considers appropriate. We believe that this approach is consistent with the approach we have taken in section § 405.1868 (''Board Actions in Response to Failure to Follow Board Rules'') in which we similarly leave to the Board's discretion whether to dismiss an appeal or take some other, lesser action.

We are amending proposed § 405.1835(c)(3) to address possible misleading and unnecessary language concerning adding an issue to an appeal of a revised NPR. Proposed § 405.1835(c)(3) stated that a request to add an issue to an appeal is timely if ''[t]he Board receives the request to add issues no later than 60 days after the expiration of the applicable 180-day period prescribed in paragraph (a)(3) of this section or, for a request to add issue(s) following a reopening conducted in accordance with and within the period specified in § 405.1885(c)(1).'' We have deleted the language in § 405.1835(c)(3) pertaining to a request to add issues following a reopening. We note that we did not include such language in the corresponding proposed intermediary hearing officer regulations at § 405.1811(c)(3). Such language is potentially misleading in that it may suggest incorrectly that a notice of reopening is the trigger point for appealing an issue, whereas, in fact, under our longstanding policy (which is reaffirmed in this final rule at § 405.1889), only those matters actually revised and specifically contained in a revised determination following a notice of reopening are appealable. We also believe the language is unnecessary because a revised determination is treated the same under our rules as an original determination for purposes of the time in which to request a hearing or add an issue. Thus, if a revised NPR containing two distinct revisions were issued, and a provider timely appealed one of the revisions (that is, within 180 days after the date of receipt by the provider of the revised NPR), it could add the second revision as an issue within 60 days after the expiration of the 180-day period for appealing the revised NPR.

In § 405.1811(b)(2)(i) and § 405.1835(b)(2)(i), we proposed that a provider would be required to explain its dissatisfaction with the amount of Medicare payment for the specific item(s) at issue by stating why Medicare payment is incorrect for each disputed item. We acknowledge that there may be instances in which a provider may be uncertain as to whether Medicare payment is incorrect because it does not have access to underlying data (for example, data from a State agency). Accordingly, we have revised § 405.1811(b)(2)(i) and § 405.1835(b)(2)(i) to allow a provider to explain why it is unable to determine whether payment is correct as a result of not having access to underlying information.

Further, in response to a commenter's suggestion that providers be required to list their parent corporation at the time of filing a single appeal so as to assist the Board in identifying providers under common ownership, we are adding new § 405.1835(b)(4) to require a provider under common ownership or control to furnish the name and address of its parent corporation and to provide a statement that: (1) To the best of the provider's knowledge, no other provider to which it is related by common ownership or control, has pending a request for a Board hearing pursuant to this section or pursuant to

§ 405.1837(b)(1) on any of the same issues contained in the provider's hearing request for a cost reporting period that falls within the same calendar year as the calendar year covered by the provider's hearing request; or (2) a pending appeal(s) exist(s), and the provider name(s) and provider number(s), and the case number(s) (if assigned), for such appeal(s).

Finally, in preparing this final rule, we have corrected minor wording inconsistencies between § 405.1811, which pertains to intermediary hearings, and § 405.1835, which pertains to Board hearings, where appropriate.

Comment: One commenter stated that the section on who is entitled to a hearing should be clarified to include those entities that were formerly providers or the successor organizations that retained responsibility for previously filed cost reports following a change of ownership. In recent years, numerous tax-exempt organizations sold hospital operations and the proceeds went to local charitable foundations. Frequently, those organizations retained responsibility for filed cost reports, and the rules should be clarified to grant hearing rights to those organizations regarding those cost reports.

Response: We made no specific proposal concerning the hearing rights of former providers or successor organizations following a change in ownership. However, we appreciate the concerns raised by the commenter and, therefore, we may seek to address this issue in a future rulemaking or through other instructions.

1. Provider Dissatisfaction With Medicare Reimbursement; Revised Self-Disallowance Policy

We proposed that, in order to preserve its appeal rights, a provider must either claim an item on its cost report where it is seeking reimbursement that it believes to be in accordance with Medicare policy, or self-disallow the item where it is seeking reimbursement that it believes may not be in accordance with Medicare policy (for example, where the intermediary does not have the discretion to award the reimbursement sought by the provider). In order to self-disallow an item, the provider would be required to follow the applicable procedures, which are contained currently in section 115 of the PRM, Part II (CMS Pub. 15–2), for filing a cost report under protest. We stated that we believed our proposal was appropriate under the Supreme Court's decision in *Bethesda Hospital Association* v. *Bowen*, 485 U.S. 399 (1988). We further stated that we believed that our proposed policy was a reasonable response to statements by the *Bethesda* providers and others that it was necessary, for any reimbursement request in excess of the amount allowed under program policy, to raise the entire payment request before the Board, because it would be improper to include a cost report claim for more payment than is permitted by Medicare policy. We noted that it has been our longstanding policy that a cost report claim at variance with Medicare policy is not improper, provided that the claim is not intended to procure an intermediary determination (or reviewing entity decision) by fraud or similar fault. We are adopting our proposal, effective with cost reporting periods ending on or after December 31, 2008.

Comment: One commenter recommended that the text of section 115 *et seq.* of the PRM, Part II, be placed in the regulations. The commenter noted that these sections of the PRM have not changed since 1980. Another commenter stated that the protested amount line on the cost report is available for situations where a provider is not in agreement with Medicare policy and that CMS should be holding that out as the way to assert differences of opinion with Medicare policy.

Response: We are adopting the proposal, which is essentially a codification of the protested amount line procedures set forth in section 115 *et seq.* of the PRM, Part II. We are modifying the proposal so that the requirement, that a provider self-disallow an item by following the applicable procedures for filing a cost report under protest, is effective for cost reporting periods ending on or after December 31, 2008.

Comment: One commenter stated that the final rule should require that, when a provider self-disallows an item in accordance with the proposed policy, the provider should specifically identify the regulation or other authority the provider is challenging as invalid, and that the appeal should be limited to that challenge. The commenter stated that some providers have been misusing the protested line amount procedure. Specifically, the commenter said that it was aware of instances in which a provider listed a claim related to bad debts in the protested line amount. According to the commenter, the provider was not challenging any policy related to bad debts, but rather lacked the documentation for its bad debts claim and was using the protested amount procedure as a way of avoiding a possible reopening denial based on Program Memorandum A–01–141 (December 14, 2001). According to the commenter, this program memorandum gives intermediaries discretion to deny a reopening request where a provider was culpable in not adequately documenting its claim and where the claim was reported not under protest, but rather was made in the cost report proper.

Response: Although we encourage providers to identify the specific manual provision, CMS Ruling, regulation, or statutory section that they believe prevents them from receiving payment for the self-disallowed item, we are not requiring through these regulations that they do so. We are attempting to strike a balance between, on the one hand, having providers present enough information so as to put the intermediaries on notice as to actual or potential reimbursement disputes, and, on the other hand, not making it unduly burdensome for providers to file cost reports. For the same reason, we are encouraging, but not requiring, providers to identify in the hearing request the specific authority they believe prevents them from receiving reimbursement for a self-disallowed item. We note, however, that where the authority allegedly preventing reimbursement for the self-disallowed item is a CMS Ruling, regulation or statute, the provider may wish to seek expedited judicial review (EJR) early in the appeals process, in accordance with the procedures under § 405.1842, or the Board may wish to explore granting EJR on its own motion. If the provider does seek EJR or the Board initiates own motion consideration of EJR, the provider would need to identify at that time the specific authority that it believes prevents it from receiving reimbursement for the self-disallowed item. We caution that the fact that we are not requiring by regulation that providers identify in the hearing request the specific authority at issue should not be seen as preventing the Board from issuing instructions that would require providers to do so. Under section 1878(e) of the Act, the Board has the authority to issue instructions governing hearings before it, provided that those instructions are not inconsistent with the statute or regulations of the Secretary.

Finally, although some providers may be using the protested line amount procedures inappropriately, as alleged by the commenter, we do not believe that mischaracterizing a documentation issue (or some other issue) as a self-disallowance prevents an intermediary from denying a reopening request. Program Memorandum A–01–141

Chapter 8, section 60.1 of CMS Pub. 100–06, states that intermediaries should inform providers that, as a general rule, they will not honor reopening requests for audit adjustments based on lack of documentation, but it also does not require intermediaries to allow all requests for reopening audit adjustments that are not based on (or are not characterized by the provider as based on) lack of documentation. Moreover, under the self-disallowance policy contained in this rule, providers should not self-disallow items for which they do not have a good faith belief that the items may not be allowable under Medicare payment policy. Under § 405.1835, in order to preserve its appeal rights, a provider must either include a claim for the specific item on its cost report, or, where it has a good faith belief that the item may not be allowable under Medicare policy, list the item on the cost report. Therefore, if a provider were to simply list an item as a self-disallowed item, when the provider is aware that the issue is one of documentation and not policy, the provider would run the risk that the appeal of that item would be dismissed.

Comment: Several commenters asserted that the proposal that the provider identify an item as a ''protested amount'' was inconsistent with the Supreme Court's decision in *Bethesda*. For example, two commenters, using identical language, stated that the Supreme Court concluded that providers could claim ''dissatisfaction,'' within the meaning of the statute, without incorporating their challenge in the cost reports filed with their fiscal intermediaries, and that our proposal directly contradicted the Supreme Court's conclusion by mandating that a provider had to claim dissatisfaction by incorporating a challenge into the cost report through either declaring the item as a cost or declaring it as a protested item. One commenter said that the Supreme Court concluded in *Bethesda* that no statute or regulation expressly mandated that a challenge to the validity of a regulation be submitted first to the intermediary, and that it would be futile to submit challenges based on regulations, statutes or CMS's formal policies to the intermediary before seeking Board review; therefore, the proposed policy was in direct violation of clear statutory authority. Another commenter said that rather than reflecting the reasoning and findings of *Bethesda*, the proposed policy appeared to have adopted the narrowing of *Bethesda* in *Little Company of Mary Hospital and Health Centers* v. *Shalala*, 24 F.3d 984 (7th Cir. 1994). According to this commenter, the *Little Company of Mary Hospital* case narrowed the *Bethesda* decision by providing that in order for a provider to be able to self-disallow a cost, there must be a statute, regulation or CMS ruling that makes reimbursement of an item unallowable. This commenter stated that the *Little Company of Mary Hospital* case was the decision of a single circuit and therefore conflicts with the more general proposition of the Supreme Court in *Bethesda*.

Response: It has been our longstanding view that providers that fail to claim on their cost reports costs that are allowable under the Medicare law and regulations cannot meet the ''dissatisfaction'' requirement. See, for example, *Little Co. of Mary Hosp. & Health Care Ctrs.* v. *Shalala*, 165 F.3d 1162 (7th Cir. 1999). This proposed change would simply codify in our regulations our longstanding interpretation of ''dissatisfaction.''

We continue to believe that our proposed policy that a provider must either include a claim for reimbursement of a cost on its cost report or self-disallow the cost in order for the Board to obtain jurisdiction over an appeal pertaining to that cost is consistent with the Supreme Court's decision in *Bethesda*. We believe the commenters that specifically mentioned *Bethesda* have misunderstood the import of *Bethesda* on our proposal. In *Bethesda*, providers that submitted their cost reports to their intermediary complied with the Secretary's regulation by self-disallowing malpractice insurance costs in excess of the regulation. The providers then filed a request for a hearing before the Board to contest the regulation, and the Board dismissed for lack of jurisdiction. Ultimately, the Supreme Court rejected the Secretary's position that section 1878(a)(1)(A)(i) of the Act, which requires that a provider be dissatisfied with a final determination of its fiscal intermediary, ''necessarily incorporates an exhaustion requirement.'' The Court found that this ''strained interpretation'' of a statutory exhaustion requirement was inconsistent with the express language of the statute. (*Bethesda*, 485 U.S. at 404.) The Court agreed that, under section 1878(a)(1)(A)(i) of the Act, a provider's dissatisfaction with the amount of its total reimbursement is a condition of the Board's jurisdiction, but held that ''it is clear, however, that the submission of a cost report in full compliance with the unambiguous dictates of the Secretary's rules and regulations does not, by itself, bar the provider from claiming dissatisfaction with the amount of reimbursement allowed by those regulations. No statute *or regulation* expressly mandates that a challenge to the validity of a regulation be submitted first to the fiscal intermediary. * * * Thus, [the providers in this case] stand on different ground *than do providers who bypass a clearly prescribed exhaustion requirement or who fail to request from the intermediary reimbursement for all costs to which they are entitled under applicable rules. While such defaults might well establish that a provider was satisfied with the amounts requested in its cost report* and awarded by the fiscal intermediary, those circumstances are not presented here.'' (*Bethesda*, 485 U.S. at 404–05 (emphasis added).) In sum, although the Supreme Court in *Bethesda* held that the Secretary may not rely on section 1878(a)(1)(A)(i) as explicitly requiring providers to present challenges to a regulation to their intermediaries as a condition to the Board's jurisdiction, the Court specifically recognized that the Secretary could impose an exhaustion requirement by regulation, and that a provider who fails to claim all costs to which it is entitled may fail to meet the jurisdictional prerequisite of dissatisfaction. We note that we are not requiring providers to claim costs or items that they believe may not be in accordance with Medicare payment policy—rather, we are merely requiring that the provider list such items on the cost report by following the protested line amount procedures.

In *Bethesda*, the providers listed on their cost reports the costs at issue, but deliberately did not claim them. As noted by the Ninth Circuit in *Adams House Health Care* v. *Bowen*, 862 F.2d 1371, 1375 n.3 (9th Cir. 1988), the question was left open by *Bethesda* as to whether the Board is deprived of jurisdiction to hear an appeal concerning a cost that was omitted entirely from the cost report. We interpret section 1878(a)(1) of the Act to mean that a provider is not ''dissatisfied'' with a final determination of the intermediary or the Secretary regarding any matter that is omitted from the cost report, and that, as a result, the Board does not have jurisdiction to hear an appeal regarding the matter. Although the Supreme Court in *Bethesda* indicated that if a provider were to bypass a ''clearly prescribed exhaustion requirement'' it ''might well'' be precluded from raising the issue before the Board, we believe our proposal to be even less than an exhaustion requirement. We believe it to

be more akin to simply a presentment requirement.

We do not believe that the *Little Company of Mary Hospital* decision is inconsistent with the Supreme Court's decision in *Bethesda*. As the Seventh Circuit in *Little Company of Mary Hospital* noted, *Bethesda* ''says only that a provider can challenge a *rule* before the Board even after 'admitting' that the rule is applicable when submitting its expenses to the intermediary,'' and that *Bethesda* ''strongly suggests that a hospital that does not ask its intermediary to reimburse it for all the costs for which it is entitled cannot, on appeal to the Board, first ask for new costs.'' (24 F.3d at 992–93, emphasis in the original.) Thus, *Little Co. of Mary* was not a narrowing of *Bethesda*, as one commenter asserted. Rather, it was an application of *Bethesda* to the facts before it, facts that mirrored the language quoted above from *Bethesda*.

We recognize that the First Circuit's majority opinion reached a contrary result in *Maine General Medical Center* v. *Shalala*, 205 F.3d 493 (1st Cir. 2000). Because *Maine General* relied on a pre-*Bethesda* decision that analyzed Board jurisdiction under 42 U.S.C. 1395oo(d), and not 42 U.S.C. 1395oo(a), as required by *Bethesda*, and because it failed to recognize the implications of the *Bethesda* dicta, we believe that *Maine General* was incorrectly decided.

Although no commenters raised the argument that the ''dissatisfaction'' requirement applies only to the total amount of program reimbursement reflected in the NPR, and that ''dissatisfaction'' therefore does not need to be expressed with respect to each issue challenged on appeal, we note that a provider successfully made this argument in *Loma Linda University Medical Center* v. *Leavitt*, 492 F.3d 1065 (9th Cir. 2007). We respectfully submit that the Ninth Circuit erred in its analysis. Although there may be nothing in the statute indicating that dissatisfaction must be expressed with respect to ''each claim'', there also is nothing in the statute indicating that the Secretary cannot interpret the dissatisfaction requirement in this manner. The statute thus is ambiguous on this point, and the Ninth Circuit should have accorded deference to the Secretary's interpretation, particularly in light of the Secretary's expertise in how the Medicare provider reimbursement process works.

Specifically, an intermediary makes distinct reimbursement determinations for each expense item and then sums these distinct determinations. The ''final determination,'' which here is the NPR, thus is not simply one total amount. Rather, it is comprised of many individual calculations representing the various items for which the provider seeks payment. A provider rarely, if ever, would challenge before the Board its payment for every discrete item that goes into the total reimbursement figure. Instead, a provider challenges discrete elements of the total amount, only some of which may be reviewed by the Board. Dissatisfaction with total reimbursement thus is based on dissatisfaction with items that result in total reimbursement, and it is completely reasonable to interpret 42 U.S.C. 1395oo(a) to require dissatisfaction to be shown with respect to each issue being appealed.

Moreover, *Bethesda* involved the question of whether the Board had jurisdiction over one particular issue, not whether it had jurisdiction over an entire NPR. *Bethesda* thus implicitly assumes that jurisdiction must be obtained on an issue-specific basis. Furthermore, the facts of *Little Co. of Mary* make clear that, in that case, the provider was dissatisfied with other issues in its NPR. Yet this dissatisfaction with the overall total amount of program reimbursement did not affect the court's decision in that case.

We also note that the Secretary's interpretation of the statutory language at 42 U.S.C. 1395oo(a) is consistent with court decisions related to reopenings. In those cases, the courts refrained from similar attempts to exaggerate the significance of the statutory phrase at 42 U.S.C. 1395oo(a) ''total program reimbursement due the provider.'' *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449, 453 (1999) (Board lacks jurisdiction over intermediary's ''refusal to reopen * * * [which] is not a 'final determination * * * as to the amount,' but rather a refusal to make a new determination''). In *HCA Health Services of Oklahoma* v. *Shalala*, 27 F.3d 614 (D.C. Cir. 1994), the court noted that ''when an intermediary revisits only certain specified *determinations* contained in the original NPR * * * [p]art of the final determination is obviously contained in that portion of the original NPR which was never revisited, while the remaining elements are clearly to be found in the reopening decision.'' 27 F.3d at 617 (emphasis added). The court thus recognized that the ''final determination'' is really comprised of many individual determinations.

Finally, an issue-specific requirement of ''dissatisfaction'' has a sound policy basis. If providers were able to claim items for the first time during a Board appeal simply because they had expressed dissatisfaction with respect to other cost items, the Board would be required to assume responsibilities that are more appropriately borne by fiscal intermediaries rather than by a ''review'' board. Such a system also would provide an end-run around the deadline for filing an accurate cost report, as providers could file ''placeholder'' appeals with respect to items claimed on their cost reports with the knowledge that they could always make additional claims later.

In any event, even if the Board has jurisdiction under the statute to hear an appeal concerning an item that was omitted entirely from the cost report, whether the cost is one that may be allowable or the item involves a challenge to a binding regulation, manual instruction or CMS Ruling, this jurisdiction is not mandatory. In *Maine General Medical Center* v. *Shalala*, 205 F.3d 493 (1st Cir. 2000), the majority held that the statute did not deprive the Board of jurisdiction to hear a claim involving a cost omitted from a cost report, but it adopted the Secretary's position that even if the Board had jurisdiction ''it would be entirely permissible for the Board to conclude, as a matter of policy, not to hear [the] claim.'' (*Maine General*, 205 F.3d at 501.) The court continued: ''All we hold is that Congress did not, in the statute, require the Board to reach this result by stripping it of jurisdiction. This outcome preserves some flexibility for the agency, which may be exactly what Congress intended. It is not our job to exercise that flexibility for the agency.'' (*Id.*) See also *Loma Linda*, 492 F.3d at 1072–73 (holding that Board jurisdiction is discretionary).

Sections 1102(a) and 1871(a) of the Act authorize the Secretary to issue regulations for the efficient administration of the Medicare program. Irrespective of whether the Board has jurisdiction under the statute to hear an appeal concerning an item that was omitted entirely from the cost report (and we do not agree with the *Maine General* or *Loma Linda* cases on this point), the requirement that providers either claim an item on their cost reports or, where the item involves a challenge to a binding regulation, manual instruction or CMS Ruling, list the disputed item in accordance with the longstanding instructions contained in section 115 of the PRM, Part II, fits comfortably within our statutory authority to issue regulations to administer the Medicare program and is a reasonable exercise of that authority. Providers are already required, for program integrity reasons, to list ''protested items;'' that is, items for

which they believe they are entitled to receive payment, but for which they believe that their intermediaries would disallow, on the basis that reimbursement for such items is contrary to regulation or policy interpretation. Under section 115 of the PRM, Part II, providers that do not wish to risk running afoul of the cost report certification process, by including an item on their cost reports that is contrary to Medicare regulations or payment policy, are allowed to include these items on the ''protested amount'' line on their cost reports. We believe it is reasonable to require providers to notify their intermediaries, via their cost report submission, of all items for which they potentially may be claiming reimbursement. Such a requirement allows the Medicare program to estimate better its potential liabilities and to issue changes or clarifications to its policies, and allows intermediaries to estimate better their workload and audit priorities. Also, if we were to adopt a policy that providers have to list on their cost reports only those items that they believe are in accord with Medicare payment policy, the Board would be required to continue adjudicating disputes as to whether an omitted cost is or is not in accord with Medicare payment policy (because if the omitted cost were in accord with Medicare payment policy, the provider would not have the right to a hearing).

Comment: One commenter stated that it disagreed with the proposed policy that would require providers to identify self-disallowed issues as protested items. Providers have to trust the information with which they are provided when preparing cost reports and follow the directions that have been issued. The individuals who prepare cost reports may not have the background, time, or ability to evaluate or question whether the data provided by government sources or the instructions that have been issued should be challenged. This provision may put undue pressure on individuals who prepare cost reports, and could increase administrative costs as providers seek professional help to identify issues of which the providers may not be aware. According to the commenter, it can take a considerable amount of research and investigation into issues to discover that errors exist in the underlying government data used to prepare the cost report. Once this discovery is made, it seems appropriate that the error be corrected and adjustments made. Providers should not be held responsible for discovering errors made by government bodies.

Another commenter stated that it is impractical to expect providers to file under protest every potential item on their cost reports that may be disallowed under the applicable regulations or manual provisions. Providers are faced with overwhelming numbers of regulatory and policy manual issuances covering a complex array of constantly changing Medicare billing and documentation requirements. According to the commenter, there is no basis in law or equity for CMS's attempt to cut off providers' appeal rights because the providers may not recognize the invalidity of a particular intermediary's interpretation of CMS's regulations and policies at the time they file their cost reports.

Response: We do not believe that there should be any significant difficulty for providers in identifying items for which they believe they should receive payment in derogation of Medicare payment policy. Upon deciding that it does, in fact, wish to challenge Medicare payment policy with respect to one or more item(s) the provider has self-disallowed, the provider should include the item(s) in its request for a hearing, or add the issue later, in accordance with the procedures for adding issues under § 405.1835(c). The Medicare program expects provider personnel, whether on the provider's staff or outside professionals, to have the background, time, and ability to complete and understand the cost reporting requirements.

Comment: One commenter stated that the statute does not require that providers indicate in the cost report that they will be dissatisfied with a final determination, and that CMS is placing form over substance in this regard. This commenter said that, although increasing efficiency within the appeal system is a worthwhile goal, any efficiency gain does not justify providers' loss of their rights to appeal meritorious claims by virtue of inadvertence to procedural requirements that are not obvious.

Response: We do not agree that our requirement amounts to a procedural requirement that is not obvious to providers. The statute at 42 U.S.C. 1395oo(a) requires that a provider express dissatisfaction with a determination of the intermediary or the Secretary. Arguably, therefore, a provider could not be dissatisfied with a determination that does not explicitly or implicitly address an item, because the item is neither claimed nor even listed on the cost report. Moreover, many providers are already availing themselves of the protested line amount procedures contained in section 115 of the PRM, Part II. In any event, in addition to the legal notice that providers are receiving through this final rule, we anticipate that providers will informally be alerted to the provisions of this rule, including the self-disallowance policy, through hospital associations and other provider organizations, law firms, trade publications and others.

Comment: Several commenters stated that by requiring providers to follow the procedures in the PRM for filing a cost report under protest, more administrative work will be created for the hospitals and the intermediaries because the item or cost has to be manually claimed and the impact manually calculated. The commenters further stated that the intermediaries must manually review each protested cost or item and decide to remove or allow, and that the intermediaries' failure to do so would automatically reimburse providers for the cost or item.

Response: We believe that our self-disallowance policy will not create a significant amount of work for most providers and intermediaries, for several reasons. First, many providers are already using the protested line amount procedures contained in section 115 of the PRM, Part II. Also, the commenters are incorrect that the item or cost has to be manually ''claimed'' on the cost report.

We do not believe that providing an estimate of the self-disallowed item will prove burdensome to providers. Moreover, if the provider believes that listing the item on the cost report is worthwhile, the provider may have already engaged in an estimate of sorts, and in any event, if the provider does decide to appeal the item, it should estimate the reimbursement effect of the item at that time. Finally, intermediaries are not required to review each protested cost or item to decide to remove or allow that cost or item. Whereas, at one time, items appearing on the protested amount line were ''above the line'' (that is, they appeared before, and made up part of, the total claim for reimbursement), that is no longer the case. On the current cost report, the protested amount appears ''below the line'' and is not included in the provider's total claim for reimbursement.

2. Audits of Self-Disallowed Items

We proposed that, where a provider is successful in obtaining reimbursement for a self-disallowed item, the intermediary must audit the item to determine the proper reimbursement effect.

Comment: Three commenters believed that our proposal was unnecessary. One commenter stated that it does not have an objection in principle with the proposal that an intermediary must audit self-disallowed items after a decision awarding them to the provider, and said that its experience has been that in every instance in which providers have successfully challenged a CMS policy, payment has been audited or reviewed for accuracy under the agreement of the parties to the dispute. The second commenter believed that the proposal was unnecessary because CMS already has the right to, and routinely does, instruct its intermediaries to perform additional auditing steps before issuing an NPR as a result of a final agency determination. The third commenter stated that the Board would expect that self-disallowed items would be unaudited.

Response: The final decision awarding reimbursement for a self-disallowed item may come from the Board, the Administrator, or a court. Although we believe that, in most instances, the administrative or judicial body that issues a decision would not specify a dollar figure for reimbursement, the proposal was intended to ensure that intermediaries, in fact, have the opportunity to determine the correct amount of reimbursement after an award is made. We believe that it would be inappropriate for the administrative or judicial body to award a specific amount for reimbursement without the benefit of an audit by the intermediary. Of course, the intermediary could audit the self-disallowed item prior to an award, but this would mean that the intermediary would be spending resources to determine an amount for an item that, under Medicare policy, would not be awarded.

Comment: Three commenters said that the regulations should place a limit on the time an intermediary has to conduct the audit of the awarded self-disallowed item. One commenter stated that the regulations should set forth a reasonable time limit to audit and calculate payment, and that 60 days certainly should be sufficient. The second commenter stated that, whereas the need for an accurate determination of the amount of reimbursement is important, the proposal threatens to prolong indefinitely the closure of the appeal, because no limit is placed on the time the intermediary would have to complete the audit. The third commenter stated that any audit subsequent to a decision to pay a self-disallowed item should occur within a limited period of time.

Response: We agree that in all cases intermediaries should complete the audit of an awarded self-disallowed item in a reasonable amount of time. We decline to impose a specific time limit on intermediaries for auditing self-disallowed items, however, because what is reasonable in a given case will depend in part on the scope and complexity of the audit and the provider's cooperation, as well as the intermediary's other program priorities.

Comment: Two commenters disagreed with the proposal to permit intermediaries to audit self-disallowed costs that are ultimately awarded during the appeals process. In the first commenter's view, the proposal offends the judicial principle of finality and gives the Medicare program ''two bites at the apple.'' According to the commenter, the intermediary has enough time between the time that a provider appeals a self-disallowed cost and a Board hearing for an intermediary to audit or otherwise evaluate or question the amount of the claim. The other commenter stated that the proposal to require intermediaries to audit eventual awards of self-disallowed costs could result in an entirely new disallowance and appeal based on new grounds. A provider could be forced to litigate the same items multiple times, which would be inconsistent with the due process rights of the provider. Any audit subsequent to a decision to pay a self-disallowed item should be restricted to a determination of the payment amount, and should not open new grounds for disallowance.

Response: We disagree that the proposal is counter to the principle of finality, or that it would give the Medicare program ''two bites at the apple.'' The purpose of the proposal was not to allow the intermediary to relitigate the question of whether the provider is entitled to reimbursement for the self-disallowed item, but rather to ensure that the intermediary has the opportunity to determine the reimbursement effect of the final decision awarding that self-disallowed item. We believe the language in § 405.1803(d)(3), that CMS may require the intermediary to ''audit'' a self-disallowed item, sufficiently conveys that, under this provision, the intermediary is restricted to determining the amount of program reimbursement, and not whether the item should be allowed. Although the intermediary could audit the self-disallowed item prior to an award, the intermediary would be spending resources to determine the correct amount for an item that may not, and, at least from the perspective of the program, should not be awarded.

Comment: One commenter stated that one way to minimize the problem of unaudited self-disallowed costs would be to allow the provider and the intermediary to enter into a stipulation regarding whether the self-disallowed costs have been audited. Another commenter stated that a more practical procedure would be for the parties to stipulate the amount in controversy, with an audit by the intermediary, if necessary, at the outset of the appeal, rather than after a possibly lengthy process.

Response: We believe that a stipulation that the amount at issue for a self-disallowed cost that has not been audited may be helpful, but would not be an adequate substitution for our proposal, which would prohibit the award of a specific amount of reimbursement in the absence of an audit. Where the intermediary knows the amount of potential reimbursement during the pendency of an appeal, either because it has audited the issue or otherwise has the necessary information, the intermediary can stipulate to the amount at issue. Intermediaries are in the best position to know their workload priorities and to decide on allocation of their resources. We are not preventing intermediaries from determining the amount at issue prior to a decision awarding the reimbursement at issue; rather, the purpose of the proposal was to prevent intermediaries from being forced to audit the amount of reimbursement prior to a decision favorable to the provider.

Comment: One commenter stated that the regulations should make clear that any dispute with regard to an audit or calculations would remain in the jurisdiction of the entity that rendered the last merits decision.

Response: We decline to require that the entity that awarded the reimbursement for the self-disallowed item maintain continuing jurisdiction in case there is a dispute concerning the audit. We would have no authority to require a court, once having remanded the case for an audit by the intermediary, to retain continuing jurisdiction over the case. The Board or the Administrator may not see the need to maintain continuing jurisdiction over the case, once having ruled for the provider on the self-disallowed item. To the extent that the provider disagrees with the calculation of the audited item, the provider may bring a new appeal to the intermediary or to the Board, if the

provider meets the amount in controversy requirements.

3. Determining Timeliness of Hearing Requests (§ 405.1811 and § 405.1835)

We proposed to revise our regulations to provide that the 180-day period for requesting a Board or intermediary hearing begins on the date of receipt by the provider of the intermediary determination or, where applicable, the expiration date of the 12-month period for issuance of a timely NPR by the intermediary. We received one comment on this issue, which pertained more closely to our proposed definition for ''date of receipt'' and to our proposal for a presumption that documents from a reviewing entity are received within 5 days of their mailing, unless a preponderance of the evidence establishes that they were received later than the 5-day period. Accordingly, we have addressed this commenter's concerns in section II.B. of this final rule.

4. Contents of Hearing Request

In order to facilitate an early focus by the parties and the reviewing entity on the jurisdictional requirements for a hearing before the Board or intermediary, we proposed that the original hearing request include a demonstration (through argument and supporting documentation) that the provider satisfies the jurisdictional requirements for the hearing request. We also proposed that, in order to facilitate the reviewing entity's ability to determine compliance with our proposed self-disallowance rules, the hearing request must contain a description of the nature and amount of each self-disallowed item and the reimbursement sought for each item. Finally, we proposed clarifying the current requirement that a hearing request include supporting documentary evidence. We stated that we were aware of various cases in which the need to determine Board jurisdiction over a specific matter at issue had been hampered by the absence of the NPR(s) relevant to the appeal, or by confusion about whether the NPR at issue was the initial NPR or a revised NPR issued after reopening (see § 405.1885 and § 405.1889). Because the Board would not be able to make appropriate findings of fact and conclusions of law about its jurisdiction without this information, proposed § 405.1811(b)(3) and § 405.1835(b)(3) would require the hearing request to include each intermediary determination at issue in the appeal.

Comment: One commenter stated that the proposed rule would place an unreasonable burden on providers to look into the future and defend against unknown jurisdictional challenges that may arise. This commenter proposed that, if jurisdictional documentation must be submitted with the original hearing request, the intermediary should be required to read it and determine within a reasonable period of 60 to 90 days if any jurisdictional issues exist. Arbitrary jurisdictional challenges by intermediaries have increased dramatically in recent years, created additional demands on Board resources, and have caused substantial delays in cases moving through the administrative process. Once the Board has taken jurisdiction over an issue, that decision should have some finality. According to the commenter, if CMS's intent is to reduce the backlog, an administrative process that is fair to both the provider and the intermediary should be established.

Response: We disagree that requiring a brief demonstration in writing that the request for hearing meets the jurisdictional requirements constitutes an unreasonable burden on providers. The party seeking relief before an administrative or judicial tribunal has the burden of demonstrating that the tribunal has jurisdiction over its claim or appeal. In most cases, the jurisdictional question will be straightforward and the provider will either be able to demonstrate easily that the intermediary hearing officer(s) or the Board has jurisdiction, or, at the least the provider will be able to anticipate arguments concerning jurisdictional deficiencies. With respect to the commenter's assertion that some intermediaries make arbitrary jurisdictional challenges, we believe that claims presented by providers, as well as defenses raised by intermediaries, should be made in good faith. If an intermediary has raised a defense, jurisdictional or otherwise, that does not have a reasonable basis in law or fact, or has not raised a reasonable jurisdictional defense in a timely manner, the intermediary's conduct should be reported to the Board, and if the Board believes it to be appropriate, the Board can refer the matter to CMS for possible action. This is not to say that, where an intermediary has raised a jurisdictional defense that is similar to one that it or another intermediary has raised unsuccessfully before, the intermediary would be precluded from raising the jurisdictional defense if it was otherwise reasonable. (However, in that situation, the intermediary should note its jurisdictional objections to the Board in a way so as not to delay the resolution of the appeal and, if necessary and appropriate, renew its jurisdictional objections in a request for Administrator review of the Board's final determination on the merits.) Similarly, we do not believe that an intermediary should purposely delay making jurisdictional defenses, but, again, the burden is on the provider to demonstrate jurisdiction, and we decline to either impose a specific time period for an intermediary to raise jurisdictional defenses or to provide that, having once determined that jurisdiction exists, the Board is precluded from revisiting the issue. Additional facts that are developed during the course of proceeding before the Board may cause the intermediary to challenge, and the Board to deny, jurisdiction. In civil litigation, jurisdictional defects can generally be raised at any time, even on appeal. Although a court may be obliged to dismiss a case for lack of jurisdiction even where the jurisdictional objection is made at a late stage in the proceedings, it reserves the authority to sanction a party if the party has unreasonably delayed in making the objection. If the Board believes that an intermediary has unreasonably delayed in making a jurisdictional objection, it may refer the matter to CMS for possible action.

Comment: One commenter stated that an issue included in a hearing request may at times be reopened by the intermediary with a partial revision being made. Such a revised determination by the intermediary should not preclude the provider from continuing to appeal the balance of the issue on the basis that it fails to meet the amount in controversy requirement. The Board should preclude any jurisdictional challenge in this situation. There is no need for jurisdictional review in these circumstances.

Response: If a provider satisfies the amount in controversy requirement at the time it files its appeal, a subsequent revision or partial revision to an issue or issues that causes the remaining controversy to go below $10,000 (or $50,000 in the case of a group appeal) will not deprive the Board of jurisdiction to hear the appeal. We have added new paragraph (c)(4) to § 405.1839 to clarify this point.

Comment: One commenter stated that the proposed requirements for documenting a provider's position in the original hearing request creates an unreasonable burden due to the time and effort to prepare the documentation. As a result, this requirement would effectively reduce the 180-day filing period, in violation of the statute.

Response: We do not believe that the proposed requirements for documenting a hearing request are onerous. As we stated in the proposed rule (69 FR 35723) requiring providers to include certain information in their hearing requests facilitates an early focus by the parties and the Board that the jurisdictional requirements for a hearing are met.

Comment: One commenter said that the cost of developing documentation could be unnecessary for those issues that are likely to be resolved through the administrative resolution process. Because the resolution process typically results in a provider accepting less than full reimbursement for a disputed issue, if providers are forced to incur the costs of developing documentation, the costs of going forward with a hearing may be justified. As a result, more cases may go to hearing and fewer cases may be settled and withdrawn.

Response: We do not believe that the proposed requirements for documenting a hearing request are onerous. Moreover, we do not believe that a provider would be able to reach an administrative resolution with an intermediary on an issue without developing at least as much documentation as would be needed for a hearing request on that issue.

Comment: One commenter recommended that the final rule add a provision requiring that providers include intermediary documentation on the disallowances appealed, and that the intermediaries in turn be required to provide supporting documentation to providers. Without intermediary supporting documentation, providers cannot, in the hearing request, articulate their position and submit documentation in support of their position. Currently, many intermediaries justify disallowances by citing only general regulatory provisions and do not state why the provider did not meet the cited provisions or what auditing standards were applied. Medicare and Government Accountability Office rules require that the intermediary document reasons for disallowances and undergo supervisory review. The commenter stated that if intermediary disallowances were properly documented, challenges could be narrowed and the case backlog could be reduced.

Response: In § 405.1835(b)(3), we are requiring providers to submit to the Board a copy of the intermediary or CMS determination under appeal. Further, providers must submit any other documentary evidence that they consider necessary to meet the requirements for obtaining a Board hearing. We agree that intermediaries should provide at least a brief explanation for the adjustment, so as to put the provider on notice as to the reason for the adjustment. However, in light of the huge number of adjustments that intermediaries make, and in view of the fact that many of these adjustments are not (and would not be, regardless of the degree of explanation) appealed, we are not requiring intermediaries to provide extensive and detailed explanations of their adjustments prior to the filing of a hearing request.

We also note that the existing requirements in § 405.1803 dictate that the intermediary include appropriate references to law, regulations, CMS Rulings and program instructions to explain why its determination of the amount of program reimbursement due to the provider differs from the amount claimed by the provider. In addition, we note that the current audit instructions for intermediaries contain similar requirements. (See CMS Pub. 100–06, Chapter 8, General Audit Guidelines, 170, Exhibit VI.) (Further, we believe that the intermediary review and adjustment process is outside the scope of this rulemaking.) Where a provider disagrees with, or has questions concerning, an intermediary's adjustment, the provider may contact the intermediary for further clarification. We note that the 180-day period for requesting a hearing should allow the parties sufficient time to exchange information concerning the basis for the claim and the adjustment and the parties' respective positions concerning the adjustment. If the provider does not receive a satisfactory response from the intermediary concerning the adjustment, the provider may appeal the adjustment. The provider should note in its request for a hearing the basis for the provider's disagreement, or, where the provider believes that it does not have enough information to articulate as full an explanation for its disagreement as it would prefer, the provider may state that, though it believes that it is entitled to a reversal of the adjustment, the provider nevertheless lacks enough information to determine at that point the full basis for its disagreement with the intermediary. In all cases, through pre-hearing conference and other communications, or through formal discovery if need be, the provider and the intermediary should be able to arrive at an understanding of the basis for the provider's claim and the intermediary's adjustment. Ultimately, if the provider does not present a full basis for its claim, it will be difficult to prevail on its appeal, and if the intermediary does not fully support its disallowance, it will be difficult for the intermediary to defend its adjustment.

Comment: One commenter stated that it did not believe that requiring providers to submit more documentation earlier in the process would have much of an impact on relieving caseload. This commenter believes that a more effective proposal might be to charge the intermediary interest, from the time the provider submits its final position paper until the time the case is resolved, on the amount that is eventually paid to the provider.

Response: We do not have the authority to charge interest against the intermediary, as the commenter suggests. The payment of interest is a waiver of sovereign immunity, which can be effected only through legislation enacted by the Congress.

Comment: One commenter stated that the proposal to require providers to demonstrate in the hearing request that they meet the requirements for a Board hearing and to include a description of the nature and amount of each self-disallowed item and the reimbursement sought for each cost was outside CMS's statutory authority. According to the commenter, the Congress established the Board as an independent tribunal within the Department of Health and Human Services, not subject to CMS's direct oversight or control, permitting CMS only to review a final decision of the Board after it is issued. Under the Medicare statute, only the Board, and not CMS, has full power to make rules and establish procedures, not inconsistent with the provisions of the statute or the regulations of the Secretary, which are necessary or appropriate. This commenter also objected to the proposed requirement, that, where the provider is appealing from a revised NPR, the provider must include the pertinent reopening notice and the initial NPR so that an appropriate determination can be made as to whether a specific matter at issue is within the scope of the revised NPR. CMS's position that providers can appeal only issues that were actually adjusted in revised NPRs is contrary to the doctrine in *Edgewater Hospital* v. *Bowen*, 857 F.2d 1123 (7th Cir. 1989). The commenter stated that the proposed new requirements for hearing requests would create significant new hurdles for providers and make it much more difficult for providers to meet appeal deadlines.

Response: We disagree that we do not have authority under the Medicare statute to govern procedures for hearings before the Board. As the

commenter notes, section 1878(e) of the Act provides that the Board's operating rules are subject to regulations issued by the Secretary, such as this final rule. With respect to the commenter's point that our proposal that providers may appeal issues only that were actually adjusted in revised NPRs is contrary to the court's decision in *Edgewater Hospital* v. *Bowen*, we continue to believe that our proposal is well-founded. We respond at length in section II.V. of this final rule (Reopening Procedures) to the assertion that, based on *Edgewater*, we should allow an appeal of a revised NPR to include an appeal of matters that were addressed in a notice of reopening but not actually revised.

Comment: One commenter stated that clarification was necessary because providers were adding issues to an appeal of a revised NPR that were not within the scope of a revised NPR.

Response: We agree that one benefit of requiring providers to document their position in their request for a hearing is alerting the Board as to whether the appeal concerns an issue that was or was not within the scope of a revised NPR.

Comment: Two commenters found confusing the statement in the proposed rule (69 FR at 35723–24) that a hearing request would no longer be required to include documents necessary to support the provider's position on a specific reimbursement matter, because the reviewing entity is required to make a preliminary finding of its jurisdiction before it considers the merits of a particular issue. One of the commenters stated that, in order to determine the merits and preliminary findings of its jurisdiction, the intermediary (for purposes of an intermediary hearing officer proceeding) needs the necessary documents to support the merits of the provider's position. The commenter recommended that all supporting documentation, and not just documentation in support of jurisdiction, be required to be supplied with the hearing request. According to the commenter, documentary evidence should be required in order to facilitate a review and possible resolution of the issues. A reopening request must be accompanied by all supporting documentation, and the same rule should apply with respect to hearing requests.

Response: We note that, because the intermediary hearing officer (or the Board in a Board appeal) must make a preliminary determination of its jurisdiction (that is, whether the request for hearing was timely and whether the amount in controversy requirement was met) prior to addressing the merits, the provider would not need initially to file documents that pertain only to the merits of the appeal. If, however, the provider believes that there is documentation that is necessary to support a preliminary determination of jurisdiction and that documentation is intertwined with the merits of the appeal, the provider must, under § 405.1835(b)(3), submit that documentation with its hearing request. Likewise, if the intermediary hearing officer or the Board believes that additional documentation is necessary to examine jurisdiction, the reviewing entity may request additional documentation from the provider. We have amended § 405.1840(a)(2) to clarify that, by ''preliminary determination of jurisdiction,'' we mean a determination of whether the request for hearing was timely (either received within 180 days after the date of receipt by the provider of the intermediary or Secretary determination, or the period for receipt was extended under § 405.1836), and whether the amount in controversy requirement was met.

Comment: One commenter questioned whether the Board would have the ability to dismiss an appeal if required information is not submitted with the hearing request. Similarly, another commenter stated that the rule should specify whether an imperfect but timely request would be dismissed or whether there would be an opportunity for the provider to correct the defect.

Response: Proposed § 405.1811(b) and § 405.1835(b) stated that a request for an intermediary or Board hearing ''must'' be submitted in writing and ''must'' include certain prescribed items. Although one could fairly conclude that a hearing request that would meet the requirements of proposed § 405.1811(b) or § 405.1835(b) would be a prerequisite to obtaining a hearing, the proposed rule did not state whether a provider that submits a non-conforming request would have the opportunity to cure the request, and if so, whether the provider could have more than one opportunity to cure the request before its appeal would be dismissed. We have clarified § 405.1811(b) and § 405.1835(b) to state that the intermediary or Board may dismiss with prejudice an appeal that does not comply with the requirements of § 405.1811(b) or § 405.1835(b), or take other action as it deems appropriate. We believe that this approach is consistent with the approach we have taken in section § 405.1868 (''Board Actions in Response to Failure to Follow Board Rules'') in which we similarly leave to the Board's discretion whether to dismiss an appeal or take some other, lesser action.

Comment: Two commenters stated that they were concerned that the ''detailed'' information required for the content of the initial hearing request would unduly burden small, rural, and less sophisticated providers that would not have the ability to file appeals without the assistance of outside expertise. In addition, the proposed contents requirements would remove the Board's flexibility to accept appeals.

Response: We do not believe that the proposed requirement is unduly burdensome, even for ''small, rural and less sophisticated providers.'' As adopted, our proposal requires only that the provider demonstrate that it has met the various requirements for obtaining a hearing. As we stated in the proposed rule (69 FR 35723), the hearing request would no longer need to include documents necessary to support the merits of the provider's appeal.

Comment: One commenter stated that it was concerned with proposed requirements that the provider document and provide argument that its appeal is strictly and demonstrably within the jurisdiction of the appeals panel. Likewise, according to the commenter, the proposed requirements for documentation regarding self-disallowance issues seem to unfairly shift the burden entirely onto the provider, without offering detailed and specific criteria for what is and is not acceptable documentation and standards of argument.

Response: The purpose of proposed § 405.1835(b) was to provide the Board with the information necessary to make a preliminary determination (timeliness and amount in controversy) as to whether it had jurisdiction over the provider's appeal, as well as providing the intermediary with the information necessary to determine whether it would file a jurisdictional challenge with the Board. A provider would not be required to argue its case in detail at this point in the process. Rather, as the moving party, the provider would be required only to demonstrate that it is dissatisfied with an intermediary or Secretary determination and that it has filed its request for a hearing timely and that the amount in controversy is at least $10,000.

5. Adding Issues to Original Hearing Request (§ 405.1811(c) and (§ 405.1835(c))

In the proposed rule, we believed it was necessary to amend the regulations addressing the provider's ability to add issues to its original hearing request. Currently, a provider is effectively

allowed to wait for new issues to appear and add issues anytime before the hearing begins. It is our view that, because providers may add issues to a request at any time prior to a hearing, the ability of the Board to conduct hearings and decide cases expeditiously has been seriously compromised. At the time of the publication of the June 25, 2004 proposed rule, there were approximately 10,000 cases at the Board that had yet to be resolved. We believed the availability of such an extended period for adding issues had become a major obstacle to the Board's efforts to reduce its backlog.

The ability of providers to add issues at any time to a hearing request not only has led to larger and more complex cases, but has also meant that the Board's ability to schedule and hold hearings efficiently has been significantly impaired through the practice of some providers of adding issues shortly before the scheduled hearing date. Some providers apparently wish to keep a hearing request open as long as possible in the hope or anticipation of a favorable court case on some reimbursement issue that they can then add to their hearing requests. Therefore, we proposed that, rather than having an open-ended period for adding issues, it would be appropriate and prudent to allow providers a 60-day period for adding issues, commencing with the expiration of the applicable 180-day period for filing the original hearing request. In essence, this additional 60-day period would afford providers an adequate opportunity to appeal all the issues that may have been overlooked in the original hearing request. We examined section 1878(d) of the Act, which gives the Board the power not only to affirm, modify, or reverse the intermediary's determination, but also to make any other revisions on matters covered by the cost report, regardless of whether these matters were considered by the intermediary in its determination. We interpreted this statutory provision to address only the Board's powers over a jurisdictionally proper appeal under section 1878(a) of the Act; therefore, section 1878(d) does not prevent us from limiting the period a provider has to add issues. We believe our proposal to allow a 60-day period for adding issues is an appropriate exercise of the Secretary's general rulemaking authority under sections 1102 and 1871 of the Act.

Comment: Three commenters supported our proposal. One commenter noted that requiring all issues to be identified within our proposed timeframe would add huge efficiencies to the process. All three commenters stated that providers are afforded ample time to decide which items they wish to appeal during the 180-day appeal period.

Several commenters opposed our proposed change. Some commenters suggested that the proposed rule restricts provider appeal rights, denies access to appeal, and is contrary to the statute. One commenter suggested that the 60-day period is far too brief to allow providers to add issues to appeals, and that CMS has provided no additional information as to how it determines 60 days to be an appropriate period. A few commenters suggested that the Supreme Court's decision in *Bethesda Hospital Association* v. *Bowen*, 485 U.S. 399 (1988), is informative on this issue. Commenters opined that *Bethesda* made clear that, once jurisdiction for a cost reporting year was established, the only requirement was ''that the matter must have been covered by such cost report.''

Response: After careful consideration of the comments received in this final rule, we are adopting our proposal to include a 60-day period for a provider to add issues beyond the 180-day period permitted for filing a hearing request. For the efficient administration of the appeals process, we believe our policy of having the appeal resolved as early as possible, while at the same time giving the parties to the hearing ample opportunity to present their cases, is appropriate. Following a given cost reporting year, providers have five months to file a cost report. (See § 413.24(f)(2).) After a cost report is filed, the intermediary typically takes about a year to issue a final determination on an unaudited cost report. We believe it is quite reasonable to expect that from the time it takes to file a cost report to a 240-day period after a final determination has been issued, covering a span of approximately two years or more, a provider should have sufficient opportunity to identify the issues it wishes to appeal for that cost year. The Board will then be able to set a hearing date with full knowledge that the hearing will not be further delayed by the inclusion of last minute issues.

We disagree with those commenters that asserted that there is a statutory right to add issues at any time prior to a hearing. The Medicare statute does not address a timeframe for adding issues to an appeal. The only statutory provision related to the timing of an appeal is found at section 1878(a)(3) of the Act. There, a provider is entitled to request a hearing before the Board if it files a request within 180 days after notice of the final determination. We believe it is reasonable to read this statutory provision in conjunction with section 1878(d) of the Act to mean that a provider must include in its notice of appeal all the issues it wants to appeal, especially given that section 1878(a)(3) of the Act allows a generous 180-day period to request a hearing. Although we continue to believe that providers should not be allowed to delay interminably the hearings process by adding issues at the last minute before a scheduled hearing date, we believe our approach of providing an additional 60 days beyond the timeframe for requesting a hearing to add issues that may have been overlooked strikes an equitable balance that will serve the interests of the parties to the hearing and the Board.

Section 1878(d) of the Act, the provision upon which some commenters relied as granting a right to providers to add issues at any time, in fact affords no such right. Section 1878(d) of the Act states in relevant part that: ''The Board shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary * * * and to make any other revisions on matters covered by such cost report * * * even though such matters were not considered by the intermediary in making such final determination.'' We interpret section 1878(d) of the Act as permitting the Board to make revisions to cost report items that directly flow from the determination with which the provider has expressed dissatisfaction and from which the provider has filed a jurisdictionally proper appeal under section 1878(a) of the Act. See *Little Co. of Mary Hosp. and Health Care Ctrs.* v. *Shalala*, 828 F.Supp. 570, 576 (N.D. Ill. 1993), aff'd 24 F.3d 984 (7th Cir. 1994). However, section 1878(d) of the Act does not pertain to the timing for the inclusion of issues, contrary to the commenters' view.

For similar reasons, we disagree with the commenter that suggested that the Supreme Court's decision in *Bethesda* controls in this situation. As discussed more fully in section II.C. of this final rule, the *Bethesda* decision involved a challenge to the Board's decision that it did not have jurisdiction to consider a cost that was not claimed on the provider's cost report, and did not in any way deal with the question of the timeliness of adding issues to a hearing request. We believe that *Maine General Medical Center* v. *Shalala*, 205 F.3d 493 (1st Cir. 2000), also discussed in section II.C. of this final rule, is more relevant. In *Maine General*, the court held that the statute did not deprive the Board of jurisdiction to hear a claim involving a

cost omitted from a cost report (a conclusion with which we strongly disagree), but it agreed that ''it would be entirely permissible for the Board to conclude, as a matter of policy, not to hear [such a] claim.'' (*Maine General*, at 501.) The court continued: ''All we hold is that Congress did not, in the statute, require the Board to reach this result by stripping it of jurisdiction. This outcome preserves some flexibility for the agency, which may be exactly what Congress intended. It is not our job to exercise that flexibility for the agency.'' (*Id.*) Similarly, whereas we agree that the statute does not have to be interpreted as preventing the Board from hearing an appeal of an issue that was added subsequent to the submission of the request for hearing, we believe that we retain the authority to prescribe explicitly by regulation the Board's authority to hear issues that were not contained in the request for hearing.

Comment: Several commenters suggested that a deadline for adding issues should be directly related to the imminence of the Board hearing. For example, the deadline should be set with the filing of position papers or tied to a reasonable period prior to the scheduled hearing date, such as 60 or 90 days.

Response: We considered, but ultimately declined to adopt, the approach of requiring that issues be added no later than a set period (for example, 60 or 90 days) prior to the scheduled hearing date. We rejected this approach as potentially unworkable because adding an issue (or multiple issues) even months prior to a scheduled hearing could delay the hearing and interfere with the Board's ability to schedule hearings in a predictable manner.

Comment: One commenter stated that the time in which an issue may be added is solely within the Board's purview. Another commenter suggested that the ability to add issues could be waived by agreement of both the provider and the intermediary.

Response: We disagree with the commenter that suggested that the time for which an issue may be added is (or should be) solely within the Board's purview. Section 1878(e) of the Act gives the Board full power and authority to prescribe rules, to the extent not inconsistent with the regulations of the Secretary. Here, we believe that it is appropriate to regulate the time period for adding issues, rather than allowing the Board to prescribe by rule or determine on a case-by-case basis the time in which to add an issue. The Secretary, not only the Board, has an interest in ensuring that the appeals process is conducted in an efficient manner. The Secretary also has an interest in gauging at any particular time the Medicare program's potential liabilities due to administrative and judicial appeals, which is made much more difficult if issues may be added at any time, or at some point in time later than the period we proposed. We also believe that, if the Board had the authority to prescribe or to extend, on a case-by-case basis, the time for adding an issue, it could be besieged by requests and objections thereto by the parties. Because we disagree that the Board should have the discretion to prescribe or extend the time for adding an issue, it follows that we also disagree with the commenter that suggested that the timeframe for adding issues could be waived if both the provider and the intermediary agreed to do so. Any process in which the parties could waive the time period for adding issues, without the consent of the Board, is inherently undesirable, as it would have the potential to interfere with the Board's ability to effectively manage its caseload.

Comment: Two commenters suggested that CMS has not furnished any evidence of a cause and effect relationship between the large backlog of cases before the Board and the addition of issues to pending appeals. Another commenter suggested that a comprehensive analysis of the reasons for the large case backlog should be undertaken. Other commenters suggested that our proposal was unnecessary because steps already taken by CMS have significantly reduced the backlog at the Board.

Response: We do not believe that we are required to quantify a cause and effect relationship between the backlog of cases and the addition of issues to a pending appeal, nor is it incumbent upon us to undergo a comprehensive analysis of the reasons for the large backlog at the Board. We believe the Secretary, under sections 1102(a) and 1871(a) of the Act, has the statutory authority to issue regulations for the efficient administration of the Medicare program. The Board's experience with the adding of issues and the resulting increase in the complexity of cases and the delays in cases because of the need to reschedule hearings has convinced us that the proposal is necessary. We also disagree that the proposal is unnecessary because of other measures that have been taken. At the present time there are approximately 6,800 cases pending before the Board. Irrespective of other measures that may have reduced the backlog, the present number of pending cases is still unacceptable, and can be reduced, or at least better controlled, with this deadline to add issues.

Comment: One commenter suggested that providers should have the right to add to pending appeals an issue arising from a change or clarification in the law. Because intermediaries are prohibited from conducting a reopening based on a change in the law, adding an issue to the appeal is the only available means by which a provider may vindicate its legal rights. Another commenter suggested that a provider should be given a full year after it receives the NPR to evaluate potential issues, and noted that a 1-year timeframe is considerably less than the 3-year timeframe in which an NPR can be reopened. Another commenter suggested that, just as CMS seeks to limit a provider from adding issues beyond 60 days from the expiration of the 180-day appeal period, CMS should also limit an intermediary's right to reopen and revise an NPR beyond 60 days from the issuance of the NPR.

Response: We disagree that because intermediaries are prohibited from conducting a reopening based on a change in law, adding an issue to the appeal is the only means by which a provider may vindicate its legal rights. A provider may vindicate its legal rights by bringing a timely appeal from an NPR and identifying in its request for hearing all issues it wishes to appeal, or by adding any issue within 60 days after the 180-day period for requesting a hearing. As noted above, a provider thus has approximately 2 years after filing its cost report to identify all issues it wishes to bring to the Board.

We disagree with the commenter that suggested that the timeframe for adding issues should be at least a year after it receives the NPR. We also disagree with the commenter that suggested that, if the time to add issues is limited, an intermediary's ability to reopen a previous determination should be similarly limited. As explained above, we believe 240 days after receipt of an NPR is a reasonable time to identify all issues the provider wants to appeal. We also note that the time period for requesting a reopening does not need to correlate to the time period for appealing an issue because the reopening and appeals procedures are separate and distinct. Unlike the effect of allowing an inordinate amount of time to add an issue, the time period for requesting a reopening does not directly impact upon the Board's ability to effectively manage its caseload. Also, the appeals process is mandated by statute, and is designed to give

providers the right to contest matters before the Board (assuming that the timely filing, amount in controversy and other requirements are satisfied). In contrast, the reopening process is a creature of the regulations, allowing an intermediary, through the exercise of its discretion (or upon direction from CMS), to reopen and potentially revise matters covered by a cost report for which, in most cases, the time for appealing the matters at issue has expired. Thus, although there is a lengthy period to request a reopening, there is no right to a reopening.

Comment: A few commenters also requested a technical clarification concerning the end of the proposed timeframe for adding issues; that is, whether the end of the period is 60 days from the date the provider files an appeal, or 60 days from the end of the 180-day period during which the provider may file an appeal.

Response: We proposed that providers could add issues to their hearing requests no later than 60 days beyond the expiration of the 180-day filing period for requesting a Board hearing (or intermediary hearing, as applicable). After careful consideration of all comments received, we continue to believe this policy is fair and strikes an equitable balance for the parties to the hearing and the Board.

Comment: Several commenters suggested that by limiting the timeframe for adding issues, providers would be forced to appeal everything and then weed out issues later, as appropriate, causing even further delays in settling hearings.

Response: We expect that providers will not file frivolous claims. Also, as we stated above, we believe that our proposal provides ample time for providers to identify all issues they wish to appeal. Moreover, the final rule also requires a provider to submit to the Board with its hearing request an explanation for each specific item at issue with the reasons that the provider believes Medicare payment is incorrect, and how and why Medicare payment must be determined differently. This latter requirement should effectively deter any provider from disputing every item on the cost report simply to protect itself on appeal.

Comment: One commenter noted that a provider might not have the necessary information from the intermediary to meet the proposed deadline for adding issues. For example, it can take several months for providers to obtain the intermediary's audit work papers needed to determine the merits of a new issue. Two commenters suggested that CMS could provide the Board with the authority to extend the deadline for adding issues when it deems an extension to be appropriate.

Response: We would expect that an intermediary will promptly provide its work papers to a provider upon request. If, however, the intermediary has not timely provided documentation to support an adjustment, and the provider is dissatisfied with the determination, the provider must add the issue to its hearing request prior to the 60-day deadline in order to preserve its appeal rights. If, upon receipt of the work papers, the provider is satisfied that the adjustment is correct, the provider should withdraw that issue from the appeal. For the reasons stated above, we are not providing the Board with the authority to extend the deadline for adding issues.

Comment: One commenter suggested that the current policy of adding issues until the hearing is held should continue because providers would have no other reliable recourse to correct errors found in the cost report. This commenter stated that intermediaries were abusing their discretion by refusing to reopen and revise cost reports for clear and obvious errors within 3 years of the issuance of the NPR.

Response: We disagree with the suggestion that providers should be able to add issues until the commencement of the hearing because intermediaries have allegedly abused their discretion in refusing to reopen and revise cost reports. Providers are responsible for identifying all issues that they wish to appeal. Under our proposal, which we are finalizing, providers have ample time to identify all issues they wish to bring before the Board. As stated in an earlier response, the appeals process is different from the reopening process. If intermediaries are allegedly improperly refusing to reopen cost reports, the remedy does not lie with an adjustment to the appeals process. CMS would have to investigate the allegations, determine if the allegations are in fact supportable, and if so, take appropriate action against the intermediary.

E. Provider Requests for Good Cause Extension of Time Period for Requesting Hearing (§ 405.1813 and § 405.1836)

Under current rules, a provider may request an intermediary hearing officer or the Board to extend ''for good cause shown'' the 180-day period for requesting a hearing. The request must be filed within 3 years of the date of the original NPR. In the proposed rule, we cited a split among the Federal circuit courts of appeals on the basic authority of the Board to extend the 180-day period. In response to the case law and the case backlog at the Board, we proposed retaining this policy, with certain modifications. We believed that, in many instances, the current 3-year period for requesting an extension was unreasonably lengthy and could result in an increase in the Board's backlog of cases. As a result, we proposed allowing providers a shorter period in which to file for a hearing beyond the normal 180 days, and only in limited specialized circumstances. Thus, the appeals period could be extended ''for good cause'' only in cases where a provider could establish that it could not reasonably have been expected to submit a hearing request within the 180-day period due to extraordinary circumstances beyond its control. Also, the request could be made only if it was submitted within a reasonable time after the expiration of the 180-day period, and in no event would a request be honored if it was made more than 3 years after the date of the NPR or other determination that the provider wished to appeal. This 3-year outside limit for requesting extension represents the same timeframe that existed in the previous regulations at § 405.1841(b).

We also proposed that the Board or other reviewing entity would be prohibited from granting a ''good cause'' extension request if the provider attempted to rely on a change in the law, regulations, CMS Rulings, CMS instructions, or other Federal legal provisions as the basis for the extension request. In addition, we proposed that a decision by the Board or other reviewing entity to grant or deny an extension would be reviewable by CMS but would not be subject to judicial review.

We are adopting our proposals. We have made a technical change to proposed § 405.1813(e)(1) concerning the component within CMS to which intermediary hearing officer decisions should be sent. As the CMS Office of Hearings neither currently receives nor reviews such decisions, we changed this provision to indicate only that an intermediary hearing officer decision should be sent to CMS (currently, the decisions are received by the Center for Medicare Management, a component within CMS).

As § 405.1813 and § 405.1836 are virtually identical in their treatment of good cause extension requests for intermediary and Board hearings respectively, we have made minor, non-substantive wording changes to make these sections consistent, wherever possible.

Comment: Several commenters were concerned about the proposed lack of

judicial review of a decision by the Board to grant or deny an extension request. One of these commenters asserted that, because the Board would be prohibited from granting an extension request due to a change in the law or regulations, our proposal constituted a ''pre-emptive strike'' at precluding judicial review of an issue that challenged a provision of the law or the regulations. Another commenter suggested that a decision by the Board denying a requested extension constituted a final determination and should therefore be subject to judicial review in the same manner that a Board's decision finding that a provider lacked jurisdiction constituted an appealable final determination.

Response: After a careful review of all of the comments received regarding provider requests for extension, we have decided to finalize our policy as proposed. Our longstanding policy has permitted extensions of the timeframe for requesting hearings only in limited circumstances, and that concept has been carried forward in the final rule. Thus, we have retained a procedure whereby a provider will have the opportunity to request an extension for filing an appeal with the Board, even after the 180-day statutory period for requesting appeal has expired. Moreover, even though we will require that the extension request be made within a reasonable time in all cases, we are retaining the current outside limit of 3 years after the date of the intermediary determination or other determination that the provider wishes to appeal.

With regard to the lack of judicial review following a decision by the Board to grant or deny an extension request, we believe that the Supreme Court's decision in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), is informative. In that decision, the Supreme Court ruled that an intermediary's declination to reopen upon request a determination was not subject to further review, either administratively or by a court. It is important to note that Medicare rules also prohibit an intermediary from reopening a determination at a provider's request when there is a change in the law or regulations. Just as the reopening of intermediary determinations are governed solely by regulations, so too are decisions made by the Board as to whether an extension request should be granted or denied. Therefore, under sections 1102(a) and 1871(a) of the Act, which give the Secretary authority to issue regulations for the efficient administration of the Medicare program, we believe we are authorized to provide for discretionary grants and denials of requests to extend the time for requesting a hearing, and to further provide that these discretionary actions are not reviewable by the courts.

We disagree with the commenter that suggested that, because the Board would not be permitted to grant an extension request on the basis that a change in the law or regulations occurred, judicial review of a challenge to a law or regulation would be precluded. Providers are responsible for identifying, at the time of their hearing request or within 60 days following the expiration of the 180-day appeal period, all issues they want to appeal. We also disagree with the commenter that suggested that a decision by the Board denying an extension request should be treated as a final determination, similar to a final appealable determination by the Board finding that the Board lacked jurisdiction. There is an important distinction between these two types of Board decisions. In the first instance, when the Board denies an extension request that alleged good cause, the provider has acknowledged that it failed to meet the statutory 180-day timeframe for requesting an appeal. Therefore, the provider has lost any statutory right to appeal in this situation. In contrast, in a case where the Board issues a decision that it lacks jurisdiction, and dismisses the appeal, the provider does not necessarily concede that it has failed to file a timely appeal or that the Board lacks jurisdiction for some other reason. Therefore, where a provider does not agree that the Board lacked jurisdiction pursuant to the statute, it is entitled to bring an appeal to the Administrator and, if applicable, to Federal district court in order to resolve the issue.

Comment: One commenter suggested that CMS failed to provide sufficient reasons for the removal of the 3-year timeframe, replacing it with an ambiguous ''reasonable time'' standard. The commenter believed the 3-year period should be retained and, in the event that it is not retained, suggested that the Board be given discretion to determine whether an extension request was made within a reasonable timeframe. The commenter also suggested that there is nothing in the proposed rule that supports prohibiting the reliance on a change in the law or regulations as a reason for finding that ''good cause'' exists. Another commenter questioned the phrase ''reasonable time'' and wanted to know how ''reasonable time'' could be viewed as equaling ''no more than three years after the date of the intermediary determination.''

Response: As noted in the proposed rule, we considered eliminating altogether good cause extensions of the 180-day period for requesting a hearing. We proposed retaining good cause extensions to allow providers to submit hearing requests beyond the 180-day limit only in extraordinary circumstances beyond their control (for example, fire, catastrophe or strike) that existed prior to the expiration of the 180-day appeal period. We believe it is fair and appropriate that, absent extraordinary circumstances, providers should be expected to file their appeals within the 180-day period. Specifically, providers that are dissatisfied with a final determination should file a timely appeal, rather than depend on a right to file late if there is a favorable change in the law at some point after the 180-day appeal period.

We also believe that setting a reasonable time, not to exceed 3 years, for filing a late appeal is appropriate. Again, given that the circumstances giving rise to the claim of good cause for a late filing must exist prior to the expiration of the 180-day appeal period, the purpose of the reasonable time requirement is to allow the provider a sufficient time to recover from the unseen event and gather the necessary records, and make the necessary preparations for filing an appeal. The purpose is not to allow the provider to file a late appeal based on a favorable change in law or other circumstances that could arise after the expiration of the 180-day period. We decline to set a definite period, and instead believe that what constitutes a reasonable time for filing an appeal beyond the timely filing limit should be left to the Board's discretion (subject to the outside limit of 3 years) based on the particular facts before it. Moreover, because a provider must file a claim under protest to preserve its right to appeal a claim when the provider seeks reimbursement for an amount that may not be allowable under the controlling law, regulations, or policy, we do not consider a subsequent change in the law, regulations, or policy as falling within the ''good cause'' exception.

Comment: Three commenters suggested that CMS has too much involvement in the Board's decision-making process. One of the commenters suggested that the Administrator's ability to review the Board's decision to grant or deny a good cause extension request was an example of CMS's intention to gain total oversight over the Board. Another commenter believed that CMS was attempting to usurp the Board's discretion in determining whether there was good cause to grant an extension. The commenter suggested that only the Board is authorized to

establish the procedures and limitations governing its own independent review of provider appeals. The other commenter suggested that CMS should provide for extensions in circumstances where either CMS employees or appeals personnel contributed to the delays in filing a timely appeal (for example, unreasonable delays in responding to written inquiries).

Response: We disagree with the suggestion that we are overly involved in the Board's decision-making process. Again, we rely upon sections 1102(a) and 1871(a) of the Act, which grant the Secretary the necessary authority to issue regulations for the efficient administration of the Medicare program. It is our view that the parties to a Board hearing may avail themselves of Administrator review following a decision rendered by the Board. That particular policy has never varied throughout the existence of the Board. The Board is independent of CMS and, as an independent body, issues decisions outside of the realm of CMS influence. Section 1878(f)(1) of the Act authorizes the Secretary (delegated to the Administrator of CMS) to reverse, affirm, or modify a decision made by the Board. A decision rendered by the Board to grant or deny a provider a good cause extension request is merely another example of the myriad decisions handed down by the Board that are subject to review by the Administrator.

A provider is required to establish ''good cause'' before the Board can allow an extension of the 180-day time limit for filing a hearing request. We have not defined all the ''extraordinary circumstances'' that the provider can rely upon to satisfy a ''good cause'' extension. Therefore, the Board has the discretion to weigh the factual scenarios presented by a provider and make its decision accordingly.

Finally, in the scenario where a provider believes that CMS or Board personnel are not responding in a timely fashion to written inquiries, in our view, the Board should not grant an extension request for ''good cause.'' Instead, the provider would be expected to protect its rights by filing a timely appeal within the 180-day period prescribed by the Act.

F. Intermediary Hearing Officer Jurisdiction (§ 405.1814)

In the proposed rule, we sought to clarify the scope of an intermediary hearing officer's jurisdiction; that is, appeals that have amounts in controversy of between $1,000 and $9,999.

In proposed § 405.1814(a)(1)(ii) (and § 405.1840(a)(2), for Board cases), we required the intermediary hearing officer (and the Board) to make a preliminary determination of the scope of its jurisdiction and notify the parties of its jurisdictional findings, before conducting certain proceedings. For clarity, we have amended these sections by way of a parenthetical to explain that the intermediary hearing officer's (or Board's) preliminary determination of the scope of its jurisdiction consists of a review as to whether the request for hearing was timely and whether the amount in controversy has been met. Also, we removed language from these sections that required the intermediary hearing officer (or Board) to ''notify'' the parties of such preliminary determination. The latter revision was made primarily because, as most Board cases are settled prior to hearing, it would be costly and inefficient for the Board to notify the parties of preliminary jurisdictional findings. Requiring such notification would unnecessarily slow the ultimate resolution of cases.

For clarity, we also made minor technical changes to other portions of § 405.1814, and conformed language in § 405.1814 to that in § 405.1840 (concerning the Board's jurisdiction), wherever possible.

Comment: One commenter suggested that if an appeal were initially filed as a request for an intermediary hearing, but it was subsequently determined that the amount at issue in the appeal had exceeded $10,000, the regulations should provide that the appeal must be transferred to the Board.

Response: We agree with the commenter. Our policy is that, when an intermediary hearing officer has initially accepted jurisdiction because the amount in controversy is between $1,000 and $9,999, any change increasing the amount in controversy to at least $10,000 (for example, a more accurate estimate of the amount in controversy or the adding of an issue) will produce a change in forum; that is, the Board will accept jurisdiction. However, where the Board initially accepts jurisdiction after determining that a case has at least $10,000 in controversy, and that amount is subsequently reduced to a figure below $10,000 because one or more of the issues has been settled or withdrawn, it is our policy that, notwithstanding the amount in controversy falling to a level below $10,000, the Board will continue to have jurisdiction and, as a result, may hold a hearing and issue a decision. (We have a similar policy regarding the situation in which a group appeal initially satisfies the $50,000 jurisdictional threshold and subsequently falls below that threshold.) We have added paragraph (c)(4) to § 405.1839 to clarify the effect of a change in the amount in controversy.

G. CMS Reviewing Official Procedure (§ 405.1834)

In the proposed rule, we sought to codify the procedures currently located in section 2917 of the PRM for the CMS review of intermediary hearings. The proposed rule stated that the provider, by submitting a proper request, would be entitled to review of the intermediary hearing officer(s) decision, and also proposed that the Administrator would have discretionary, ''own motion'' review authority. In proposed § 405.1834(d)(2), we stated that the Administrator, through the CMS reviewing official, may exercise his or her discretionary authority to review an intermediary hearing officer decision by accepting review within 60 days after receipt of the decision by CMS's Office of Hearings. We received one comment on this proposal, which is discussed below.

We are making the following changes. First, we have revised the regulation text at § 405.1834(d)(2) to provide that the 60-day period for noticing own motion review begins from the date of the intermediary hearing officer decision. In § 405.1834(e)(2), we are clarifying the proposal that the CMS reviewing official's review of an intermediary hearing officer decision would not be limited to a hearing on the written record if certain criteria are met, including that the CMS reviewing official determines that holding the hearing is preferable, in the interest of administrative efficiency, to remanding the matter to the intermediary. For clarity, in § 405.1834(e)(2)(iii), we are replacing the language ''the matter must not be remanded'' with ''[i]t is not necessary or appropriate to remand the matter to the intermediary hearing officer(s).''

We have made technical changes to proposed § 405.1834(b) and § 405.1834(c), and § 405.1834(e)(3) concerning the component within CMS to which intermediary hearing officer/CMS reviewing official decisions should be sent. As the CMS Office of Hearings neither currently receives nor reviews either of these decisions, we changed these provisions to indicate that intermediary hearing decisions should be sent to the appropriate CMS component for review by a CMS reviewing official. Following the review and issuance of a written decision by a CMS reviewing official, the decision is

then sent to CMS (currently, both intermediary hearing officer decisions and CMS reviewing official decisions are received by the Center for Medicare Management, a component within CMS).

We clarified language in § 405.1834(d)(1), pertaining to own motion review by the Administrator.

In § 405.1834(e)(1) we proposed that the CMS reviewing official must give great weight to ''other interpretive and procedural rules and general statements of policy.'' We revised the quoted language to read ''other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS'' in order to be consistent with the language in § 405.1867 regarding the authorities to which the Board is not bound but must give great weight.

Comment: One commenter suggested that the proposed provision at § 405.1834(d)(2) is inconsistent with other provisions that give CMS the right to conduct and complete review within 60 days of the date the provider receives the decision. The commenter was also concerned that there may be a problem with intermediaries sending decisions to the appropriate CMS component at the same time they send them to providers.

Response: We believe that the statutory provision that mandates the Administrator both accept review and render a decision within 60 days of the provider's receipt of the Board's decision is unusual and not the optimal procedure for taking review. We continue to believe it would not be appropriate to constrain the CMS reviewing official in this manner when taking review of an intermediary hearing officer decision. We do not share the commenter's concern that the intermediary hearing officers will unduly delay forwarding their decisions to the appropriate CMS component. Rather, we believe that intermediary officers will promptly forward their decisions to CMS. Moreover, to the extent that a provider is concerned that CMS has not promptly received an intermediary hearing officer decision, the provider may contact CMS to verify its receipt of the decision. Nevertheless, in response to the commenter, we are providing a date certain for the onset of the 60-day period for the CMS reviewing official to notify the provider and the intermediary that he or she is taking own motion review. Therefore, we have revised proposed § 405.1834(d)(2) to provide that the 60-day period for noticing review begins from the date of the intermediary hearing officer decision.

H. Group Appeals (§ 405.1837)

In the proposed rule, we introduced various revisions to clarify and update the regulation to reflect longstanding group appeal procedures. For example, we provided that each provider in a group appeal must satisfy individually the requirements for a single provider appeal (except for the $10,000 amount in controversy requirement). We also provided that a group appeal must be limited to one legal or factual issue that is common to each provider in the group. Additionally, we clarified the distinction between mandatory and optional uses of group appeal procedures. We also added a new provision that specified the requirements for the contents of a request for a group appeal. We also clarified existing regulations regarding the processing of group appeals pending full formation of the group and issuance of a Board decision.

We are making several changes to the proposed rule, including technical and editorial changes.

We have revised § 405.1837(b)(1) (with respect to mandatory group appeals) and § 405.1837(b)(2) (with respect to optional group appeals) to provide that one or more of the providers in the group may, as a matter of right, appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for purposes of meeting the $50,000 amount in controversy requirement, and, subject to the Board's discretion, may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for other purposes, such as convenience. We have added some examples in the text following § 405.1837(b)(1) in order to illustrate the application of—(1) The amount in controversy requirement; and (2) the rules on when a provider under common ownership may (either as a matter of right or as a matter of Board discretion) join a group appeal involving a different cost reporting period than that pertaining to the provider, to specific situations. We have revised the language in § 405.1837(b)(3) to clarify that whereas one or more commonly owned or operated providers may initiate a mandatory group appeal (group appeals brought under § 405.1837(b)(1)), at least two providers are required to initiate an optional group appeal (group appeals brought under § 405.1837(b)(2)).

In proposed § 405.1837(c)(4), we would have required the providers in a group appeal to submit a statement that either—(1) The providers believe that they meet all the requirements for a group appeal and that the Board can proceed to make jurisdictional findings; or (2) the Board ''must defer'' making jurisdictional findings until the providers request the Board to do so. Consistent with proposed § 405.1837(c)(4)(ii), proposed § 405.1837(d)(4) and § 405.1837(e)(2) stated that the Board may not make jurisdictional findings until the providers request them. After further consideration, however, it is our position that, if the Board believes at any point in the group appeals process that, for purposes of administrative efficiency, it should make jurisdictional findings, it should be allowed to do so. Accordingly, we have revised § 405.1837(c)(4)(ii) and § 405.1837(e)(2), and have deleted § 405.1837(d)(4).

Likewise, we believe the Board should not be required to make jurisdictional findings before conducting further proceedings in the appeal. The Board is in the best position to know whether, in any given case, it is administratively efficient and proper to conduct proceedings in advance of making jurisdictional findings. Accordingly, we have deleted proposed § 405.1837(d)(3).

We have revised proposed § 405.1837(e) with respect to the procedures for determining that a group is fully formed, to be consistent with the current regulations and the Board's practice. Proposed § 405.1837(e)(2) would have provided that a group would be fully formed upon notice from the providers to the Board, but did not include a mechanism for determining that the group would be considered fully formed absent such a notice. We believe that it is appropriate for the Board to retain the abilities both to determine that a group is fully formed and that the group appeal should proceed, and to set schedules for the closures of groups, rather than being required to hold open indefinitely the group formation. Accordingly, we have deleted certain language in proposed § 405.1837(e)(2) and have revised § 405.1837(e)(1) to provide that with respect to mandatory group appeals, absent a notice from the providers that the group is fully formed, the Board may issue an order requiring the providers to demonstrate that there is at least one commonly-owned or controlled provider that is a potential addition to the group. With respect to optional group appeals, we have revised § 405.1837(e)(1) to provide that, absent a notice from the providers that the group is fully formed, the Board will issue an order that the group is fully formed or will issue general instructions

that set forth a schedule for the closing of optional group appeals.

We have revised § 405.1837(e)(2) to state that the Board will not dismiss any group appeal hearing request for failure to meet the amount in controversy requirement until the Board has determined that the group is fully formed.

We have deleted language from proposed § 405.1837(e)(5) that stated that the Board must grant a request to join a group appeal if the request is unopposed by the group members and is received by the Board prior to a final decision by the Board on the appeal. Our rationale for this revision is that the Board generally should have the discretion, for purposes of administrative efficiency, to grant or deny a request for joining a group appeal. We note that the Board may modify an order that a group has been fully formed, and thus could allow a provider to join a group appeal that was originally declared fully formed. Note that we have moved the language in proposed § 405.1837(e)(6), which stated that a denial by the Board of a request to join a group is without prejudice to the provider bringing a separate appeal, to § 405.1837(e)(4). We have substantially revised the language of proposed § 405.1837(e)(7) and also incorporated proposed § 405.1837(e)(7) into § 405.1837(e)(4). We proposed that, for purposes of determining the timeliness of any separate appeal, the period from the date of receipt of the provider's original hearing request through the date of receipt by the provider of the Board's denial of the provider's request to join the group appeal, must be excluded from the applicable 180-day period for filing a separate appeal (see § 405.1835(a)(3)) and from the 60-day period for adding issues to any single provider appeal (see § 405.1835(c)(3)). We have revised this language to state that, for purposes of determining timeliness for the filing of any separate appeal and for the adding of issues to that appeal, the date of receipt of the provider's request to form or join the group appeal is considered the date of receipt for purposes of meeting the applicable 180-day period prescribed in § 405.1835(a)(3). We were concerned that our proposal was potentially confusing and could have been disadvantageous for providers that filed the request for a group appeal hearing on or near the end of the deadline for doing so. For example, under our proposal, a provider that filed a request for a Board hearing on a group appeal on the 177th day after receiving its intermediary determination, would have only three days after the Board denied its request to join the group to file a separate appeal. Under our revision, because the provider's request for a hearing on the group appeal was timely, its subsequent request for a separate hearing also would be timely.

In response to a comment, in revised § 405.1837(e)(5), we provide that, as a general rule, where a provider has appealed an issue through electing to form, or join, a group appeal, it may not subsequently request the Board to transfer that issue to a single provider appeal brought in accordance with § 405.1811 or § 405.1835. We provide an exception to the general rule in the case of a group appeal that does not meet the jurisdictional requirements. Where the Board determines that the requirements for a group appeal are not met (that is, where there has been a failure to meet the amount in controversy or the common issue requirement), it will transfer the issue that was the subject of the group appeal to a single provider appeal (or appeals) for the provider (or providers) that meets (or meet) the requirements for a single provider appeal.

Comment: A commenter objected to our proposal to clarify that each provider in a group appeal must satisfy the requirements for a single provider appeal (except for the amount in controversy requirement) as interfering with the Board's statutory authority to establish the procedural requirements governing provider appeals.

Response: We believe our proposal is consistent with what is required by statute. The statute provides for a different amount in controversy requirement for group appeals, but still requires that providers appeal from a final determination of an intermediary or the Secretary and that the appeal be timely.

Comment: One commenter stated that it was generally supportive of the proposals on group appeals, but sought clarification on a few points. This commenter stated that some of the proposals, if adopted, would conflict with the Board's current instructions on group appeals. Therefore, we should be prepared to immediately revise the Board's instructions to avoid confusion.

Response: To the extent that there is any conflict between the provisions of this final rule and the Board's current instructions, the former will control. We anticipate that the Board will make revisions to its current instructions as a result of the publication of this rule.

Comment: Two commenters stated that they supported the proposal to allow groups to aggregate claims across multiple cost reporting periods in order to satisfy the $50,000 amount in controversy requirement. One of these commenters believed that the proposal is ambiguous as to whether items may be combined across cost years only for the purpose of meeting the $50,000 amount in controversy requirement. According to the commenter, providers should be allowed to combine common issues from multiple cost reporting periods, regardless of cost report year end, into one group appeal. Because providers have a variety of cost reporting periods, and some may even have multiple cost reporting periods within one calendar year, there is no reason to require a commonality of cost reporting periods as a requirement for a group appeal.

Response: Our proposals for group appeals were made with the view that, to the extent we have discretion under the statute, we should allow appeals to be brought as group appeals so as to reduce the workload on the Board, as well as the burden on providers and intermediaries. Our specific proposal to allow providers to combine the same item for multiple cost reporting periods into one group appeal was made under the section of the proposed rule pertaining to the amount in controversy requirements. However, we have further examined the issue and believe that providers with different cost reporting periods may, subject to the Board's discretion, raise the same issue in a group appeal, even when the amount in controversy requirement can be satisfied without including all of the multiple cost reporting periods. We have amended § 405.1837(b)(1) and § 405.1837(b)(2) accordingly.

Comment: One commenter stated that, whereas it agrees that it is proper to transfer an issue from an individual appeal to a group appeal, the regulations should specifically state that the amount in dispute for a transferred issue is applied, for purposes of the amount in controversy requirement, only to the group appeal. For example, the commenter stated, if an individual Board appeal had two issues with $9,000 in dispute for each issue, and one of the issues was transferred to a group appeal, the $9,000 amount in dispute would be applied to the group appeal for purposes of meeting (or exceeding) the $50,000 amount in controversy requirement, and the single appeal would be left with one issue with $9,000 in controversy (in which case the appeal would have to be dismissed for not meeting the $10,000 minimum).

Response: Our longstanding approach regarding meeting the amount in controversy requirement for single provider appeals is that, as long as the

provider has met the $10,000 requirement initially, subsequent events (including, but not limited to, withdrawal, transfer or settlement of an issue) that takes the amount below $10,000 will not deprive the Board of jurisdiction. As noted in section II.I. of this final rule, we are amending § 405.1839(c)(4) to provide specifically that, where a provider or group of providers has requested a hearing before the Board pursuant to § 405.1835 or § 405.1837, and the amount in controversy changes to an amount less than the minimum for a Board appeal due to the settlement or partial settlement of an issue, transfer of an issue to a group appeal, or the abandonment of an issue in an individual appeal, the change in the amount in controversy does not deprive the Board of jurisdiction.

Comment: One commenter noted that proposed § 405.1837(b)(1) states that any commonly owned or controlled provider may not appeal to the Board any common issue in a single provider appeal brought under § 405.1835. The commenter asked whether this meant that providers under common ownership or control cannot appeal an issue at all if the combined amount in controversy does not meet the $50,000 threshold for a group appeal.

Response: We believe that the language of section 1878(f)(1) of the Act, which requires that any appeal to the Board by providers that are under common ownership or control be brought as a group appeal, can reasonably be read to mean that any appeal by commonly owned or controlled providers that could be brought as a group appeal must be brought as a group appeal. Therefore, if there are, for example, three commonly owned providers that wish to appeal the same issue, but the amount in controversy is $10,000 for each (so that the $50,000 amount in controversy requirement for group appeals would not be met), each of the three providers could bring an individual appeal. We have clarified the language in § 405.1837(b)(1) for this purpose.

Comment: One commenter asked whether a provider may add an issue to a group appeal when the provider has appealed one issue of an original NPR, joined a group appeal, and is within the 60-day proposed time limit to add an issue, but is beyond 180-days from the original NPR.

Response: We understand the commenter to be asking whether a provider, having appealed only issue A in an individual appeal, can join a group appeal that involves issue B. The answer depends on whether the provider first (or concurrently) requests the Board to add issue B to its individual appeal and meets the requirements for adding the issue to its individual appeal. Under § 405.1835(c) of this final rule, a provider may add an issue to its individual appeal if its request to do so meets certain requirements, including the requirement that the Board receive the request no later than 60 days after the expiration of the applicable 180-day appeal period prescribed in § 405.1835(a)(3). If the provider requests and meets the requirements for adding an issue to its individual appeal, it may also request, under § 405.1837(b)(3)(ii), that, upon addition of the issue to the individual appeal, the issue be transferred from the individual appeal to the group appeal. If the provider is beyond the time for adding an issue to its individual appeal, it may not circumvent the time limit for doing so by seeking to appeal that issue through joining a group appeal.

Comment: One commenter noted that, under current Board instructions, a group appeal may be initiated only by two or more providers, but because of varying fiscal year ends and varying dates of NPRs, an appeal on a common issue for one provider may be due to be filed before the time is ripe for other providers to join in the group. Therefore, this commenter supports the proposal to allow a group appeal to be initiated by a single provider, with other providers joining later.

Response: We are clarifying that, although a single provider may initiate a mandatory group appeal, two or more providers are required to initially file an appeal for optional groups pursuant to § 405.1837(b)(3). Our policy for optional group appeals is based upon administrative efficiency concerns. Fundamentally, by definition, a group appeal must ultimately contain two or more providers. Accordingly, without the requirement to meet this definition from the onset of filing an appeal, the Board would be forced to entertain an abundance of requests to transfer to (or create) an individual appeal from single providers who filed a group appeal, but failed to join with another provider before the group closing deadline. We recognize, however, that due to the statutory requirement that providers under common ownership or control must appeal common issues as a group, combined with the fact that these providers may receive their final determinations on a staggered basis, we will allow, pursuant to § 405.1837(b)(3), a single provider that anticipates that a commonly owned or controlled provider will have an identical issue under appeal, to initiate a mandatory group appeal, despite the administrative efficiency concern above. In the unlikely event that no other providers ultimately appeal the issue, the Board will either transfer the group appeal issue to an existing individual appeal, administratively convert the group case number to an individual case number, or administratively create a new individual case number for the issue if the jurisdictional requirements of § 405.1811 or § 405.1835 are met.

Comment: One commenter believed that the current policy permitting hospitals to file individual appeals and to subsequently transfer common issues to group appeals should be retained. Providers under common ownership should not be precluded from pursuing a common issue in a group appeal if they initially appealed it in an individual appeal. This would allow hospitals time to determine whether an issue is common to other hospitals under common ownership, which is not always evident when one hospital receives a particular adjustment. Similarly, another commenter stated that it is not practical for a commonly owned provider to be required to file the initial appeal request as a group appeal. Not all commonly owned hospitals are centralized or situated in a way that enables them to coordinate initial appeals as a group appeal within the 180-day deadline for seeking a hearing. This commenter suggested that, instead, we could require consolidation of single appeals into a group appeal within a certain time after the single appeals have been filed. The commenter also suggested that providers could be required to list their parent corporation at the time of filing a single appeal to assist the Board in identifying providers under common ownership.

Response: We believe it is reasonable to expect that the parent corporation of commonly owned or controlled providers has a mechanism in place to identify issues that are common to more than one provider and to coordinate any appeals of these issues. Further, we believe that the parent corporation is in a better position than the Board to identify commonly-owned providers. Therefore, we are requiring a commonly owned provider to bring a timely appeal, as—(1) A group appeal (either initiating it or joining it) for an issue that is shared by other provider(s) to which it is related by common ownership; or (2) a single provider appeal for an issue that is peculiar to itself. (By ''timely'' we mean an appeal that satisfies the time limits stated in § 405.1835(a)(3) and § 405.1835(c).) Where a commonly owned or controlled provider mistakenly files an issue

within a single provider appeal that should have been brought as a group appeal, the Board will transfer the issue to an existing group appeal (or, where applicable, the Board will form a group appeal by transferring the same issue that was filed by two or more commonly owned or controlled providers within single provider appeals). We believe, however, that where a provider has brought a single provider appeal and then wishes to join (or form) a group appeal involving providers to which it is not related, the Board should retain discretion as to whether to deny the provider's request. In order to assist the Board in identifying individual appeals that should have been brought as group appeals (or should have been joined to an existing group appeal), we are amending § 405.1835 to add a new paragraph (b)(4) to require a commonly owned provider to provide the Board with certain information. Specifically, a commonly owned provider must list the name of its parent corporation, and either state that, to the best of its knowledge, no other provider related to it by common ownership or control has an individual or group appeal pending before the Board on the same issue for a cost reporting period that falls within the same calendar year. Alternatively, when an appeal already exists, the provider must give information (for example, the provider name and number) concerning that appeal.

Comment: One commenter stated that, when a group appeal is instituted by one of a small number of hospitals, there may be uncertainty as to whether similar adjustments will be received by one or more of the remaining hospitals. Thus, the final rule should specify that the issue appealed in a group appeal may be redesignated into an individual appeal (or appeals) where an insufficient number of hospitals receives common audit adjustments to meet the $50,000 amount in controversy requirement. Similarly, another commenter recommended that we allow providers under common ownership or control to change an appeal that was originally brought as a group appeal to an individual appeal under certain circumstances. The commenter gave the following example: Providers A and B are the two members of a chain organization and have a common legal or factual issue. Provider A receives an adjustment from its intermediary on the legal or factual issue and, consistent with existing policy, files a group appeal before all other commonly owned providers (here, Provider B) have received their NPRs. Provider B then receives its NPR from its intermediary, but the intermediary does not make an adjustment on the same legal or factual issue. In this case, the case cannot proceed as a group appeal. The commenter gave as other examples the situations in which two providers have the same issue, but do not meet the amount in controversy requirement, or when one of the providers has failed to timely appeal.

Response: In regard to the situation in which only one provider, in an organization of commonly owned or controlled providers, has received an adjustment on a particular item, we do not believe that there is ''an issue common to such providers.'' Therefore, the case can proceed as a single provider appeal (provided that the jurisdictional requirements for a single appeal are met). Similarly, where providers timely bring a group appeal, but fail to meet the $50,000 amount in controversy requirement, the Board will restructure the group appeal as separate single provider appeals for those providers that meet the $10,000 amount in controversy requirement for single provider appeals. We emphasize, however, that, where a group appeal is redesignated as one or more single provider appeals, the time in which to add issues is unaffected. That is, under § 405.1835(c)(3) as finalized, the Board must receive a request to add an issue no later than 60 days after the expiration of the 180-day period specified in § 405.1835(a)(3) for bringing the appeal. Thus, if a provider brings an appeal involving issue A as a group appeal, on the last day of the 180-day period, and more than 60 days later the group appeal is redesignated as one or more single provider appeals, the provider would not be able to add issue B to its single provider appeal. If, on the other hand, the provider brings a group appeal as to issue A on the 150th day of the 180-day period, and the group appeal is redesignated as a single provider appeal 60 days later, the provider would have an additional 30 days to add issue B to its single provider appeal, as it would have until 60 days after the expiration of the 180-day period to add the issue. We note that, as revised, § 405.1837(e)(4) states that, for purposes of determining timeliness for the filing of any separate appeal and for the adding of issues to that appeal, the date of receipt of the provider's request to form or join the group appeal is considered the date of receipt for purposes of meeting the applicable 180-day period prescribed in § 405.1835(a)(3). We were concerned that our proposal could have been disadvantageous for providers that filed the request for a group appeal hearing on or near the end of the deadline for doing so. For example, under our proposal, a provider that filed a request for a Board hearing on a group appeal on the 177th day after receiving its intermediary determination, would have only three days after the Board denied its request to join the group to file a separate appeal. Under our revision, because the provider's request for a hearing on the group appeal was timely, its subsequent request for a separate hearing also would be timely. Accordingly, the provider's request to add issues to a subsequent individual appeal is 60 days beyond the applicable 180-day period prescribed in § 405.1835(a)(3) (regardless of when the subsequent separate appeal was created).

Comment: One commenter stated that if an issue is transferred to a group appeal, it should not be transferred back to a single appeal. According to the commenter, when providers transfer an issue to a group appeal and then back to a single appeal, it creates an unnecessary administrative burden for the intermediary and the Board. Also, many providers transfer issues back and forth as a way to hold the issue open until they have accumulated the necessary data.

Response: We agree with the commenter's concern. Accordingly, § 405.1837(e)(5) provides that, apart from the situation where the requirements for a group appeal are not met (that is, where there has been a failure to meet the amount in controversy requirement or the common issue requirement), a provider may not transfer an issue from a group appeal to a single provider appeal. In the situation where a provider has elected to form or join a group appeal, and the requirements for a group appeal ultimately are not met, the Board will transfer the provider's appeal to an individual appeal.

Comment: One commenter noted that proposed § 405.1837(b)(1) requires commonly owned or operated providers to bring as a group appeal ''a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS rulings that is common to providers * * *'' The commenter believes that the proposed regulations should be clarified, because they do not impose a timeframe for common issues among commonly-owned providers that must be brought in group appeals. As drafted, all provider appeals of common issues that were repeated year after year would have to be combined in one group. This would make the groups unworkable in

terms of size and organization, and they would not be able to close their groups when the same issue repeated itself in new fiscal years. Therefore, the final rule should specify that all common issue appeals for fiscal years ending in the same calendar year be included in one group.

Response: We are amending § 405.1837(b)(1) to clarify that commonly owned or operated providers must bring as a group appeal a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS rulings that is common to providers and that pertains to cost reporting periods ending in the same calendar year.

Comment: One commenter noted that proposed § 405.1837(c)(3) would require providers to submit ''a copy of each intermediary or Secretary determination under appeal, and any other documentary evidence the providers consider necessary to satisfy the hearing request requirements of paragraphs (c)(1) and (c)(2) of this section * * *'' The commenter sought clarification as to exactly what documents would need to be submitted with the group appeal request. Also, it is not clear what the proposed regulation means by ''any other documentary evidence the providers consider necessary to satisfy the hearing request requirements.'' It is unclear what other documentation is needed.

Response: We are clarifying that, when referring to ''intermediary determination,'' we do not intend to require that the entire NPR be submitted with the group appeal. It is only necessary to submit the first page of the NPR, showing the date of issuance, along with the page containing the adjusted amount or protested item in dispute. At a minimum, to satisfy the documentation requirements of § 405.1837(c)(3), it is necessary to submit the first page of the final determination (for example, the NPR), showing the date of issuance, together with the pages containing the adjusted amounts or protested items in dispute. Providers should also submit any additional documentation that they consider necessary to satisfy the requirements for obtaining a group appeal.

Comment: One commenter stated that filing a Schedule of Providers with supporting documentation can be a costly endeavor. This commenter recommended that any rule change that affects group appeals be prospective, that is, any pending group appeals should be excepted to avoid unnecessary administrative filings and potential jurisdictional challenges for otherwise properly pending cases.

Response: We believe that the filing of a consolidated Schedule of Providers with supporting documentation (which is already required by the Board in its current instructions) is necessary; otherwise, the intermediary, the Board, the Administrator, and the courts could be required to review piecemeal jurisdictional documentation. We note further that the current process, which requires providers to submit the Schedule to the intermediary, which, in turn forwards the Schedule to the Board (with comments either challenging or agreeing to the existence of jurisdiction), appears to be working efficiently. Accordingly, we are adopting the proposal without change.

Comment: A commenter stated that sometimes there is more than one disputed fact or question of law pertaining to a single item on the cost report. A common example of this is the disproportionate share hospital (DSH) adjustment, which is determined by a combination of calculations, each of which may have more than one element in dispute. According to the commenter, the Board should have the authority to handle more than one question of fact or law in a group appeal if that would lead to a more efficient resolution. Further, even if the Board wished to split sub issues into separate groups pursuant to proposed § 405.1837(f)(2)(ii), we should clarify that a provider may initiate a single group appeal for a single line item in dispute.

Response: The statute requires that a group appeal involve only a common question (singular) of fact or interpretation of law or regulations. The regulations at § 405.1837(a)(2) further specify that a group appeal involve a single question of fact or interpretation of law, regulations, or CMS Rulings that is common to each provider in the group. What constitutes an appropriate group appeal issue in a given case will be determined by the Board.

Comment: One commenter stated that the present requirement that a group appeal be closed within 12 months is unworkable. For groups involving commonly owned providers, the issuance of NPRs for some would-be members of the group can lag behind substantially the NPRs of those already in the group. Therefore, the commenter was supportive of the proposed change that would allow a group to remain open until the provider notifies the Board that the group is complete. The commenter requested, however, that, if the proposal is finalized, we should make clear that the Board's current instructions, that is, those that mandate the closure of all groups by certain deadlines and the creation of a ''schedule B'' for any would-be members of a group of commonly owned providers that do not have their NPRs, are superseded.

Response: Under new § 405.1837(e)(1), the Board will make a determination that a group formed under § 405.1837(b)(1) (for mandatory group appeals) is fully formed. That determination will be made upon the group notifying the Board that the group is fully formed, or upon an order by the Board, following an opportunity for the group to show why the group should not be considered fully formed. Similarly, under § 405.1837(e)(1), the Board will make a determination that a group formed under § 405.1837(b)(2) (for optional group appeals) is fully formed based upon its judgment in a particular appeal, under the facts and circumstances, that the group is fully formed, or through instructions setting a time limit for keeping non-mandatory group appeals open, after which the group will be considered fully formed. There is no need to specifically state in the regulation text that any contrary instructions of the Board are superseded. Under section 1878(e) of the Act, the provisions of this rule supersede any contrary instructions promulgated by the Board.

Comment: One commenter stated that, although it supported the proposed change to allow groups to remain open past 12 months, commonly owned providers should have the ability to close groups so that they do not remain open indefinitely. It would be in the interest of both the Board and commonly owned providers to close a group so that the appeal may be moved forward, without prejudicing the rights of the remaining providers under common ownership or control. According to the commenter, chain organizations should be able to close a group appeal when a substantial number of providers have been added to the group. Remaining providers could be put into a subsequent group, which would be bound by the decision of the Board in the subsequent group. The commenter believes that this arrangement would be consistent with the language in section 1878(f)(1) of the Act that an appeal by providers under common ownership or control ''must be brought by such providers as a group with respect to any matter involving an issue common to such providers.''

Response: We believe that we lack the authority to allow, for the same period, more than one group appeal per issue by commonly owned or controlled

providers. We believe that our proposal that a group appeal involving commonly owned or controlled providers not close until the group notifies the Board that the group is complete would have adequately protected other such providers that would like to join the group appeal.

However, we are adopting our proposal with a modification. We are providing in § 405.1837(e)(1) that the Board may issue an order requiring the group to demonstrate that at least one commonly owned or controlled provider has preserved the issue for appeal, in accordance with § 405.1835, by claiming the relevant item on its cost report or by self-disallowing the item. The provider must not yet have received its NPR or other final determination with respect to an item for a cost year that is within the same calendar year as that covered by the group appeal (or it has received its NPR or other final determination with respect to an item for that time period, and the provider is still within the time to request a hearing on the issue). Once the Board has determined that a group appeal involving commonly owned providers is fully formed, no other provider under common ownership may appeal the issue (either by joining the group or by pursuing an individual appeal) that is the subject of the group appeal, with respect to a cost reporting period that falls within a calendar year covered by the group appeal, unless the Board modifies its determination that the group is fully formed.

Comment: A commenter stated that it realizes that the requirement that commonly owned or operated providers must pursue legal or factual questions through a group appeal is contained in the statute. However, in some cases, hospital chain organizations are divided into regional divisions that operate independently, and therefore could make it difficult for the organization to identify common issues and manage group appeals across regions. According to the commenter, we should establish an exception to allow regional divisions that operate independently to bring separate group appeals.

Response: Our interpretation of the statute is that commonly owned or operated providers must bring ''a'' group appeal on the same issue. If the Congress had intended to permit separate group appeals, it could have said that the appeal must be brought by ''one or more groups.'' Therefore, at this time, we believe we are constrained to require that commonly owned or operated providers bring only one group appeal for the same issue (regarding cost reporting periods ending in the same calendar year).

Comment: A commenter noted that proposed § 405.1837(c)(2) requires that the provider provide an explanation for the ''disputed cost'' or ''specific cost'' at issue in its request for a group appeal. This provision should be amended to use the more generic term ''item'' rather than ''cost,'' as there are items claimed on the cost report that may be challenged that are not ''costs'' *per se* (for example, a DSH payment). The commenter notes that ''item'' is used at § 405.1837(a).

Response: We agree and have amended § 405.1837(c)(2) accordingly.

Comment: One commenter stated that the use of the phrases ''each specific cost at issue'' and ''each disputed cost'' are misleading, because group appeals are limited to one issue.

Response: Proposed § 405.1837(c) used the phrases ''each specific cost at issue'' and ''each disputed cost'' because, although a group appeal is limited to a single legal or factual issue, that issue could involve more than one line item on a cost report. As stated above, we have changed the word ''cost'' to ''item'' in § 405.1837(c)(2).

I. Amount in Controversy (§ 405.1839)

We sought to clarify in the proposed rule the method for determining the amount in controversy for both individual and group appeals. Under our proposal, the amount in controversy would be determined based only on those particular adjustments that the provider has challenged and would include the combined total of all issues raised by the provider that arise within the same cost year. We also specified that in a single provider appeal, the provider could not aggregate issues across more than one cost year for purposes of meeting the amount in controversy requirement. However, two or more providers would be allowed to aggregate issues across more than one cost year to meet the amount in controversy requirement for a group appeal.

We are adopting our proposals. In addition, we are adding new § 405.1839(c)(4) to provide that, where a provider has requested a hearing before an intermediary in accordance with § 405.1811, and the amount in controversy is subsequently determined to be at least $10,000 (for example, due to a reassessment of the amount in controversy by the intermediary hearing office or due to adding an issue), the appeal will be transferred to the Board. Where a provider or group of providers has requested a hearing before the Board in accordance with § 405.1835 or § 405.1837, and the amount in controversy changes to an amount less than the minimum for a Board appeal due to the settlement or partial settlement of an issue, transfer of an issue to a group appeal, or the abandonment of an issue in an individual appeal, the change in the amount in controversy does not deprive the Board of jurisdiction. This is consistent with our longstanding policy. Where a provider or group of providers has requested a hearing before the Board pursuant to § 405.1835 or § 405.1837, and the amount in controversy changes to an amount less than the minimum for a Board appeal due to a more accurate assessment of the amount in controversy, the Board will not retain jurisdiction.

Comment: One commenter noted that the proposed rule would require that the provider demonstrate that its reimbursement would increase by at least $10,000 (for an individual appeal) if the appeal is successful, and stated that, although the proposal was helpful because it did not rely upon the reimbursement determination in an NPR, the proposal does not directly address situations in which no NPR exists. The commenter suggested that we clarify that the jurisdictional amount is satisfied if the provider demonstrates that the total disputed program reimbursement for each cost reporting period at issue meets or exceeds the $10,000 threshold, without regard to whether an NPR or other determination reflects the disputed amount. In the past, confusion has arisen as to whether an amount in controversy for jurisdictional purposes existed before an NPR has been issued. For example, intermediaries may settle cost reports and issue original NPRs, and may subsequently render a final determination impacting the settled cost report. When a provider files an appeal prior to a reopening and issuance of a corrected NPR, issues have arisen regarding how to determine the amount in controversy. The Board has typically decided that the final CMS determinations are appealable, regardless of the issuance of a corrected NPR, and the Board allowed providers to ''estimate'' the amount in controversy. The commenter stated that it appears that the proposed rule confirms the Board's position.

Response: Regarding an appeal of a final CMS or intermediary determination, a provider satisfies the amount in controversy requirement by establishing that the final determination has a reimbursement effect of least $10,000 in controversy.

J. Board Jurisdiction (§ 405.1840)

In the proposed rule, we sought to clarify the rules regarding the Board's preliminary determination of jurisdiction following a provider's hearing request. Among other things, at § 405.1840(a)(2), we proposed that the Board should be required to make a preliminary determination regarding jurisdiction in every case, and notify the parties of its jurisdictional findings before proceeding with the case.

In § 405.1840(b)(1), relating to specific matters that are removed from the Board's jurisdiction, we have updated the regulatory citations to the coverage appeals process and the Quality Improvement Organization appeals process. In § 405.1840(c)(2) we corrected a citation to a specific paragraph of § 405.1842, and in § 405.1840(c)(3), we clarified citations to specific paragraphs of § 405.1875.

For a discussion of other changes we made to § 405.1840(a)(2), please refer to section II.F. of this final rule (Intermediary Hearing Officer Jurisdiction).

Comment: One commenter noted that there was no specific timeframe under which the Board was required to issue a decision when the intermediary has made a jurisdictional challenge. The commenter recommended that when the intermediary disputes jurisdiction, the Board should be given a period of 90 days to render a decision.

Response: Although we understand the commenter's concern, we decline to impose a strict timeframe under which the Board would be required to issue a decision regarding a jurisdictional dispute raised by an intermediary. We believe that the Board, based on its own workload priorities, should be given unfettered discretion to set timeframes (with the exception of timeframes for discovery and subpoena requests) on jurisdictional and other pre-hearing matters such as the filing of position papers.

Also, although not the subject of a specific comment, we believe that the notification requirements we imposed on the Board in proposed § 405.1840(a)(2) are unduly restrictive and burdensome. In order to promote our vision of a more streamlined appeals process, we believe we would be ill advised to require the Board in all cases to notify the parties (presumably in writing) of its preliminary findings (that is, whether the request for hearing was timely, and whether the amount in controversy has been met) regarding jurisdiction. In most cases, jurisdiction is readily obtained, and there is essentially no need to formalize in writing that the Board has accepted jurisdiction. Therefore, we have amended new § 405.1840(a)(2) accordingly. Where the Board finds that it does not have jurisdiction over every specific matter at issue in the appeal, the Board must issue a dismissal decision under § 405.1840(c)(2) and notify each party to the appeal.

K. Expediting Judicial Review (§ 405.1842)

Under section 1878(f)(1) of the Act, a provider in certain situations may immediately seek judicial review of an action of the intermediary involving a question of the statute or regulations whenever the Board determines that it is without authority to decide the issue. If the Board determines that it has jurisdiction over the issue, but it lacks the authority to decide the issue, the provider may obtain expedited judicial review (EJR). The intent of this provision is to eliminate undue delays resulting from a requirement that providers pursue time-consuming and unproductive administrative reviews before they could obtain judicial review of a Board determination. We proposed several changes to § 405.1842 to clarify any confusion surrounding the procedures and the types of cases to which EJR applies.

We are adopting our proposals. We have revised the text at § 405.1842(e)(3)(ii) to clarify that, upon receiving a request for EJR, the Board will have 30 days either to issue an EJR decision (if the request is complete) or issue a written notice to the provider that the provider has not submitted a complete request (describing in detail the further information that is needed to complete that request).

Comment: One commenter noted that the proposed rule would require that, in instances in which a provider request for EJR is deemed incomplete by the Board, the Board must issue a written notice to the provider describing in detail the additional information needed to complete the request. The commenter suggested that the final rule provide that there be a 30-day period for the Board to provide a notice to the provider that the request for EJR is incomplete, and another 30-day period for the provider to respond to the notice of incompleteness. Once a provider responds to the notice of incompleteness, the Board would have 30 days either to issue an EJR decision, or to ensure that the provider has received another notice of incompleteness. The commenter also suggested that intermediaries be required to comply with all of the deadlines applicable to the provider in the event that the intermediary files a response to the provider's request for EJR.

Response: It was our intent that, upon receiving a request for EJR, the Board would have 30 days either to issue an EJR decision (if the request is complete) or issue a written notice to the provider that the provider has not submitted a complete request (describing in detail the further information that is needed to complete that request). We are clarifying the text at § 405.1842(e)(3)(ii) accordingly. We decline to require that the provider be given 30 days to respond to a notice from the Board that its request for EJR is incomplete. We believe the time period in which to respond should be left to the Board's discretion, because a period shorter or longer than 30 days could be warranted, depending on the facts of the case.

Comment: One commenter stated that the proposed rule would provide that, if any allegedly relevant lawsuit was filed before a final EJR decision, the Board would be precluded from conducting any further proceedings on the EJR decision until the lawsuit was resolved, and that it appears that the proposed policy would apply, regardless of the basis for the lawsuit. The commenter suggested that the final rule provide that the Board be required to conduct further proceedings on an EJR decision when the provider subsequently files a lawsuit brought on jurisdictional grounds other than the Social Security Act. If the Board were allowed to grant EJR, the issues jurisdictionally under the Medicare statute could be added to the pending matter in court, thus preserving judicial resources and avoiding multiple lawsuits.

Response: The commenter is correct that the proposed policy would apply regardless of the jurisdictional basis for the lawsuit. However, we decline to adopt the commenter's suggestion that we make a distinction based on the jurisdictional basis pleaded in the complaint. We do not agree that it would be appropriate for the Board or the intermediary to spend its limited resources to spend time on a Board appeal if the provider has filed a complaint that involves a legal matter that is relevant to a legal issue in the Board appeal. If the court properly has jurisdiction over the appeal, the decision, that it or a higher court renders, may resolve the issue or issues in the Board case, or otherwise inform the Board in reaching a decision, or affect the parties' decision as to whether they should attempt to settle the Board case. On the other hand, where the basis for the court's jurisdiction is defective (which we believe would most likely be

the situation when a provider attempts to file a complaint based on a legal issue related to an appeal still pending before the Board), a contrary rule would not discourage providers from filing improper appeals with the court. We believe our proposal to be in line with the general rule practiced by courts that an appeal to a higher court deprives the lower court of jurisdiction to conduct further proceedings until the appeal is resolved by the higher court.

L. Parties to Proceedings in a Board Hearing or Intermediary Hearing (§ 405.1843 and § 405.1815)

In the proposed rule, we restated the longstanding position that CMS is not a party to a Board hearing. However, because CMS decisions and policies are very often the subject of provider disputes, we stated that we believed it would be important to include CMS in the hearings process, without conferring upon it the status of a party. Therefore, we proposed to authorize intermediaries to designate a representative from CMS (including an attorney) to defend the intermediary's position at a Board hearing. We also proposed that CMS could file *amicus curiae* briefs with the Board in cases having major policy implications, where CMS was not formally designated as the intermediary's legal representative.

We have clarified in § 405.1843(a) and in § 405.1815 that it is the Board or the intermediary hearing officer (and not the intermediary) that determines whether an entity is a related organization of the provider, and that such a determination is made in accordance with the principles enunciated in § 413.17 (and is not, strictly speaking, a determination made ''under'' § 413.17).

In § 405.1843(b), we have clarified that, although the Board may call as a witness any employee or officer of Health and Human Services or CMS having personal knowledge of the facts and the issues in controversy in an appeal, the Department's *Touhy* regulations at 45 CFR, Part 2 (Testimony by employees and production of documents in proceedings where the United States is not a party) apply as to whether such employee or officer will appear.

We have added § 405.1843(e) to provide that a non-party other than CMS may seek leave from the Board to file *amicus curiae* briefing papers with the Board. We have also added new § 405.1843(f) to provide that the Board may exclude from the record all or part of an *amicus curiae* briefing paper. Where the Board excludes from the record all or part of an *amicus curiae* briefing paper submitted by CMS, it will state for the record its reason(s) in writing.

Comment: Most of the commenters that addressed this proposal opposed enhanced involvement by CMS before the Board. One commenter suggested that if CMS files a timely *amicus curiae* submission with the Board, that submission should be based upon the record of the case. Upon Administrator review, any information or documentation submitted by CMS that was not included in the hearing record should be prohibited. Another commenter suggested that if CMS is allowed as a non-party to file *amicus curiae* submissions with the Board, other interested non-parties should also be able to file *amicus curiae* submissions. Two commenters suggested that the filing of an *amicus* brief provides a means for CMS to influence the process. One of these commenters suggested unfairness due to a lack of proper inquiry or the absence of cross-examination. Another commenter suggested that CMS should not be permitted to make *amicus curiae* submissions because CMS has sufficient opportunity to address its policies in other forums (for example, proposed rules or instructions). One commenter fully supported the proposal, stating that intermediaries would be better equipped to defend their actions by having a CMS representative handle the case.

Response: We emphasize again that CMS will not be a party to a Board proceeding and, moreover, we do not anticipate that CMS normally will take a proactive role in defending policy positions before the Board. However, we reiterate that many Board appeals are directly the result of a CMS determination, not an intermediary determination, and, where this is the case, we believe it is reasonable to permit CMS an opportunity to defend its rationale for making the determination.

Regarding the commenter that stated that if CMS will be allowed to file *amicus curiae* briefs, other non-parties should also be allowed to make *amicus curiae* submissions, we agree that the Board should retain the discretion on whether to accept them. We have added a new paragraph (e) to § 405.1843 to state that a non-party other than CMS may seek leave from the Board to file an *amicus curiae* brief. The Board will have unfettered discretion to grant leave, and if leave is granted, the Board can accept or reject the brief in whole or in part.

Regarding the commenter that was concerned that an *amicus curiae* submission filed by CMS with the Board might not be based upon the record of the case, we note that *amicus curiae* submissions in court are generally argumentative and not evidentiary in nature. To the extent that an *amicus curiae* submission purports to rely on evidence not before the Board, the Board may choose to attempt to have the record supplemented by that evidence, as well as to have the discretion to exclude from the record the submission in whole or in part. We have added new paragraph (f) to section § 405.1843 to provide that the Board may exclude, in full or in part, an *amicus curiae* brief submitted by CMS or any other interested non-party (but that where it excludes all or part of an *amicus curiae* brief) submitted by CMS, it must state its reason(s) in writing.

We also disagree with the commenter that suggested that the ability of CMS to file an *amicus curiae* brief somehow places CMS in a position where it can unduly influence the Board decision making process. The Board is an impartial, independent forum, and therefore takes its responsibility seriously in addressing and resolving the matters before it. The Board's only concern is to provide a fair and just hearing process and issue decisions in accordance with the law and regulations. As stated previously, the Board has discretionary authority, after reviewing a submission by CMS, to admit or exclude the submission from the record.

Finally, we disagree with the commenter that suggested that CMS, rather than being able to submit *amicus curiae* briefs to the Board, should address its policies by way of publishing proposed rules or by issuing instructions. During the course of an adversary proceeding where potentially millions of dollars are at issue and significant program policies may be in dispute, the best means of defending existing policies are through effective advocacy and cogent oral and written arguments.

Comment: One commenter suggested that we should acknowledge that CMS is the real party in interest in a Board proceeding so that providers would then have the full right to obtain discovery and testimony from CMS.

Response: After reconsidering the issue, in this final rule we are not providing for discovery against CMS. As explained in section II.N. of this final rule, we are concerned that the ability of CMS to conduct its day-to-day business could be significantly compromised if it is constantly engaged in responding to discovery or forced to seek immediate Administrator review of

Board orders granting discovery. We also believe that discovery disputes concerning CMS, or the Secretary or a Federal agency, which may involve motions to compel or motions for protective orders or other procedural filings, will cause a further backlog of cases before the Board. For these reasons, we have decided that the discovery procedures in § 405.1821 and § 405.1853 will not apply to CMS, the Secretary (or any other component of HHS), or any other Federal agency. We have also revised the procedures for depositions at § 405.1853(e)(2)(ii) to clarify that the Department's Touhy regulations at 45 CFR, Part 2 (Testimony by employees and production of documents in proceedings where the United States is not a party) will apply as to whether an employee or officer of CMS or HHS will appear at a deposition.

Comment: One commenter requested clarification as to whether the intermediary could call a CMS employee as a witness in a case before the Board. Two commenters suggested that proposed § 405.1843 be eliminated and replaced with a provision that, where CMS has made the final determination upon which the Board hearing is based, a CMS representative should be required to testify at the hearing.

Response: Current practice at the Board is that an intermediary will occasionally ask a CMS employee to testify at an oral hearing.

We disagree with the commenters that suggested that § 405.1843 of the regulations be eliminated and replaced with a provision stating that a CMS employee should always be required to testify at a Board hearing when there is a CMS determination that is under dispute. Although CMS's policies and actions bear at least indirectly on each and every hearings dispute before the Board, CMS is not an adversarial party in the Board proceeding. That adversarial responsibility falls upon the intermediary. In most cases, the written submissions made by an intermediary in defense of a CMS determination are clear and succinct and would not require additional evidence, in the form of oral testimony by a CMS employee, to explain the determination.

Comment: One commenter suggested that CMS representation of an intermediary violates the regulation (§ 405.1843(b)) which does not permit CMS to be a party to a Board hearing, unless CMS acts as an intermediary.

Response: Our current regulation at § 405.1843(b) permitted CMS to act as a party to a Board hearing in those cases where we served as a direct dealing intermediary for a small number of providers. We no longer act as an intermediary, and, for that reason, we proposed deleting the provision that allowed CMS party status at the Board. We have adopted this proposal. We note that when CMS provides representation for an intermediary at a Board hearing, the representation does not in any way elevate CMS to party status.

Comment: Two commenters suggested that no matter how we characterize it, CMS should be considered a party to the Board hearing if it participates at the hearing. One of the commenters stated that, if CMS represents the intermediary at the hearing, the Administrator should not be allowed to review and overturn the Board's decision. Also, prevailing providers should be entitled to legal fees under the Equal Access to Justice Act (5 U.S.C. 504).

Response: We once again reject the suggestion that the proposed limited participation by CMS at future Board hearings should define CMS as a party to the Board hearing. We also disagree with the suggestion that, if we represent the intermediary at the hearing, the Administrator would be required to recuse himself from reviewing the Board decision.

The statute at section 1878(f) of the Act provides for the Secretary's review of a decision of the Board. This review is also consistent with section 557 of the Administrative Procedure Act (APA), which provides agency review of an initial decision. In this review process, the Administrator acts, pursuant to his or her delegated authority, for the Secretary in rendering a final decision. Consequently, the commenter's suggestion that the Administrator should be prohibited from reviewing a Board decision under the proposed circumstances is contrary to the plain language of the controlling law and the statutory framework provided by the APA.

Because CMS is not a party to a Board hearing, we do not believe that the provisions of the Equal Access to Justice Act are applicable relative to the reimbursement of expenses incurred (for example, legal fees, expert witness fees, etc.).

M. Quorum Requirements (§ 405.1845)

Three Board members, at least one of whom is representative of providers of services, constitute a quorum. Current regulations state that, with the provider's approval, the Board Chairman may designate one or more Board members to conduct a hearing and prepare a recommended decision for adjudication by a quorum of Board members.

In order to expedite the resolution of the large number of cases backlogged at the Board, we proposed that the Board Chairman could designate one Board member to conduct a hearing, allowing for more than one hearing to be held simultaneously. The Board Chairman would not be required to obtain the approval of the provider or the intermediary before assigning the case to a single Board member. In our view, the rights of the parties would not be prejudiced because the hearing decision would be issued by a quorum of Board members. We also proposed that a recommended decision would not be needed when less than a quorum conducted the hearing. Board members who were not present at the hearing would be able to review the record of the hearing and make an informed decision based upon that review. Also, we proposed that the Board could offer the parties the option to have a hearing on the written record. Both parties would be required to agree to waive their rights to an oral hearing as a condition for holding a hearing on the written record. We are not making any substantive changes to our proposal. We have clarified in § 405.1845(d)(1) that a quorum is not required to issue a dismissal decision, which reflects current Board practice. We have made a technical change to proposed § 405.1845(f)(2), and, for clarity, we have renumbered proposed § 405.1845(f)(3) as paragraph (g), and accordingly renumbered proposed § 405.1845(g) as paragraph (h).

Comment: One commenter suggested that the interest of justice cannot adequately be served with only one Board member hearing the case in person. The other Board members could not fairly decide a case because they could not adequately adjudge the credibility of witnesses based on only a review of the written transcript of the hearing. Several commenters suggested that the Board should be required to obtain the approval of the provider or the intermediary before assigning less than a quorum to conduct a hearing. Because of the highly technical issues, if a Board member is not present, a simple review of the written record may not be sufficient to render an appropriate decision. Another commenter wanted to know if the full Board could be required to hear a case at the request of either the intermediary or the provider.

Response: We disagree with the commenter that suggested that justice could not be served if only one Board member heard the case in person. Administrative law principles clearly allow for an adjudicator to resolve

disputes without being present at an oral hearing. Consistent with 5 U.S.C. 557(b) of the APA, an administrative officer charged with the decision making (for example, a member of the Board) is not required to personally hear the testimony, but may rely instead on the written record. Although only one Board member may preside at the hearing, a quorum of at least three Board members (at least one of whom is representative of providers) is required to issue a final Board hearing decision. We believe our quorum requirement adequately ensures that the hearing process will be fair and that the resulting decision will reflect the reasoned opinion of the Board and not merely a single member of the Board.

We also disagree with the commenters that suggested that the Board be required to obtain approval of the provider or intermediary before assigning less than a quorum to conduct a hearing. We do not believe that the rights of the parties are prejudiced in any way by not requiring the Board to obtain the permission of one or both of the parties to the hearing. Provided that the hearing decision is issued by at least a quorum of Board members, the parties to the hearing are being afforded procedural due process under the principles of administrative law. As stated above, the APA clearly permits an adjudicative officer to formulate a decision based only upon a review of the written record.

As to the commenter that inquired whether a provider or intermediary could request the full Board membership to hear a case, we note that the Board has the discretionary authority to grant such a request.

Comment: One commenter suggested that there should be at least two Board members present at live hearings to ensure that an individual Board member would not be able to sway the outcome of a Board decision.

Response: We disagree with the suggestion that if only one Board member hears a case, that particular member is in a position to unduly influence the other decision makers. We disagree that fairness and impartiality in the decision making process is ensured only when a minimum of two Board members conduct a hearing.

Comment: One commenter suggested that a provider might be prejudiced if two Board members assigned to a case reflect a ''minority'' view of the Board. This could lead to inconsistent decisions on the same legal questions by different Board panels. Also, allowing less than five members to decide cases distorts Congress's intention in creating the Board.

Response: Section 1878(h) of the Act requires that the Board be composed of five members, two of whom are representative of providers of services. At least one member must be a certified public accountant, and all of the members must be knowledgeable in provider payment principles. The Board, like all adjudicative bodies, strives for consistency in decision making. However, there may be occasions in which one panel of the Board hearing an appeal on an issue could decide differently from another panel of the Board with respect to the same issue. The Board, at its discretion, may seek to identify issues on which it is divided and ensure that a full complement of the Board (which at any given time may be less than five members) hears those issues. If either party is dissatisfied with a decision issued by the Board, review mechanisms are in place (Administrator, judicial review) to contest the decision. We also disagree with the commenter's statement that all five Board members must decide a case, so that congressional intent will not be distorted. Our longstanding policy, as contained in the regulations, allows for a quorum of at least three Board members (at least one of whom is representative of providers of services) to issue Board hearing decisions. This policy has been implemented for many years, has not been controversial, and has helped to create a more effective and efficient appeals process.

N. Board Proceedings Prior to Hearing; Discovery in Board and Intermediary Hearing Officer Proceedings (§ 405.1853 and § 405.1821)

We proposed several revisions to § 405.1853. Proposed § 405.1853(a) specified the present requirement that, prior to any Board hearing, the intermediary and provider must attempt to resolve legal and factual issues, and following that attempt, must send to the Board joint or separate written stipulations setting forth the specific issues that remain for Board resolution. We proposed removing the requirement that the intermediary ensure that all documentary evidence in support of each party's position is in the record. We proposed continuing the present requirement that the intermediary be required to place in the record a copy of all evidence that it considered in making its determination, and would add, that, where the determination under appeal is a Secretary determination, the intermediary would be responsible for placing in the record all evidence considered by CMS in making the Secretary determination.

In proposed § 405.1853(b), we made several proposals concerning the timing, content and format of position papers. Specifically, we proposed that the Board would set the deadlines for submitting position papers in each case as appropriate, and that the Board would have the authority to extend the deadline for good cause shown.

Proposed § 405.1853(c) and § 405.1853(d) set forth requirements relating to ''initial'' and ''further'' status conferences, which could be for a wide variety of purposes.

In § 405.1853(e) and § 405.1821 we proposed changes in discovery procedures for Board and intermediary hearing officer hearings. Proposed § 405.1853(e)(1), and proposed § 405.1821(b)(1) specified the basic requirements for discovery, including the requirement that the matter sought to be discovered must be relevant to the specific subject matter of the Board or intermediary hearing. Proposed § 405.1853(e)(2) specified that the method of discovery permitted would generally be limited to reasonable requests for the production of documents for inspection and copying, and a reasonable number of interrogatories, with depositions permitted in limited circumstances. A party would not be permitted to take an oral or written deposition of another party or a non-party, unless the proposed deponent agrees to the deposition, or the Board finds that the proposed deposition is necessary and appropriate under criteria contained in the Federal Rules of Civil Procedure. We proposed that requests for admissions, or any other form of discovery other than requests for production of documents, interrogatories and depositions would not be permitted. Proposed § 405.1821(b)(2) was similar, except that it would not permit depositions in proceedings before an intermediary hearing officer(s).

In § 405.1853(e)(3), we proposed time limits for requesting discovery. We proposed that a party's discovery request would be timely if the date of receipt of such a request by another party or non-party, as applicable, is no later than 90 days before the scheduled starting date of the Board hearing. A party would not be permitted to conduct discovery any later than 45 days before the scheduled starting date of the Board hearing. We further proposed that, upon request and upon a showing of good cause, the Board could extend the time for making a discovery request or extend the time for performing discovery. The Board would be permitted to extend the time for requesting discovery or for conducting discovery only if the

requesting party establishes that it was not dilatory or otherwise at fault in not meeting the original discovery deadline. If the Board granted the extension request, it would be required to impose a new deadline and, if necessary, reschedule the hearing date so that all discovery ended no later than 45 days before the hearing. Proposed § 405.1821(a) would be similar for proceedings before an intermediary hearing officer(s).

In § 405.1853(e)(4) and § 405.1821(c), we proposed to specify the rights of non-parties with respect to discovery requests. A non-party would have the same rights as a party in responding to a discovery request. These rights would include, but would not be limited to, the right to select and use any attorney or other representative, and to submit discovery responses, objections, motions, or other pertinent materials to the Board.

In § 405.1853(e)(5) and § 405.1821(c)(3), we proposed a specific procedure for motions to compel and for protective orders. In order to conserve Board resources and promote an efficient hearing process, each party would be required to make a good faith effort to resolve or narrow any discovery dispute, including a dispute with a non-party. Any motion to compel discovery and any motion for a protective order, and any response thereto, would have to include a self-sworn declaration describing the movant's or respondent's efforts to resolve or narrow the discovery dispute.

In § 405.1853(e)(6), and in § 405.1821(d)(2), we proposed a general rule, and an exception thereto, for the reviewability of Board or intermediary hearing officer(s) orders on discovery. Generally, any discovery or disclosure ruling issued by the hearing officer(s) or the Board would not be final and would not be subject to immediate review by the Administrator. Rather, such a ruling could be reviewed solely during the course of Administrator review of one of the Board decisions specified as final, or deemed to be final by the Administrator, or of judicial review of a final agency decision. However, we also proposed that, where the Board or hearing officer(s) authorize discovery or compel disclosure of a matter for which a party or non-party made an objection based on privilege, or some other protection from disclosure, that portion of the discovery ruling would be reviewable immediately by the Administrator. We proposed that there would be an automatic stay where the party or non-party, as applicable, notifies the Board or intermediary hearing officer(s) of its intention to seek immediate review. The duration of the stay would be limited to no more than 15 days in the case of Board proceedings and to no more than 10 days in the case of intermediary hearing officer(s) proceedings. If the Administrator granted a request for review or takes own motion review before the expiration of the stay, the stay would continue until the Administrator or CMS reviewing official renders a written decision, but if the Administrator did not grant or take review within the time allotted for the stay, the stay would be lifted and the Board or hearing officer(s) ruling would not be immediately reviewable.

We have made several changes to our proposals, as discussed below. We note that, in preparing this final rule, we remain concerned that, although under certain circumstances CMS would have had the right to seek immediate Administrator review of a Board disclosure or discovery ruling, the ability of CMS to conduct its day-to-day business could be significantly compromised if it is constantly engaged in responding to discovery or forced to seek immediate Administrator review of Board orders. We also believe that discovery disputes concerning CMS, or the Secretary or a Federal agency, which may involve motions to compel or motions for protective orders or other procedural filings, will cause a further backlog of cases before the Board. For these reasons, we have decided that the discovery procedures in § 405.1821 and § 405.1853 will not apply to CMS, the Secretary (or any other component of HHS), or any other Federal agency. A non-party (other than CMS, or other Federal agency as described above) may only be required to respond to requests for the reasonable production of documents. A party will not be allowed to serve written interrogatories on any non-party, consistent with the general rule that interrogatories are not normally served on non-parties. We have also revised the procedures for depositions at § 405.1853(e)(2)(ii) to clarify that the Department's Touhy regulations at 45 CFR Part 2 (Testimony by employees and production of documents in proceedings where the United States is not a party) will apply as to whether an employee or officer of CMS or HHS will appear at a deposition.

As a result of these changes, we are hopeful that the discovery procedures as finalized will be fair to the parties and will streamline the appeals process. We believe that the current process for seeking documents under the Freedom of Information Act procedures will meet providers' needs for gaining access to information in our possession. We note that because these procedures are a procedural rule, and hence exempt from notice and comment rulemaking, we would be able to modify the rule's provisions insofar as they relate to CMS (or other Federal agency) through a CMS Ruling or other means.

In § 405.1853(b)(2), we removed the requirement that the Board must find good cause for extending the deadline for submitting a position paper. We believe that, for administrative efficiency and for purposes of fairness, the Board should have wide discretion to extend the time for submitting a position paper, as the facts and circumstances in any given case may so require.

In § 405.1853(b)(3), we have clarified that the ''timeframe to be decided by the Board,'' for purposes of submitting exhibits on the merits of the provider's claim, may be through a schedule applicable to a specific case or through general instructions. We also revised this paragraph to provide that the general rule, that any supporting exhibits regarding jurisdiction must accompany the position paper, is subject to a Board order or general instructions to the contrary.

In § 405.1853(e)(2), we have clarified the reference in the proposed rule to Federal Rules of Civil Procedure (FRCP) 32 governing the allowance of depositions in certain circumstances, and have specifically referenced FRCP 32(a)(3), with respect to the criteria the Board must employ in order to permit the deposition of a witness who does not wish to be deposed.

In § 405.1853(e)(3) and § 405.1821(a)(2) we have modified the proposal's requirement that discovery must be ''received'' by a certain time, and have instead provided that discovery must be ''served'' by a certain time, in order to prevent any disagreement and collateral litigation before the Board or the intermediary hearing officer(s) as to when discovery was actually received. With respect to the time period itself, we have changed the timeframe from 90 days before the scheduled date of the hearing, to 120 days before the initially scheduled starting date of the hearing, to ensure that the parties and Board have sufficient time to address any discovery disputes prior to the hearing. We have added clarifying language at § 405.1821(c)(3)(iii)(B) and § 405.1853(e)(5)(vii) to state that nothing in § 405.1821 or § 405.1853 authorizes the intermediary hearing officer or Board to compel any action from the Secretary or CMS. Likewise, in § 405.1821(c)(2) and § 405.1853(e)(4), we have revised language that stated

that a non-party has the ''same'' rights as any party when responding to discovery requests. Although this statement was generally true under our proposal and remains generally true under this final rule, it is not entirely accurate with respect to CMS or the Secretary or any other Federal agency, as a non-party. Neither an intermediary hearing officer nor the Board may compel CMS or the Secretary or any other Federal agency to respond to discovery or take other action.

In § 405.1821(d)(2) we have revised the minimum time for the stay in the case of a CMS reviewing official reviewing a discovery ruling from 10 days to 15 days.

Comment: Several commenters disagreed with our proposal to modify the requirement in section § 405.1853(a) that providers must submit position papers to the Board no later than 60 days after the hearing request, and instead allow the Board to set position paper deadlines on a case-by-case basis. One commenter stated that the proposed change would reduce the certainty of timeliness and critical due dates, making case management more difficult for all parties, and that only the Board had authority to establish the appeals process before the Board. Other commenters stated that the Board should not have the authority to arbitrarily remove the reference to the 60-day timeframe for submitting position papers, or to set the deadlines for submitting position papers on a case-by-case basis as the Board deems appropriate, because there would be no consistency.

Response: We disagree that our proposal would reduce the certainty of timeliness and critical due dates and make case management more difficult for all parties. The Board will issue a schedule of due dates for the filing of position papers and other events in each case, and the provider and intermediary will have adequate notice of the deadlines. We also note that it is very common for due dates for position papers to be extended beyond 60 days after the hearing request, and for the Board to set the due dates for other events on a case-by-case basis; we therefore, do not regard the proposal as a significant change in the way proceedings are currently conducted. Finally, we do not agree with the commenter's point that only the Board has the authority to establish appeals procedures before it. Under section 1878(e) of the Act, the Board has the authority to determine procedures to the extent that they are not inconsistent with the Secretary's regulations. Moreover, our proposal gives more, not less, discretion to the Board with respect to the setting of due dates for position papers, as compared to the current regulatory requirements. Changes that may occur from time to time in the volume and relative complexity of the Board's caseload weigh in favor of allowing the Board flexibility in setting due dates. In order to afford the Board greater flexibility, we are modifying our proposal that the Board may extend, for good cause shown, the deadline for submitting a position paper. We believe that the Board should have the discretion to extend the deadline without a showing of good cause (particularly because the Board has the discretion to set the initial deadline for the filing of the position paper).

Comment: One commenter supported our proposal to remove the current requirement that the intermediary ensure that all documentary evidence in support of each party's position be in the record. This commenter also agreed with the proposal that the intermediary should be responsible for placing in the record all evidence considered by CMS in making a determination about an issue. The commenter suggested, however, that ''all relevant evidence,'' regardless of whether that evidence was considered by CMS, be placed in the record. The commenter also stated that the proposal should be expanded to specify the remedy to which a provider is entitled if CMS or the intermediary does not comply with the requirement to place evidence in the record. The proposal should also be expanded to specify the powers that the Board has to compel CMS to produce evidence, including documentary evidence, answers to interrogatories, and depositions of CMS witnesses. Finally, according to the commenter, the rule should provide effective, compulsory measures to ensure compliance by CMS.

Response: We are not adopting the suggestion that the intermediary be required to place ''all relevant evidence'' in the record, regardless of whether that evidence was considered by CMS. We believe it is unclear whether, and to what extent, evidence that was not considered by CMS is nonetheless ''relevant.'' If a provider believes other evidence is relevant and therefore deserves to be made part of the record, the provider can move for its admission. Where a provider believes that an intermediary has not fulfilled its obligation to include evidence in the record that was considered by CMS in making a determination, the provider may seek an order from the Board. If the intermediary does not comply with an order of the Board, the Board may refer the matter to the component of CMS that has oversight of contractors. Also, on review of a final decision of the Board, the Administrator would have the authority to remand to the intermediary, if necessary, to supplement the record. As discussed below in section II.O. in connection with subpoenas, the Board does not have authority to compel CMS to take actions, including placing evidence in the record, answering discovery, or making witnesses available for depositions. However, upon review of a Board decision, the Administrator or a court may order the record to be supplemented with additional information, if necessary. We have added clarifying language at § 405.1821 and § 405.1853(e)(5)(vii) to state that nothing in § 405.1821 or § 405.1853 authorizes the intermediary hearing officer or Board to compel any action from the Secretary or CMS. Likewise, in § 405.1821(c)(2) and § 405.1853(e)(4), we have revised language that stated that a non-party ''including HHS and CMS'' has the same rights as any party when responding to discovery requests. We have deleted the reference to ''HHS and CMS'' because the intermediary hearing officer and Board discovery processes do not apply to CMS, HHS or any other Federal agency. The statement remains true with respect to other non-parties.

Comment: One commenter stated that the current backlog of cases at the Board must be reduced. This commenter believes that a more aggressive approach to reducing issues that involve clear errors would be beneficial. According to this commenter, a number of appeals to the Board involve audit errors, clerical errors, or other minor issues that amount to little more than protective appeals. Although the proposal to require providers and intermediaries to attempt to resolve legal and factual issues would seem to be a mechanism to resolve these issues or errors, absent the involvement of the Board or its staff, no resolution occurs, and the appeal drags on to a hearing. The commenter recommended that a mechanism be established by which a provider can identify issues that should be quickly resolvable, and explain why they can be resolved quickly, followed by the Board or its staff convening a conference call to address the issues. In the commenter's view, bringing the parties together early in the appeal can eliminate some or all issues quickly, minimizing the burden on all involved.

Response: Currently, intermediaries and providers are encouraged to work together to resolve disputes in order to avoid taking an issue to a hearing that

can and should be settled. We believe our proposal will further facilitate the resolution of issues. What the commenter recommends is descriptive of what currently takes place in many cases.

Comment: One commenter noted that, although the proposed rule would encourage an early focus by the parties and the reviewing entity on the jurisdictional requirements for a hearing before the Board, the Board should be required to issue jurisdictional decisions early in the appeals process. There are many instances in which a hearing is held on the merits and the jurisdictional challenge simultaneously. Unless time limits for jurisdictional decisions are imposed, the parties may engage in additional, and possibly unnecessary, work. Preferably, all Board jurisdictional decisions should be rendered before the Board sends the acknowledgment letter establishing due dates for position papers and a tentative hearing date. Moreover, all Board jurisdictional decisions should be published for public viewing.

Response: We decline to impose time limits for jurisdictional decisions at this time. The Board must balance the need for issuing jurisdictional decisions in an expeditious manner so as not to cause the parties possible unnecessary work with the need to schedule hearings and manage its caseload. We will monitor the situation, and, if necessary, we may impose specific time limits or issue guidance through a CMS Ruling, which would be binding on the Board. The Board has published jurisdictional decisions that it feels would provide guidance for intermediaries and providers. It is impractical and unnecessary for the Board to publish every jurisdictional determination.

Comment: One commenter agreed with the proposal to include non-parties, such as CMS, within the Board discovery procedures.

Response: As finalized, the Board discovery procedures will apply to non-parties other than CMS, the Secretary (or other component of HHS) or any other Federal agency. We have decided to except Federal agencies from the intermediary hearing officer and Board discovery processes due to our concerns that a more expanded discovery process could cause significant disruption in their ability to manage their day-to-day activities, and due to our concern that discovery disputes involving CMS or other Federal agencies could cause a further backlog of cases before the Board. The Freedom of Information Act process remains available to providers and others seeking information from CMS or other Federal agency, and CMS employees are subject to being deposed, or required to testify or produce documents under the Department's Touhy regulations at 45 CFR Part 2.

Comment: One commenter stated that it understood our concern that broad discovery procedures may impact the Board's ability to schedule and hold hearings in an efficient manner, but recommended that we expand the existing types of discovery permitted to include requests for admissions. Requests for admission have been an effective means of narrowing the issues on appeal, and can expedite the appeals process by facilitating settlement and reducing the amount of time necessary for the hearing. Moreover, allowing requests for admissions would be no more onerous to parties than responding to interrogatories. Another commenter stated that we have provided no rational reason why providers should be denied this important discovery tool, which is provided under the FRCP.

Response: We are not including requests for admissions within the permitted types of discovery. We disagree that allowing requests for admissions would be no more onerous than responding to interrogatories. Apart from the burden caused by allowing another form of discovery in addition to interrogatories and requests for production of documents, there are special concerns with respect to requests for admissions. Failure to respond to requests for admissions timely could result in matters being deemed admitted, which could have dire consequences for the non-responding party in the case at hand and possibly for other, similar cases. We believe that the present process, whereby intermediaries and providers stipulate to matters not in dispute, works reasonably well in terms of narrowing issues, expediting appeals, and facilitating settlements. Our proposed revision to § 405.1853 places the duty on intermediaries to expeditiously attempt to join with the provider in resolving specific factual or legal issues and entering into stipulations. We are adopting this proposed revision. We expect that intermediaries will approach this requirement in good faith and will not seek to unduly prolong cases or force the provider to litigate matters that are not fairly in dispute. If a party believes, however, that an intermediary has not fulfilled its obligations, it may complain to the Board, and the Board may refer the matter to CMS if the Board believes it is appropriate to do so.

Comment: One commenter stated that we should consider including a provision whereby the parties could stipulate that the issues and facts in their case are identical to the issues and facts in one or more cases, and could request that the same Board decision that has been rendered, or will be rendered in the like cases, be applied to their case.

Response: We do not believe it is necessary to amend the regulations to state that the parties may so stipulate. As noted in our previous response, the intermediary must attempt to join with the provider to narrow the factual and legal issues in dispute. We see no reason why the parties could not stipulate that the facts and issues in one case are identical in all material respects to those in another case or cases. The Board has the discretion to consolidate like cases for hearing or (with the parties' consent) to dispense with the hearing in a case and effectively have that case be governed consistently with the decision in another case.

Comment: One commenter stated that the final rule should clarify for discovery deadline purposes that the scheduled starting date of the Board hearing is the specific date the hearing is on the docket, and not the anticipated month of the hearing date listed on the ''key dates'' letter received from the Board when the appeal is filed.

Response: Proposed § 405.1853(e)(3), which we are adopting, uses the term ''scheduled starting date of the Board hearing,'' which is the specific date on the Board's docket. As discussed more fully below, this final rule references the deadlines to the ''initially'' scheduled starting date of the hearing, in recognition that hearings are often rescheduled.

Comment: One commenter stated that an incomplete or late response, or no response at all, to a timely-filed request for discovery should be grounds for an extension of discovery.

Response: Proposed § 405.1853(e)(3) would have allowed the Board, for good cause, to extend the time for requesting or conducting discovery. On reexamination of our proposal, we believe that the Board should be allowed to extend the time for requesting or conducting discovery without requiring a showing of good cause. We do not believe it advisable to state that a late or incomplete response, or a non-response, would necessarily lead to an extension of the time to seek or conduct discovery; rather, in any given case, the Board should evaluate the circumstances before it and exercise its discretion to allow or disallow an extension for seeking or responding to discovery.

Comment: One commenter disagreed with our proposal to modify the time

limits for requesting discovery so that a party's discovery request must be received no later than 90 days before the scheduled hearing, and that discovery must be completed no later than 45 days before the scheduled hearing. The commenter noted that current § 405.1853(b) technically allows parties to file discovery requests as late as one day before the hearing. The commenter nevertheless viewed the proposal as an attempt to restrict provider appeal rights through technicalities. Several commenters said that, in order for discovery to be timely, it should be received no later than 60 days prior to the hearing. Also, allowing a party to conduct discovery up to 45 days before the scheduled date of the hearing is excessive, and allowing 30 days for discovery is adequate.

Response: We believe it prudent to set deadlines on requesting, conducting, and responding to, discovery. We believe that it is important to strike an appropriate balance between allowing parties a sufficient time to conduct discovery for case preparation without disrupting the hearing process through last minute discovery requests. Our proposal would have allowed parties to request discovery no later than 90 days before the scheduled date of the hearing and to conduct discovery no later than 45 days before the scheduled date of the hearing. Upon further reflection, we have decided to require that a party's discovery request is timely if it is served no later than 120 days before the initially scheduled starting date of the hearing, unless the Board extends the time for requesting discovery. We have modified the proposal's requirement that discovery must be ''received'' by a certain time, and instead provided in § 405.1853(e)(3) and § 405.1821(a)(2) that discovery must be ''served'' by a certain time, in order to prevent any disagreement and collateral litigation before the Board or the intermediary hearing officer(s) as to when discovery was actually received. ''Served'' has the same meaning as given to that term under the FRCP. We decided to use the initially scheduled starting date of the hearing as the focal point, because using the actual hearing date as the focal point would mean that a new discovery period could be obtained any time the hearing is rescheduled (as is often the case). We also want to ensure that the parties and the Board have sufficient time to address discovery disputes that may arise. We believe that, as finalized, the deadlines for submitting and responding to discovery do not pose significant difficulties for parties (and we note that, as revised in this final rule, the Board has discretion to extend the deadlines without a finding of good cause) and are necessary for the efficient administration of the hearing process.

We have revised the language in § 405.1853(e)(3)(ii) of the proposed rule that said discovery may not be ''conducted'' by a party any later than 45 days before the Board hearing, because we were concerned that ''conducted'' may have been unclear. In revised § 405.1853(e)(3)(ii), we set deadlines for holding a deposition, and for responding to interrogatories and requests for production of documents. Specifically, we have revised this paragraph to state that, in the absence of a Board order or instruction setting a specific starting date for the deposition, a party desiring to take a deposition must give reasonable notice of a scheduled deposition in writing to the deponent. However, in no event may the deposition be conducted later than 45 days before the initially scheduled starting date of the Board hearing, unless the Board extends the time for conducting the deposition. In the absence of a Board order or instruction setting a specific time, a party or non-party must respond to interrogatories or to requests for production of documents within the time allotted by the FRCP or according to a schedule agreed upon by the party requesting discovery and the party or non-party to which the discovery is directed. Responses to interrogatories and requests for production of documents must be served no later than 45 days prior to the scheduled starting date of the Board hearing, unless the Board extends the time for responding.

We have deleted the requirement that the Board may extend the time in which to request discovery or conduct or respond to discovery only upon a showing by the requesting party that it was not dilatory or otherwise at fault in not meeting the original discovery deadline. Upon reexamination, we believe it is better to afford the Board the flexibility to extend discovery deadlines without such a showing.

We are not prescribing deadlines for a time when a party must submit a motion to compel discovery or for a time when a party or non-party must submit a motion for a protective order. Rather, the Board may wish to issue specific instructions as to a time when the motions must be filed.

We have also amended proposed § 405.1853(e)(3)(v) to state that, if the Board grants an extension for requesting or conducting discovery or responding to interrogatories or requests for production of documents, it may set a new hearing date, instead of (as proposed) being required to set a new hearing date.

Finally, we have made corresponding changes to § 405.1821, with respect to discovery in intermediary hearing proceedings.

Comment: One commenter asked what would happen under the proposal if documentation was received after 45 days. Specifically, the commenter wished to know whether the documentation would be considered by the Board at the hearing, and stated that, if this were the case, the 45-day deadline meant little as timely discovery from the intermediary depended on what the intermediary had to review and from whom the request came. The same commenter also asked what the result would be if documentation was requested and received in the 45-day period, but additional data needed by the intermediary to supplement and test the original documentation arrived after the 45-day period had expired. The commenter also stated that further clarification was needed with regard to what documentation was due within 45 days, and what was due within 90 days.

Response: We believe our revisions to § 405.1853(e)(3)(ii), noted above, address the commenter's concerns. Discovery responses must be served no later than 45 days before the initially scheduled start of the Board hearing, unless the time for responding is extended by the Board. Where a party or non-party files responses late (or not at all), the Board will have the discretion to postpone the hearing or order some other remedy within its authority.

Comment: Several commenters stated that, because it is likely that a party would never agree to a deposition, the rule needs to specify that in certain cases a party must agree to a deposition.

Response: We do not agree that it is likely that a party will never agree to a deposition. Litigants in civil cases routinely agree to appear at depositions, whether in a spirit of cooperation or with the knowledge that the court can compel their attendance if necessary and appropriate. We anticipate that parties before the Board also will generally comply with notices of deposition. Moreover, we have specifically referenced, in the regulations text, Rule 32(a)(3) of the FRCP—this rule will be applied by the Board to allow the taking of a deposition in order to preserve testimony of an individual who might not be otherwise available to appear at the hearing. However, there may be instances in which a party reasonably believes that the time or place of the deposition, or the deposition itself, is unreasonable,

and, therefore may wish to resist appearing. In that situation, the party may petition the Board for a protective order. Conversely, where the party noticing the deposition believes that the deposed party is unreasonable in refusing to appear, it may file a motion to compel with the Board. We do not believe it is possible to state in advance, however, in which types of cases a party will not be allowed to refuse a notice of deposition. Whether a notice of deposition is reasonable or unreasonable will depend on the facts and circumstances of each case and is best left to the Board to manage through its ability to issue protective orders and orders to compel.

Comment: Several commenters (in identical language) said that the proposed duration of the automatic stay (no more than 15 days for Board proceedings, and no more than 10 days for intermediary hearing officer(s) proceedings) is too strict, and that it would be more effective to have the automatic stay for Board and intermediary hearing officer(s) proceedings last no more than 30 days and 15 days, respectively.

Response: The commenters misunderstood our proposals in § 405.1853(e)(6) and § 405.1821(d)(2). We proposed that the duration of the automatic stay could be no less than 15 days for Board proceedings, and no less than 10 days for intermediary hearing officer(s) proceedings. In proposing minimum lengths for the stay, we wanted to ensure that the Administrator would have sufficient time to decide whether to take review of the matter before the stay had expired. Although we continue to believe that the proposed periods are sufficient, in order to ensure that the CMS reviewing official would have sufficient time to review an intermediary hearing officer order, we have revised the minimum time for the stay in § 405.1821(d)(2) to 15 days. With respect to the commenters' suggestion that the automatic stay not last more than 30 days for Board proceedings, and not more than 15 days for intermediary hearing officer(s) proceedings, we decline to restrict the Board or intermediary hearing officer from initially setting a longer stay than the minimum period prescribed, in order to address the possibility that, due to unusual circumstances, the Board or intermediary hearing officer may believe that a longer period is needed for a party to seek review of the discovery order and for the Administrator or CMS reviewing official to decide whether to take review. Likewise, we believe that, as we proposed in § 405.1853(e)(6)(ii) and § 405.1821(d)(2), if the Administrator or CMS reviewing official decides to take review, the stay should continue until the Administrator or CMS reviewing official issues a decision on the matter, rather than prescribing a set period for which the Administrator or CMS reviewing official may rule, as some cases may be more complex than others, and the Administrator's or CMS reviewing official's other review responsibilities may be more voluminous at one time than at another.

O. Subpoenas (§ 405.1857)

Section 1878(e) of the Act states that the provisions of sections 205(d) and 205(e) of the Social Security Act with respect to subpoenas apply to the Board to the same extent that they apply to the Commissioner of Social Security with respect to title II (Social Security) of the Act. In the proposed rule, we proposed time limits for requesting Board subpoenas that would be similar in some respects to those we proposed for the discovery process. For subpoenas requested for purposes of discovery, a request would be timely if received at least 90 days before the scheduled hearing date. For a subpoena requested for the purpose of compelling attendance of a witness at the hearing, a request would be timely if received at least 45 days before the scheduled hearing. The Board could not issue a discovery subpoena any later than 75 days before the initial scheduled hearing date, and could not issue a hearing subpoena any later than 30 days before the scheduled hearing. The Board would have discretion to extend the timeframes for requesting subpoenas. The Board would also have the authority to issue subpoenas to non-parties. Finally, only the Administrator would have the authority to seek enforcement of a Board subpoena.

We have adopted our proposals, with some modifications. Some of the modifications are parallel to those revisions we made to our discovery proposals in § 405.1853(e). That is, in § 405.1857(a)(2)(i), we revised the deadline by which a request for a subpoena for discovery must be received by the Board, from 90 days before the scheduled starting date of the Board hearing, to 120 days of the initially scheduled starting date of the hearing. The revised time period essentially mirrors the time period for requesting discovery under § 405.1853(e)(3)(i). As explained in section II.N. of this final rule, we decided to use the initially scheduled starting date of the hearing as the focal point, because using the actual hearing date as the focal point would mean that a new discovery period could be obtained any time the hearing is rescheduled, and we also wish to focus the parties' attention on discovery early in the appeals process. Because we revised the deadline by which the Board must receive a request for subpoena for discovery, we have also revised the deadline for issuing a subpoena, from 75 days before the scheduled starting date of the Board hearing to 90 days before the initially scheduled starting date of the Board hearing. Like the deadline for seeking discovery, however, under this final rule, the deadlines for requesting a Board subpoena for discovery and for the Board to issue a subpoena for discovery, are subject to extension by the Board in its discretion. Likewise, if the Board extends the period for requesting or issuing a subpoena, the Board has the discretion to reschedule the hearing date. The extension procedures also apply to requests for, and issuances of, Board subpoenas for purposes of an oral hearing. (See § 405.1857(a)(4).) We have also made a clarifying change to proposed § 405.1857(d)(2)(v). With respect to the situation where a party or non-party seeks immediate review of a Board subpoena, and the Administrator may, but chooses not to, grant or take own motion review of the subpoena, we have revised the language that stated ''the Board's action stands'' to ''the Board's action is not immediately reviewable.'' The revision was made in recognition of the fact that the Administrator could review the subpoena in the course of review of a final decision made by the Board. We clarified language in § 405.1857(b)(3) that suggested the Board ''must comply'' with the FRCP and the Federal Rules of Evidence for guidance. As revised, this paragraph states that the Board ''uses'' such authorities for guidance.

Finally, we are adding language to proposed § 405.1857(a)(1)(i) to clarify that the Board may not issue a subpoena to CMS or to the Secretary (or to any Federal agency), and we are also removing the references to HHS and CMS in proposed § 405.1857(c)(4), redesignated to § 405.1857(c)(3), in order to prevent any implication that the Board may issue a subpoena to CMS or to the Secretary.

Comment: One commenter stated that an incomplete or late response, or no response at all, to a timely-filed request for discovery should be grounds for an extension of a subpoena request.

Response: Proposed § 405.1857(a)(4) would have allowed the Board, for good cause, to extend the time for requesting or issuing a subpoena. On reexamination of our proposal, we

believe that the Board should be allowed to extend the time for requesting or issuing a subpoena without requiring a showing of ''good cause.'' We do not believe, however, that it is advisable to state that a late or incomplete response, or a non-response to a discovery request, will necessarily lead to an extension of the time to request or issue a subpoena. Rather, in any given case, the Board should evaluate the circumstances before it, and exercise its discretion to allow or disallow an extension for requesting a subpoena, or for permitting itself an extension for issuing a subpoena. We have also decided, for the reasons stated above with respect to the time for requesting and completing discovery, to modify the proposed timeframes for a party to request a subpoena for purposes of discovery and for the Board to issue a subpoena for that purpose. Under the final rule at § 405.1857(a)(2)(i), a party may request a subpoena for purposes of discovery no later than 120 days before the initially scheduled starting date of the Board hearing, and, at § 405.1857(a)(3)(i), the Board may issue a subpoena for that purpose no later than 90 days before the initially scheduled starting date of the Board hearing.

Comment: One commenter opposed the proposal that a Board subpoena may be enforced only by the Administrator. The Board's decision to seek enforcement is interlocutory (that is, non-final) in nature, and therefore is not subject to immediate review by the Administrator. Moreover, even if the Administrator otherwise could review a non-final decision by the Board, section 1878(e) of the Act grants the Board sole authority to decide to initiate judicial action to enforce a Board subpoena.

Response: For the reasons stated in section II.T. of this final rule, we disagree that the Administrator lacks the authority to review non-final orders of the Board. We also disagree that section 1878(e) of the Act grants the Board sole authority to decide whether to pursue judicial enforcement of one of its subpoenas. Under the commenter's view, the Administrator could reverse a decision of the Board on the merits, but would be unable to prevent the Board from seeking any enforcement action that the Administrator would believe was inconsistent with law or agency policy. This position contravenes the well-established principle that the Administrator, on review of Board actions, has all of the powers that the Administrator would have had in making the initial decision. (*See Homan & Crimen* v. *Harris,* 626 F.2d 1201, 1205 (5th Cir. 1980); 5 U.S.C. 577(b).) Moreover, the statute plainly grants the Secretary, and by extension the Secretary's designee, that is, the Administrator, the authority to issue subpoenas and seek enforcement of them, as sections 205(d) and 205(e) of the Act have been incorporated into title XVIII of the Act through section 1872 of the Act. It is not clear how litigation to enforce a subpoena could proceed on behalf of the Administrator if the Administrator, as the Secretary's designee, were opposed to bringing that action.

Comment: One commenter commended us for proposing that non-parties may be subpoenaed by the Board. Another commenter stated that the rule should expressly acknowledge that the Board has the power to subpoena HHS and other government agencies. A provider's appeal rights under section 1878 of the Act would be rendered meaningless if the Board lacked the power to subpoena relevant and material evidence from HHS. This is particularly important in cases where CMS has rendered the determination at issue. Another commenter objected to the proposal that the Administrator may review and overrule a Board decision to subpoena a witness or documents as an affront to the Board's independence. This commenter was concerned that the Administrator might abuse this power to avoid having CMS policy experts testify before the Board.

Response: For the reasons stated in the Administrator's Order dated July 29, 2004, in *Baystate Medical Center* v. *Mutual of Omaha* (PRRB Case Nos. 96–1822, 87–1579), and in the Administrator's Order dated November 20, 2006, in *Duane Morris Outpatient Blended Rate Group* v. *Blue Cross Blue Shield Association* (PRRB Case No. 06–2057G), we believe there is no statutory basis for the Board to subpoena HHS and other Federal agencies. The United States and its agencies, as sovereign, are immune from suit, except to the extent to which they consent to be sued. It is also well-settled that a waiver of sovereign immunity ''cannot be implied, but must be unequivocally expressed.'' (See *Franconia Associates* v. *United States,* 536 U.S. 129, 141 (2002).) There is no indication in the language of sections 205(d) and 205(e) of the Act, or in the legislative history of those sections, that the Congress intended to effect a waiver of sovereign immunity. (Indeed, the fact that the party seeking to enforce the subpoena would be a Federal agency makes it even more unlikely that the Congress intended to waive sovereign immunity, for it cannot be lightly assumed that when the Congress enacted sections 205(d) and (e) in 1939, it intended to allow one agency to sue another agency.) To the contrary, the use of the words ''individual'' and ''person'' in sections 205(d) and 205(e) of the Act indicate that the Congress did not intend to waive sovereign immunity. It is a well-settled rule of statutory construction that ''person'' does not include the sovereign, unless the statute affirmatively provides otherwise, and this rule is particularly applicable where it is claimed that the Congress intended to waive sovereign immunity. (*See Will* v. *Michigan Dep't of State Police,* 491 U.S. 58, 64 (1989).) Because the Congress did not waive sovereign immunity in sections 205(d) or 205(e) of the Act, it did not waive it in section 1878(e) of the Act (which grants the Board the subpoena powers contained in sections 205(d) and 205(e)). Because only the Congress, and not Federal agencies, has the authority to waive sovereign immunity, (see *United States* v. *N.Y. Rayon Importing Co.,* 329 U.S. 654, 660 (1947)), we would be unable to subject HHS and other agencies to the Board's subpoena authority even if we were otherwise so inclined.

We are adding language to proposed § 405.1857(a)(1)(i) to clarify that the Board may not issue a subpoena to CMS or to the Secretary (or to any Federal agency), and we are also removing the references to HHS and CMS in proposed § 405.1857(c)(4), redesignated to § 405.1857(c)(3), in order to prevent any implication that the Board may issue a subpoena to CMS or to the Secretary.

Although the Board does not have the authority to subpoena HHS and other Federal agencies, we do not agree with the commenter that a provider's appeal rights are rendered meaningless in the absence of that authority. In cases in which the provider believes it is necessary to obtain information from HHS (including CMS), the provider may gain access to information through the Freedom of Information Act, which is applicable to all Federal agencies. Most, if not all, agencies (including HHS) also have ''Touhy regulations,'' by which agencies may make documents or witnesses available to the requester if sufficient need is shown, and other criteria are satisfied. Finally, upon review of a final decision of the Board or the Administrator, a court may order that the record be supplemented with additional information.

Comment: Several commenters, in identical language, said that the proposed duration of the automatic stay (no more than 15 days for Board proceedings and no more than 10 days for intermediary hearing officer(s) proceedings) is too strict and that it

would be more effective to have the automatic stay for Board and intermediary hearing officer(s) proceedings last no more than 30 days and 15 days, respectively.

Response: The commenters misunderstood our proposals. We proposed that the duration of the automatic stay could be no less than 15 days for Board proceedings. In proposing a minimum length for the stay, we wanted to ensure that the Administrator would have sufficient time to decide whether to take review of the matter before the stay had expired. We continue to believe that the proposed periods are sufficient. With respect to the commenters' suggestion that the automatic stay not last more than 30 days for Board proceedings, and not more than 15 days for intermediary hearing officer(s) proceedings, we decline to restrict the Board from initially setting a longer stay than the minimum period prescribed, in order to address the possibility that, due to unusual circumstances, the Board may believe that a longer period is needed for a party to seek review of the subpoena and for the Administrator to decide whether to take review. Likewise, we believe that, as we proposed, if the Administrator decides to take review, the stay should continue until the Administrator issues a decision on the matter, rather than prescribing a set period for which the Administrator may rule, as some cases may be more complex than others, and the Administrator's other review responsibilities may be more voluminous at one time compared to another.

P. Record of Administrative Proceedings (§ 405.1865 and § 405.1827)

We proposed to amend § 405.1865 to address with specificity the required contents of the record on appeal and to explain how excluded material is to be treated. In particular, we proposed to specify that all evidence, argument and any other tangible material (admissible or inadmissible) received by the Board, as well as a transcript of the proceedings of any oral hearing before the Board, would be made part of the record of the appeal. Any evidence ruled inadmissible by the Board, and any other material not considered by the Board in making its decision, would, to the extent practicable, have to be clearly identified and segregated in an appendix to the record for the purpose of any review by the Administrator and/or the judiciary. We further proposed that, for purposes of Administrator review, the administrative record would also include all documents and any other tangible matter submitted to the Administrator by the parties to the appeal or by any non-party, in addition to all correspondence from the Administrator or the Office of the Attorney Advisor and all rulings, orders, and decisions by the Administrator. We also proposed that the Administrator would have the authority to reverse the Board's determination regarding the admissibility of evidence or other matter. Additionally, we proposed corresponding changes, in part, to § 405.1827, relative to the record established at intermediary hearings. We are adopting our proposals.

Comment: One commenter stated that the proposed revision to allow the Administrator to reverse Board determinations on evidence and unilaterally include or exclude evidence could cause the entire administrative process to be viewed negatively. If the Administrator is given the authority to dismiss evidence after the hearing decision has been rendered, there should be a process provided for provider rebuttal or alternative arguments to be filed on the record prior to proceeding to judicial review.

Response: Our proposal was facially neutral, in that it would permit the Administrator to include, where appropriate, evidence that the intermediary or provider wanted included (but that was excluded by the Board), or to exclude, where appropriate, evidence that the intermediary or provider wanted excluded (but that was included by the Board). Because, under longstanding policy, the Board employs a relaxed standard for the introduction of evidence (rather than following the Federal Rules of Evidence), we believe there will be relatively few instances in which the Board does not allow evidence that should have been allowed, or includes evidence that should not have been allowed. In those relatively few instances, however, in which the Board makes an improper (in the Administrator's view) ruling on an evidentiary matter, it is appropriate that, where practicable, the Administrator, as the final agency arbiter, includes within, or excludes the evidence from, the record. Where the Administrator takes review of a case, the parties may comment on the Board's decision, including whether evidence that was excluded by the Board should have been included, and whether evidence that was included by the Board should have been excluded. If the provider does not agree with the Administrator's ruling as to the composition of the record, it may pursue its objections with a court. We believe that, in most cases, a provider will have advance notice as to any issues concerning the inclusion or exclusion of evidence, but in any instance the provider believes that it was surprised by the Administrator's action, it is adequately protected by pursuing its judicial remedies (it may also seek reopening from the Administrator). We note that in any case in which the Administrator takes review, his or her precise reasoning on legal or policy issues or on the weight to be given certain evidence may be unanticipated by a provider, yet there has never been (nor, we submit, a need for) a formal process to make objections prior to seeking judicial review.

Q. Board Actions in Response to Failure To Follow Board Rules (§ 405.1868)

In the proposed rule, we sought to specify how the Board would exercise its authority under section 1878(e) of the Act to respond to: (1) Intentional delaying tactics by a provider or intermediary; or (2) a failure by the provider or intermediary to timely heed a Board order or rule. We proposed that, if a provider fails to meet a filing or procedural deadline or other requirement set by the Board, the Board may dismiss the hearing request or take other appropriate action. We also proposed that, if the intermediary failed to meet any filing or procedural deadlines or other Board requirements, the Board would have the right to issue a decision based on the written record submitted to that point or to take other appropriate action. (We note, however, that the text of the proposed rule inadvertently failed to reflect this specific proposal, which we have adopted and incorporated into the text of this final rule.)

We have adopted our proposals. We have clarified that the Board's authority, in the situation where an intermediary fails to meet a filing deadline or other requirement established by the Board, does not extend to, as a sanction, reversing or modifying the intermediary or Secretary determination or ruling against the intermediary on a disputed issue of law or fact. We have renumbered proposed § 405.1868(d)(3) as paragraph (e) and made corresponding numbering changes. We have also added paragraphs (f) and (g) as a result of adopting the first and second of our ''Three Additional Proposals Under Consideration'' (see section II.W. of this final rule). We have also corrected a citation error in § 405.1868(d)(2), which referred to a Board dismissal decision ''under [non-existent] paragraph (f)(1) of this section.''

Comment: One commenter suggested that, although the provider may be penalized with a dismissal sanction, there is no corresponding sanction for an intermediary. The commenter noted that an intermediary could deliberately fail to file a position paper, have the case heard and decided on the record, and then submit a motion for CMS Administrator review with no provider rebuttal. The commenter believes that the only way the intermediary sanction provision could be effective is if the intermediary would not be allowed to request Administrator review. Another commenter noted that the proposed rule lacked an appropriate sanction against the intermediary for failing, for example, to meet filing deadlines. The commenter suggested that the Board should try to motivate the intermediary into compliance by barring the intermediary from submitting certain evidence, or limiting the materials that the intermediary could submit. Another commenter supported the intermediary sanction proposal and suggested that an intermediary's failure to follow a Board order should be entered in the written record of the proceedings and passed along to CMS as a potential contract violation.

Response: After reviewing all the comments, we are adopting the proposals that we set forth in the proposed rule. Most of the comments we received on this subject came from providers, and reflect a perceived disparate treatment by the Board when a provider, rather than an intermediary, fails to follow a procedural rule or timeframe set by the Board. We proposed two possible actions by the Board, one applicable to a provider and the other applicable to an intermediary. That is, the worst case scenario for a provider would be a dismissal of the appeal by the Board, while the harshest remedy for an intermediary would be the issuance of a decision by the Board based on the written record established at the point of the intermediary's violation. However, we note that, because providers are the proponents of a case, they are responsible for moving the case forward by meeting all deadlines. Additionally, at section 1878(e) of the Act, the Congress has given the Board authority to make rules and establish procedures to carry out its function. Moreover, we note that the Board will have broad discretion to weigh the particular facts at hand in order to decide whether or not an offense merits remedial action. We disagree with the commenter that suggested that an intermediary should not be allowed to request Administrator review if the Board has sanctioned the intermediary and issued a decision on the record. The commenter is incorrect in suggesting that the provider would be unable to rebut the intermediary's position at the Administrator level. It has been longstanding policy that, when the Administrator accepts review, each party may rebut the other party's legal arguments (although the parties are prohibited from submitting additional factual evidence that is not within the record). Moreover, we believe that any sanction assessed by the Board against a party should factor into a reviewing entity's deliberations. For example, where the Board issues a decision based on the written record because an intermediary did not file a position paper, the Administrator, upon review, may look unfavorably at the intermediary's inaction.

We also disagree with the commenter that believed that the proposed rule did not provide for an effective sanction against the intermediary. Again, we are clarifying that the proposed rule did not identify a complete listing of all potential Board sanctions. The Board has the authority to take appropriate action against either party for procedural violations, but appropriate action does not necessarily mean a dismissal or the early issuance of a decision by the Board. We believe that these provisions will alert both parties that the Board has a mechanism in place to effectively stop a delaying tactic, or to redress other procedural violations. As a result, the parties should be less inclined to ignore procedural requirements and, accordingly, be more motivated to meet the deadlines set by the Board.

Finally, we agree with the commenter that suggested that if an intermediary failed to abide by an order of the Board in a timely fashion, the Board could pass along that information to CMS as a possible contract violation. In § 405.1868(c)(2), we codify the Board's ability to take this action.

Comment: One commenter noted that intermediaries often miss Board deadlines for filing position papers, leaving providers unaware of the arguments the intermediary intends to use at the hearing. The commenter suggested that the final rule should require the Board to bar an intermediary from submitting late evidence and arguments, unless there is a showing of good cause. Another commenter suggested that the intermediary's evidence should be excluded from the hearing when the intermediary is noncompliant with Board rules.

Response: We believe that the Board's authority to sanction either party pursuant to section 1878(e) of the Act will serve as a strong impetus for the parties to customarily respond in a timely manner to Board-ordered deadlines. As to the commenters' suggestions regarding the possible exclusion of evidence, we note that it is within the Board's discretion to decide whether a party should be barred from submitting late evidence and arguments.

Comment: Two commenters noted that, contrary to our stated intention in the preamble, the proposed regulations text at § 405.1868(c) did not specify that the Board may issue a decision based on the written record to that point when the intermediary fails to meet a filing or procedural deadline set by the Board.

Response: We agree with the commenters and have added new text at § 405.1868(c)(1) to specify that the Board may issue a decision based on the written record when the intermediary fails to meet a filing deadline or other procedural requirement imposed by the Board.

Comment: One commenter noted that, when an intermediary fails to comply with a Board order or deadline, and the Board issues a decision based on the written record, upon review, the Administrator will remand all these cases back to the Board to consider additional arguments. The commenter suggested that, due to intermediary non-compliance, when the Board decides to close the record and issues a decision based on the written record to that point, the Administrator should not be able to remand the case to the Board or consider the arguments not in the record.

Response: We do not agree that in this situation the Administrator would always remand a case back to the Board to consider any missing arguments. We believe that if the Board issues an early decision based on the written record because of an intermediary violation, the Administrator, on review, may regard the intermediary violation in a negative light. Therefore, we would not expect that the Administrator would necessarily remand the matter to the Board for further evidence, unless the Administrator believes that the Board's decision to close the record itself was erroneous.

R. Scope of Board's Authority in a Hearing Decision (§ 405.1869 and § 405.1829)

Section 1878(d) of the Act provides that the Board has the authority to affirm, modify, or reverse the intermediary's findings on each specific matter at issue in the intermediary's determination and to make other revisions on specific matters, regardless

of whether the intermediary has considered those matters in making its determination. In the proposed rule, we sought to clarify that the Board's power to make additional revisions would not authorize the Board to consider or decide a specific matter at issue for which it lacked jurisdiction or for which it was not timely raised in the hearing request. Additionally, we proposed revising the title of § 405.1829 and made certain corresponding changes to this section relative to intermediary hearings. We are adopting our proposals. We have deleted paragraphs §§ 405.1869(b)(2)(i) and (b)(2)(ii) as superfluous.

Comment: One commenter suggested that, because the Board has the authority to affirm, modify, or reverse an intermediary's determination and to make additional revisions, regardless of whether the intermediary considered those matters, the Board should likewise have the authority to direct intermediaries to make reopenings necessary to effect the ''flow-through'' of issues affecting multiple years. For example, a reversal of interest capitalized by the intermediary in one year, but not subsequently amortized by the provider pending the outcome of the appeal, should be corrected for all years involved.

Response: We disagree with the suggestion that the Board has, or should have, any authority to direct intermediaries to reopen to effect the ''flow-through'' of issues impacting multiple years. The Board's authority is limited by statute to ruling on appeals that have been brought before it. Therefore, the onus is on the provider to identify, on an annual basis, any disputed items on its cost report for that particular cost year, and, if it chooses, and the amount in controversy requirement is met, to file an appeal before the Board for that cost year. The Board is not empowered to rule on cost years not before it, and generally lacks any equitable powers to direct an intermediary to take any specific action. Moreover, even if we had the authority to confer upon the Board the authority to direct the intermediary to reopen previous cost years, we would not do so. Reopenings generally have been a matter of intermediary discretion, and have not been used as a substitute for appeals. We do have the authority to direct intermediaries to conduct reopenings where we provide explicit notice to the intermediary that the intermediary's determination was inconsistent with the applicable law, regulations, CMS Ruling, or CMS general instructions in effect, based on our understanding of those legal provisions at the time that the intermediary determination was made (and not based on any change in policy, whether self-realized or directed by a court).

Comment: Two commenters suggested that the proposed clarification would be inconsistent with the plain meaning of section 1878(d) of the Act, because it imposes impermissible limits on the Board's statutory authority to consider all matters covered by the cost report. One of the commenters believed the policy directly contravened the decision by the D.C. Court of Appeals in *HCA Health Services of Oklahoma* v. *Shalala,* 27 F.3d 614 (D.C. Cir. 1994). In that case, the court stated that ''once Board jurisdiction pursuant to subsection (a) [of section 1878 of the Act] obtains, anything in the original cost report is fair game for a challenge by virtue of subsection (d).''

Response: We disagree with the suggestion that our proposal, specifying that the Board can only make additional revisions to an intermediary determination when it has jurisdiction to grant a hearing on the issue and the issue has been timely raised, is inconsistent with the statute. As we stated in our discussion of ''Adding Issues to Original Hearing Request'' in section II.D., the straightforward language of section 1878(d) of the Act grants the Board the authority to consider a wide range of issues, but does not address the timing for the inclusion of issues. The statutory provision relating to the timing of an appeal is located at section 1878(a)(3) of the Act, wherein it is clearly stated that a provider has the right to request a Board hearing within 180 days after notice of the final determination. Thus, if a provider does not indicate to the Board in a timely fashion that it is dissatisfied with a certain aspect of the final determination, the provider does not satisfy one of the key components for establishing jurisdiction, that is, timeliness. Accordingly, the provider will be unable to dispute that particular issue before the Board. Moreover, we believe that the Board must obtain jurisdiction over an issue before it can rule on the issue. If the Board decides that it lacks jurisdiction over a particular issue, it cannot entertain that issue, despite the language contained in section 1878(d) of the Act. We read section 1878(d) of the Act as permitting the Board to make revisions to cost report line items that flow directly from determinations in which the provider has expressed dissatisfaction and filed a jurisdictionally proper appeal under section 1878(a) of the Act. See *Little Co. of Mary Hosp. and Health Care Ctrs.* v. *Shalala,* 828 F. Supp. 570, 576 (N.D. Ill. 1993), *aff'd* 24 F.3d 984 (7th Cir. 1994).

Finally, we disagree that our proposed clarification is contrary to the decision in *HCA Health Services of Oklahoma* v. *Shalala.* The timing of a request for an appeal is critical to establishing jurisdiction. If a provider does not timely express dissatisfaction to the Board of a particular matter in a final determination and, therefore, does not establish jurisdiction before the Board over that matter, the provider cannot then seek to rely upon section 1878(d) of the Act for relief.

S. Board Hearing Decision and Intermediary Hearing Decision (§ 405.1871, § 405.1831 and § 405.1833)

We proposed to require that the Board's decision, with respect to any issue for which the policy expressed in a CMS instruction (other than a regulation or CMS Ruling) is dispositive, but for which the Board did not affirm the intermediary's adjustment, explain how the Board gave great weight to such instruction (as required by § 405.1867), but did not affirm the intermediary's adjustment.

We are adopting our proposals. We are amending proposed § 405.1871(a)(4) to state that where the Board's decision reverses or modifies an intermediary determination on an issue for which the policy expressed in an interpretive rule (other than a regulation or a CMS Ruling), general statement of policy or rule of agency organization, procedure or practice established by CMS would be dispositive of that issue (if followed by the Board), the Board decision must explain how it gave great weight to such interpretive rule or other such instruction but did not uphold the intermediary's determination on the issue. We are also revising the reference to ''general CMS instructions'' in proposed § 405.1871(a)(4) to read ''other interpretive rules, general statements of policy, and rules of agency organization, procedure or practice established by CMS.'' We are making a similar change to other sections in the proposed regulations text where the term ''general CMS instructions'' appeared.

Relative to intermediary hearings, we have made a technical change to § 405.1831(d) concerning the component within CMS to which intermediary hearing officer decisions should be sent. As the CMS Office of Hearings neither currently receives nor reviews such decisions, we amended this provision to indicate that the decisions should be sent to CMS (currently, the decisions are received by the Center for Medicare Management, a component within CMS). Additionally,

we revised § 405.1833 to clarify that an intermediary hearing decision is final and binding unless the decision is reviewed by a CMS reviewing official. Also, intermediary hearing decisions are subject to the provisions of § 405.1803(d).

Comment: One commenter recommended that the preponderance of the evidence standard of proof be replaced with the Generally Accepted Government Auditing Standards' standard, which is ''sufficient, competent, and relevant evidence that would persuade a reasonable person of the validity of the findings.'' Because CMS has issued manual instructions to comply with Government Auditing Standards, it would be inappropriate to impose a higher standard of proof in the appeal than required by auditing standards.

Response: We are not adopting the comment. We believe the preponderance of the evidence standard to be well-understood and widely used by administrative and judicial tribunals. We do not see any inconsistency between Government Auditing Standards, which pertain to whether audit findings are valid, and our proposal, which pertains to the determination of whether the provider has ultimately met its burden of proof regarding a certain issue.

Comment: Two commenters objected to the statement in the preamble that the Board would be required to explain how it has given great weight to CMS instructions (other than regulations and CMS Rulings) when declining to uphold an intermediary's adjustment. The first commenter stated that it was not clear to which instructions the statement was referring. Moreover, according to the commenter, we have failed to identify any valid reason why the Board should give CMS instructions any weight beyond whatever weight they deserve by reason of their own inherent power to persuade. Only substantive rules that have gone through notice and comment rulemaking have the force and effect of law. The second commenter stated that the proposal was inconsistent with the requirements of the Administrative Procedure Act and offends the authority and independence of the Board. In this commenter's view, the Board should merely be required to acknowledge that it had considered and given weight to the instructions. According to this commenter, the proposal suggests that the Administrator will have grounds to reverse the Board's decision if the Board does not follow the instructions, raising this to the same level as statutes or regulations.

Response: Existing § 405.1867 (issued in 1983) provides that ''the Board must comply with all the provisions of title XVIII of the Act and regulations issued thereunder, as well as CMS Rulings'' and that ''[t]he Board shall afford great weight to interpretive rules, general statements of policy, and rules of agency organization, procedure or practice established by CMS.'' We did not propose to change this provision and we are not doing so. The purpose of the proposal was to require the Board, in order to facilitate Administrator or court review, to explain, where a CMS instruction was seemingly on point, how the Board complied with the existing requirement that it give great weight to the instruction, but nevertheless reversed an intermediary's adjustment. With respect to the commenter's point that it was not clear to which instructions we were referring, the final rule, at § 405.1871(a)(4), uses the language ''an interpretive rule (other than a regulation or CMS Ruling), general statement of policy, or rule of agency organization, procedure or practice established by CMS.''

We are unsure of the meaning of the first commenter's statements: (1) That we had failed to identify a valid reason why the Board should give CMS instructions any weight beyond whatever weight they deserved by reason of their own inherent power to persuade; and (2) that only substantive rules that have gone through notice and comment rulemaking have the force and effect of law. To the extent that the commenter was arguing that we were proposing that CMS instructions (other than regulations and CMS Rulings) were binding on the Board, this is incorrect. Under current § 405.1867, CMS instructions (other than regulations and CMS Rulings) are not binding on the Board, but rather must be given great weight by the Board, and, again, we did not propose to change this regimen. In many cases, if an instruction is squarely on point and is given great weight by the Board, the instruction may be determinative of the outcome. However, that is not always the case (hence our proposal to explain how an instruction was given great weight but was not determinative). If the commenter was asserting that only substantive rules that have gone through notice and comment rulemaking are entitled to some level of automatic deference by the Board, we disagree. As noted above, § 405.1867 has long provided that CMS instructions other than regulations or CMS Rulings are entitled to great weight by the Board. Moreover, CMS Rulings and some regulations are not substantive (that is, legislative) rules, and yet CMS Rulings and all CMS regulations are binding on the Board under § 405.1867. Finally, we note that courts are required to give controlling weight to an agency's interpretation of its regulations, unless plainly erroneous or inconsistent with the regulation. See *Thomas Jefferson University* v. *Shalala,* 512 U.S. 504, 512 (1994). It would be anomalous if the Board were not required to give great weight to a manual instruction that (unless plainly erroneous or inconsistent with the regulation) would be given controlling weight by a court.

Comment: One commenter suggested a refinement in the proposal that the Board must explain how it gave great weight to a CMS instruction (other than a regulation or CMS Ruling) that would be dispositive of the issue if followed by the Board but nevertheless did not uphold the intermediary's determination. The commenter stated that the requirement should be limited to published instructions distributed or available to providers, which would include policy positions published in the **Federal Register**, but which would not include individual letters to CMS internal components or to other individuals.

Response: By ''instructions,'' we mean an interpretive rule (other than a regulation or CMS Ruling), general statement of policy, or rule of agency organization, procedure or practice established by CMS. The Board is already required, by virtue of § 405.1867, to give great weight to these instructions. For purposes of our proposal, we do not believe it is necessary or advisable to amend the types of instructions for which the Board is required to give great weight.

Comment: One commenter stated that there should be a deadline for decisions to be made by the Board from, as applicable, the date of the hearing, the date of the agreement for an on-the-record hearing, or the date a jurisdictional challenge is submitted. A deadline would assure all the parties that the Board's decision would be issued by a certain date, that follow-up from all parties would not be necessary, and that cases would not get lost in the system. The same commenter also recommended that ''the instructions'' include various timeframes as guidelines for the Board to follow, which would increase the efficiency of monitoring the cases for all parties.

Response: We decline generally to prescribe by rule the time by which the Board must issue decisions. We believe the Board is in the best position to manage its own docket and determine when it can issue decisions. Some cases

will be more complicated than others or otherwise will take longer to resolve. For example, Board members may or may not be in complete agreement about all of the issues, or there may be Board vacancies that may affect the quorum necessary for issuing a decision. This rule does prescribe the time for the Board to issue an EJR decision (or a determination that the request for EJR is incomplete), because the statute places a time limit on the issuance of EJR decisions by the Board.

T. Administrator Review (§ 405.1875)

In the proposed rule, we offered clarifications to the existing procedures for obtaining Administrator review of a Board decision. For example, we proposed to clarify that the date the Administrator decision is rendered is the date the Administrator signs the decision, not the date the decision is mailed. We also provided a list of the types of final Board decisions that would be subject to immediate review by the Administrator. In addition, we specified that the Administrator would have the authority to remand a matter not only to the Board, but also to any component of HHS or CMS, or to an intermediary.

We are adopting our proposed clarifications. In § 405.1875(b)(1) and § 405.1875(b)(5), pertaining to the illustrative list of criteria for obtaining Administrator review, and in § 405.1875(e)(3)(i), relating to the authorities upon which the Administrator's decision may rely, we have made a technical change, replacing ''general CMS instructions'' with ''other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.'' In § 405.1875(e)(3), we revised the language that stated the Administrator's decision ''must'' rely on certain authorities to the Administrator's decision ''may'' rely on those authorities, in order not to suggest that the Administrator's decision must rely on an authority (such as a prior decision of the Board), that is on point but not persuasive. (Note that current § 405.1875(g)(4) states that the Administrator ''may'' rely on prior decisions of the Board, the Administrator and the courts.) We have also made certain organizational changes to paragraphs § 405.1875(c)(1) and § 405.1875(c)(2), moving material from § 405.1875(c)(2) to § 405.1875(c)(1), and have made a number of minor wording changes.

Comment: A commenter objected to our proposal to add § 405.1875(f)(5) to state that the Administrator has the authority to remand a matter to a component of HHS, CMS, or to an intermediary under appropriate circumstances (including, but not limited to, the purpose of implementing a court's order). According to the commenter, the proposal is inconsistent with section 1878(f) of the Act, which states that a decision of the Board will be final, unless the Administrator reverses, affirms, or modifies the Board's decision. If the Administrator disagrees with the Board's determination, the Administrator can take necessary action without further delaying provider appeal rights. There is no need for the Administrator to remand to a lower component of his or her own agency to obtain necessary input. This commenter also disagreed with our proposal to revise § 405.1877(b) to state that an Administrator remand of a Board decision is not subject to judicial review. The commenter believes that the proposal is without legal support of any kind, and is simply intended to delay indefinitely providers' judicial appeal rights.

Response: We recognized in the proposed rule that there is a split of authority on the issue of whether the Administrator has remand authority. We continue to believe, however, that the better view is that he or she does. *See Gulf Coast Home Health Services, Inc.* v. *Califano,* 1978 U.S. Dist. LEXIS 15069 (D.D.C.). From a textual point of view, the fact that section 1878(f) of the Act states that the Secretary may affirm, reverse, or modify a decision of the Board does not mean that the Administrator (as designee of the Secretary) may not also take the lesser action of remanding a case to the Board. We also discern no reason why the Congress would have wanted the Administrator to issue a final decision in a case that the Administrator believed needed further development. The Administrator and the Office of the Attorney Advisor are not well-situated to take additional testimony or develop further facts, seek additional documentation, clarify or perform additional audit findings, etc. Thus, without authority to remand, the Administrator would be forced to choose between possibly disadvantaging the program or the provider in a case that the Administrator believes is not ripe for decision, but that needs further development. In this case, if the Administrator were to issue a decision against the provider, and the provider were to appeal the decision to a court, the likely and ironic result would be that the court would remand the case back to the Administrator or the Board for further findings. In a decision issued against the Medicare program, the program would fare worse than the provider in the first example, as CMS cannot appeal a decision of the Administrator. We believe that a more fair and efficient process is for the Administrator to retain the authority to remand to the Board for further action in appropriate circumstances. We also do not agree with the commenter's assertion that our proposed provision, that an Administrator remand order is not judicially reviewable, is without legal foundation. Remand orders of agencies and courts are interlocutory (non-final) in nature and generally are not subject to immediate review.

Comment: One commenter objected to our proposal to allow immediate Administrator review of discovery or disclosure rulings and subpoenas to which objections were made based on privilege or other protection from disclosure. According to the commenter, neither type of interlocutory (that is, non-final) appeal should be permitted, because neither type is defined by statute to be a final decision. If, however, the Administrator should be given the authority to review immediately Board rulings granting discovery or issuances of subpoenas, the Administrator should also have the authority to review Board rulings denying a discovery request or a request to issue a subpoena.

Response: We believe that our proposal is consistent with the statute, because the statute does not specifically prohibit the Administrator from taking immediate review of non-final Board rulings. We also note that the Administrator, on review of Board actions, has all of the powers that he or she would have had in making the initial decision. See *Homan & Crimen* v. *Harris,* 626 F.2d 1201, 1205 (5th Cir. 1980); 5 U.S.C. 577(b). Thus, we believe that, just as the Board has the authority to rule on discovery or subpoena matters, so too does the Administrator. In the proposed rule, we explained that it was important that the Administrator be able to take immediate review of Board rulings granting discovery or issuing a subpoena over an objection based on privilege or other protection from disclosure because, once complied with, any harm from an inappropriately ordered disclosure cannot be undone. Experience has shown that objections based on privilege or other protection from disclosure will be infrequently made, but, where asserted, will be made in a good faith belief that disclosure will be unduly burdensome or harmful. Moreover, we believe that objections will be made most often by CMS, or by intermediaries on behalf of CMS, with

respect to CMS records in the custody of intermediaries. Because the Board has no statutory authority to compel production of CMS records (including records subject to the Privacy Act), we believe it is appropriate, as a condition to allowing the Board under our regulations to compel the intermediary to produce CMS records, that the Administrator reserve the right to review immediately a Board order compelling production of CMS records.

We are not adopting the commenter's suggestion that Board orders denying discovery should be subject to immediate review. Although we recognize that, in some cases, it may be inconvenient for an intermediary or provider to proceed with its case without discovery that was requested but inappropriately denied, we believe that the potential inconvenience does not rise to the level of the potential harm that could result from inappropriate disclosures, and thus do not believe that the Board proceedings should be potentially disrupted by appeals of Board orders denying discovery or subpoenas, or that it would be a wise use of CMS's resources to present these appeals to the Administrator for his immediate review. Where the Board denies a party's request for a Board order granting discovery or its request for the Board to issue a subpoena, the party may raise the issue, if necessary, in an appeal of the final decision of the Board to the Administrator or to a court, as applicable.

Comment: One commenter objected to the proposal that the date of the Administrator's decision, for purposes of meeting the 60-day requirement in section 1878(f)(1) of the Act is the date it is signed, instead of the date it is mailed or transmitted. This commenter believes that a signed, but untransmitted, decision is not official and can be withdrawn, changed, or otherwise modified before transmission. Further, the date of mailing or transmission is not subject to tampering and can easily be confirmed. Any internal problems with obtaining timely Administrator decisions or transmission following signing should be the responsibility of the agency, and these shortcomings should not prejudice the providers. Use of the date signed, rather than transmitted, is inconsistent with compliance for every other deadline associated with these rules.

Response: We are adopting our proposal without change. The statute requires that the Board's decision will be final unless the Administrator, within 60 days after the provider of services is notified of the Board's decision, ''reverses, affirms or modifies the Board's decision.'' We believe that upon the Administrator's signing of a decision, the reversal, affirmance, or modification action is complete. Our interpretation is reinforced by the statute's provision that the time for which a provider must seek judicial review of an Administrator decision does not begin to run until the provider has received the decision. Thus, we believe our proposal is consistent with the language of the statute. We note that the court in *Sun Towers, Inc.* v. *Heckler,* 725 F.2d 315 (5th Cir. 1984), agreed with this interpretation in rejecting the provider's argument that the Administrator's decision was untimely because it was signed before, but mailed after, the 60th day after the provider received the Board's decision. According to the court in *Sun Towers,* the plain wording of the statute requires only that the Administrator's decision be rendered within 60 days of the provider's receipt of the Board's decision, 715 F.2d at 319, that there is no additional requirement in the statute that the decision be entered on any docket or mailed within 60 days of the provider's receipt of the Board's decision, 715 F.2d at 324, and that, therefore, the Secretary's interpretation that the Administrator's decision is effective upon signing was entitled to deference, 715 F.2d at 324–25.

We are also guided by practical considerations in choosing our interpretation over any other possible interpretation. Under longstanding practice, a signed Administrator decision is returned to the Office of the Attorney Advisor for making copies and for transmitting to the parties. If the Administrator's decision had to be received by the Office of the Attorney Advisor and mailed by the 60th day, the decision would have to be signed several days in advance, thus reducing the already very constricted time period for Administrator review. Although the statute gives the Administrator 60 days after the provider receives the Board's decision to conduct review and render a decision (which by itself is very brief), the period is effectively reduced by our process for seeking Administrator review.

We believe that parties to the Board's decision should have an adequate period in which to decide whether to seek Administrator review, and that, following a notice of intent to review, the parties should have a further period to submit comments on the Board's decision. Therefore, consistent with the existing regulations, we proposed that a party to the Board's decision would have 15 days after receipt of the Board decision to request that the Administrator review it, and that, upon notice from the Administrator of intent to review the decision, a further 15-day period for submitting comments will be granted. (Having received no comments on this proposal, we are adopting it without change.) If the Administrator decision had to be mailed by the 60th day, we would have to consider reducing the period of time in which the parties could submit comments on the Board's decision.

Finally, we disagree with the commenter that providers are disadvantaged by our proposal. Regardless of whether the Administrator has 60 days in which to sign a decision or 60 days in which to mail a decision, the provider's time in which to seek judicial review of the Administrator's decision does not run until it receives the decision.

Comment: One commenter stated that the criteria we proposed for Administrator review should be exclusive, not illustrative.

Response: We are not adopting the commenter's suggestion. Although we believe we have listed all of the reasons that would motivate the Administrator to take review, we nevertheless have chosen not to make the list exclusive. This is because there can be more reasons than we have listed, and also because we do not want to encourage any litigation on whether the reason given by the Administrator for taking review in any given case actually fits within the criteria specified. By making the list of reasons for review illustrative and not exclusive, the parties may have greater opportunity to seek Administrator review of Board decisions. This is a matter of convenience to providers, as it would allow them to appeal to the Administrator, rather than having to file a lawsuit, and is more than a convenience to the intermediaries, as the intermediaries may not appeal to court an unfavorable Board decision that becomes the final decision of the Secretary because the Administrator did not take review.

Comment: Several commenters stated that, regarding the proposal that the Administrator be able to include or exclude evidence that was excluded or included by the Board, the Administrator should only be able to rule on the record, because it is the record on which the Board based its decision, and it is the only thing a court may use to overturn a Board or Administrator decision.

Response: We believe it is appropriate that, as the Secretary's designee, the Administrator should have the final

administrative say as to whether the Board admitted evidence presented to it that it should have excluded, or excluded evidence presented to it that it should have admitted, or that the record before the Board was incomplete and should be supplemented on remand. Notwithstanding the commenters' assertions, we believe that our proposal is consistent with the authority courts have in reviewing administrative agency decisions, including decisions of the Board or the Administrator.

U. Judicial Review (§ 405.1877)

In the proposed rule, we sought to clarify the existing procedures for timely obtaining judicial review of a Board or Administrator decision. In particular, we proposed to clarify that a provider is not required to seek Administrator review in order to obtain judicial review. In the final rule, we have made certain technical changes to the proposed text, including clarifying language in § 405.1877(c)(3). We have also reorganized proposed § 405.1877(g)(2) and § 405.1877(g)(3) by reversing their order.

Comment: One commenter agreed with the proposal to clarify that, when the Administrator notifies the parties that he will review a Board decision, and does not render a decision within the 60-day period for review, the provider has 60 days from the end of the Administrator review period to file an action for judicial review.

Response: We are adopting the proposal without change. We believe that the clarification will assist providers in understanding the time period for filing for judicial review in this situation.

V. Reopening Procedures (§ 405.1885 through § 405.1889)

Reopening procedures are authorized specifically by our regulations, based on the Secretary's general rulemaking authority in sections 1102(a) and 1871(a) of the Act. The following is a non-exhaustive list of matters that we sought to clarify and revise in the proposed rule:

- CMS retains the ultimate authority as to whether an intermediary may or may not reopen a matter.
- A change in legal interpretation or policy by CMS in a regulation, CMS Ruling, or CMS general instruction (whether self-directed or influenced by a court decision) is not a basis for reopening a determination.
- CMS may direct an intermediary to reopen a determination in order to implement a final agency decision, a final court judgment, or an agreement to settle an administrative appeal or a lawsuit.
- A decision whether to reopen or not to reopen a determination is not subject to further administrative review or judicial review.
- For own motion reopenings, the notice of reopening must be mailed no later than 3 years after the date of the determination.
- In cases not involving an allegation of fraud, a provider's request for reopening must be received no later than 3 years after the date of the determination; however, the intermediary or reviewing entity may issue the notice of reopening within a reasonable time after the expiration of the 3-year period.
- A final determination may not be reopened after the 3-year period, except where the determination was procured by fraud or similar fault.
- An intermediary may reopen a determination that is pending on appeal before the Board or the Administrator; the intermediary may also reopen a determination for which no appeal has been taken, but for which the time to appeal to the Board has not yet expired.
- An intermediary or reviewing entity is obliged to provide written notice of the reopening, allow the parties an opportunity to present additional evidence, and notify the parties at the conclusion of the reopening of the results, including any revisions.
- Any matter considered during the course of a reopening, but not subsequently revised, is not appealable through any revised determination issued after the reopening; as a corollary, the scope of appeal of a revised determination is limited to the specific revisions that were made in the revised determination.

We are adopting our proposals. We added clarifying language to § 405.1885(a) to emphasize that only the entity that made the original determination or decision may conduct the reopening of the determination or decision. We have also added clarifying language to § 405.1885(b)(2) to state that, if a request for reopening is made timely, for example, shortly before the expiration of the 3-year period specified therein, the request remains timely, notwithstanding that the notice of reopening required by § 405.1887 is issued after the expiration of the 3-year period. We also clarified in § 405.1885(b)(2) that the rules for the date of receipt of a reopening request be consistent with our revised definition of ''date of receipt'' at § 405.1801(a). We have also added clarifying language to § 405.1885(c)(3) to provide that a matter may be reopened while it is pending on appeal before the Administrator.

Comment: Two commenters suggested that, if items within the scope of a reopening notice are not in fact revised, and therefore, are not appealable (because the time to appeal the original NPR has expired), providers will be forced to file concurrent appeal and reopening requests in order to protect their appeal rights. Another commenter noted that its intermediary had denied reopening requests solely on the basis that an appeal existed for that year. The commenter wanted intermediaries to be informed that an existing appeal before the Board should not be a factor in considering whether or not to accept or deny a reopening request for the same issues.

Response: Where an intermediary has issued a notice of reopening, the provider should not assume that matters within the scope of the reopening will in fact be revised. Therefore, to the extent that the appeal period has not already run by the time that the provider receives the reopening notice, the provider should file an appeal if it wishes to preserve the right to appeal matters covered by the notice of reopening. (If the time to appeal has already expired by the time the provider receives the notice of reopening, the only way in which the provider may appeal a matter addressed in the notice of reopening is if the matter is specifically revised in a revised determination issued after the notice of reopening.) With respect to the second commenter's point, and with respect to reopenings that are within an intermediary's discretion (that is, CMS has not directed the intermediary to reopen or not to reopen), we agree that an intermediary should not, as a matter of course, deny a request to reopen and revise an item simply because the item is already the subject of an appeal. However, we do not agree that the existence of an appeal or of an appeal right should never be taken into consideration by an intermediary in deciding whether to reopen. Rather, the intermediary should evaluate the totality of the circumstances surrounding the reopening request and decide whether it wishes to reopen.

Comment: Two commenters cited the 7th Circuit decision in *Edgewater Hospital* v. *Bowen*, 857 F.2d 1123 (7th Cir. 1989), as justification for their opposition to our proposal limiting a provider's right to appeal matters stated in a notice of reopening, but not addressed in a revised determination. One of the commenters agreed with a statement made by the court that ''[i]t simply is nonsense to argue that the

only matters which the provider can appeal are those actually changed by the intermediary.'' The other commenter suggested that we erroneously misread the *Edgewater* decision, asserting that our attempt to overrule binding judicial precedent was without legal authority.

Response: In the proposed rule (69 FR 35741 through 35742), we explained that the *Edgewater* decision, in which the court held that the provider was entitled to appeal issues that were within the scope of the reopening notice, but were not subsequently revised in the revised NPR, was based on the court's reading of the regulations. We also noted that in *Edgewater*, the provider still had time to appeal the first NPR at the time that the intermediary issued its notice of reopening. The district court stated that the provider was unaware that the two cost items that it appealed (from the revised NPR) were not going to be revised until it received the revised NPR (at which time it was too late to appeal the items from the original NPR). The court of appeals indicated that its decision may have been based in part on fairness concerns.

We believe that our existing regulations were clear that only if a matter is actually revised as a result of a reopening may that matter be appealed through an appeal of the revised determination. Nonetheless, we believe that we have addressed the *Edgewater* court's concerns in this final rule by: (1) The language in new § 405.1887(b) and new § 405.1889(b) (both of which explicitly state that a matter that was a subject of a reopening notice but not subsequently revised may not be appealed through an appeal of the revised determination); and (2) putting providers on explicit notice that if they wish to appeal an issue that is contained in an NPR, they should file a timely appeal from that NPR and not assume that the issue will be resolved in a revised NPR (even if the issue is addressed in a notice of reopening). For the sake of clarity, wherever the proposed text stated that a determination or decision was final and binding unless appealed ''or reopened,'' we have revised the language to read ''or reopened and revised.''

As courts have noted, the reopening procedures are strictly a creature of the Secretary's regulations, and are not required, or specifically authorized, by statute. See *HCA Health Servs. of Oklahoma* v. *Shalala*, 27 F.3d 614, 618 (D.C. Cir. 1994) and *Albert Einstein Med. Ctr.* v. *Sullivan*, 830 F. Supp. 846, 851 (E.D. Pa. 1992), *aff'd* 6 F.3d 778 (3d Cir. 1993). We acknowledge that the *Edgewater* decision was based in part on *Bethesda* and the statutory language. (See *Edgewater*, 857 F.2d at 1132–34.) We also note, however, that the *Edgewater* court's reasoning was specifically rejected by the Ninth Circuit in *French Hospital Medical Center* v. *Shalala*, 89 F.3d 1411, 1417 (1996), which relied on the Medicare regulations. (Id. at 1420 n. 11.) In designing the reopening procedures, we have chosen, as is our prerogative, to extend appeal rights only to those matters actually revised following a reopening. Although *Edgewater* stated that it was ''illogical'' that the plaintiff in the case before it would wish to appeal only the matter that was actually revised and not others that were contained in a notice of reopening, 857 F.2d at 1137, the issue is not what a provider wishes to appeal. Rather, the issue is what a provider should be allowed to appeal. The statute gives a provider the right to appeal matters covered by an initial intermediary determination if the amount in controversy requirement is met and the provider timely requests a Board hearing. If the provider does not pursue its statutory appeal right with respect to a certain item, it loses its right to appeal that item. That right may be resuscitated if that item is actually revised in a revised determination, because, under our longstanding policy, the revised determination is considered a separate and distinct determination to which the intermediary and Board appeals procedures (including the amount in controversy and timely request for hearing requirements) apply. If an item is not actually revised, however, there is no need to extend appeal rights to that matter simply because it was mentioned in a notice of reopening. Courts that rejected providers' arguments that the issuance of a revised determination subjected the entire cost report to appeal did so on the basis that the statutory deadline for appealing matters would be defeated. (See *Anaheim Mem. Hosp.* v. *Shalala*, 130 F.23 845, 852 (9th Cir. 1997) and *HCA Health Services of Oklahoma* v. *Shalala*, 27 F.3d at 620–21 (and cases cited therein)). If we were to allow an appeal of a matter that is addressed in a notice of reopening but not actually revised, there similarly would be a frustration of the statutory deadline for appealing. A matter that is addressed in a reopening, but not revised, remains just as administratively final as an item not addressed in a notice of reopening. To illustrate, suppose a provider claims a certain amount of interest in connection with a borrowing, and the intermediary denies the claim on the basis that the borrowing was unnecessary. If the intermediary later issues a notice of reopening and the interest issue is addressed in the notice of reopening, the intermediary does not send a check to the provider along with the notice of reopening. To the contrary, the claim for the interest remains denied until such time, if ever, there is a revision to the intermediary's original adjustment. Apart from traditional notions of administrative finality, there are practical reasons for not structuring the reopening procedures to allow an appeal of a matter that is addressed in a notice of reopening but not subsequently revised. One court noted that allowing the entire cost report to be subject to appeal based on a reopening notice would discourage the Secretary from reopening determinations for fear of being forced to endure a lengthy appeals process on extraneous issues. *Albert Einstein Med. Ctr.* v. *Sullivan*, 830 F. Supp. at 851. Similarly, if intermediaries knew that they would have to commit resources to defending appeals on matters that are addressed in a notice of reopening but not revised, they may be reluctant to broaden the scope of the notice of reopening. In this regard, we note that there are time limits on issuing a notice of reopening, and intermediaries should be encouraged, rather than discouraged, to include matters in a notice of reopening, even if a closer examination of the matters later may reveal that no revision is appropriate, in order to preserve the opportunity to make revisions.

Comment: Some commenters suggested that there are cases where the intermediary denied valid reopening requests and believe CMS should have the authority to ascertain whether the intermediary complied with CMS policy.

Response: We retain the authority to direct intermediary reopenings; therefore, we may require an intermediary to reopen a determination of that intermediary where we believe it is appropriate (and the time for reopening has not expired).

Comment: Several commenters objected to the proposal that an intermediary denial of a reopening request would not be subject to further review. In particular, commenters suggested that a provider should be entitled to a Board hearing under § 405.1835(a) if an intermediary refuses to reopen when the rules and regulations require the intermediary to do so. It was also suggested that intermediaries have denied reopenings in the past because of personal bias.

Response: Our longstanding policy is that a ''decision'' to reopen or not reopen is not subject to further

administrative or judicial review. (See *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999).) We decline to change our policy. With respect to the suggestion that Board review should be available where an intermediary refuses to reopen, despite the fact that the regulations require the intermediary to do so, the reopening rules as amended require intermediaries to reopen only when directed by CMS to do so. We do not anticipate that intermediaries will fail to comply with a CMS directive to reopen. We have no direct or indirect knowledge of any case where an intermediary denied a reopening due to an alleged personal bias. We suggest that if a provider believes that an intermediary has refused to reopen based on a bias against the provider, the provider should contact CMS. We can investigate any allegations made by a provider, determine if they are in fact supportable and, if so, take appropriate action against the intermediary. CMS could, if appropriate, also direct a reopening.

Comment: Two commenters suggested that because an intermediary must provide written notice of its intention to reopen, it should provide notice quickly; that is, within 30 days of the provider's reopening request. One of these commenters also suggested that all reopened cost reports should be settled within 180 days of receipt of the information necessary to resolve the case.

Response: Although we encourage intermediaries to react to provider requests for reopening as quickly as possible, it would be impractical to have mandated timeframes regarding notices of intention to reopen. Intermediaries have very large workloads and cannot be expected to give immediate attention to each and every provider's written request for reopening. Moreover, as is the case with many reopening requests, an intermediary must often ask a provider to submit additional documentation in support of the provider's allegations. Thus, we do not believe that it is advisable to compel an intermediary to furnish an expedited notice of reopening following a request made by a provider. We expect that intermediaries, within a reasonable time, will either issue a notice of reopening that meets the requirements of § 405.1887, or notify the provider that the intermediary declines to reopen.

Also, due to an intermediary's large workload of cases and the highly technical nature of the cost report and audit process, we do not believe it would be prudent to set timeframes on an intermediary for the resolution of a reopened cost report. (The requirement that a reopened cost report be resolved within a certain time may serve to discourage an already overtaxed intermediary from granting a reopening request.) Again, we note that intermediary reopenings are discretionary and, therefore, a provider reopening request should not be equated with a timely filed provider appeal request, where timeframes for action are clearly established. We suggest that if a provider believes an intermediary is purposely stalling or is acting in an improper manner relative to a reopening request, the provider should contact CMS so that we can determine if the activity is inappropriate and whether action should be initiated against the intermediary.

Comment: One commenter opposed our proposal to allow an intermediary to unilaterally reopen items on a cost report that are on appeal before the Board. The commenter suggested that we provided no rationale for this policy and cited longstanding Medicare policy that, once the Board accepts jurisdiction over an appeal, only the Board should be involved in making any further determinations on that appealed issue. The commenter believes that if the intermediary reopens while an appeal is pending before the Board, the Board could suspend the case, which would result in a slowing down of the appeals process and an exacerbation of the Board's backlog. The commenter recommended that an intermediary should reopen an issue currently pending at the Board only for purposes of implementing an administrative resolution of that issue. Another commenter suggested that allowing the intermediary to reopen an issue under appeal before the Board has the effect of circumventing the Administrator review process. The commenter suggested that if the intermediary reopens, the provider would drop the issue at the Board and the Administrator would not have the opportunity to adjudge the issue. Another commenter suggested that it is overly burdensome to require an intermediary, during the course of an appeal, to notify the Board that a reopening has occurred for an issue that is under appeal. The commenter suggested that the provider is the proper entity to notify the Board when an intermediary reopens during an appeal.

Another commenter suggested deletion of the proposal that an intermediary may reopen a determination for which the time to appeal to the Board has not yet expired. This commenter believed the proposal serves no purpose, because a cost report can be reopened anytime within 3 years of the date of the intermediary's determination.

Response: We disagree with the commenters that suggested that an intermediary should not be permitted to reopen a determination that is being appealed to the Board. We acknowledge that some intermediaries previously would not reopen a determination during the pendency of an appeal. However, we believe that reopening in this instance is justified because of the large volume of work at the Board and the long delays in having cases heard and resolved. Moreover, we are not aware of any legal requirement that would prohibit an intermediary from reopening in this situation. Although we do not expect intermediaries to use this authority frequently, we believe that an intermediary's ability to reopen a determination while a case is before the Board or the Administrator may, in fact, hasten the resolution of the case. We therefore disagree with the commenter that suggested that the appeals process would necessarily be slowed if the intermediary reopened prior to the case being heard. In fact, the reopening could produce a complete resolution of one or all of the issues before the Board or the Administrator.

We disagree with the commenter that suggested that a reopening by an intermediary while a case is pending before the Board would effectively circumvent the Administrator review process. First, the reopening could very well be favorable to a provider, in which case the provider would have no desire to seek Administrator review. Second, we note that any revision to a determination following a reopening may (depending on the amount in controversy remaining) trigger new appeal rights for a provider regarding the revision. If a provider elects to appeal a revised determination following a reopening, the appealed issue(s) may ultimately return to the Board and the Administrator for resolution.

We also disagree with the commenter that suggested that a provider, rather than an intermediary, is the proper party to notify the Board when the intermediary reopens during the course of a Board appeal. Regardless of any possible administrative burden, because the intermediary is the party that initiates a reopening, we believe the intermediary has an affirmative duty to notify not only the provider of the reopening, but also the reviewing entity.

Finally, we disagree with the commenter that suggested that we delete proposed § 405.1885(c)(4), which permits CMS or an intermediary to reopen a determination for which the

time to appeal to the Board has not expired and no appeal has been filed. Although the commenter is correct that a cost report can be reopened anytime within 3 years of the date of the determination, our previous policy was unclear as to whether an intermediary could indeed reopen during the appeals period timeframe. Therefore, we believed a clarification was needed to inform the intermediaries that they have the authority to reopen a determination in the appeal period following the issuance of the determination.

Comment: One commenter suggested that an intermediary should be allowed to reopen a determination that is pending on appeal before the Administrator.

Response: The preamble to the proposed rule stated specifically that the intermediary had such authority (69 FR 35741). We have made corresponding changes to the regulations text at § 405.1885(c)(3) to make clear that a reopening may also be initiated while a case is on appeal before the Administrator.

Comment: One commenter noted that the proposed regulations text at § 405.1885(b)(3) states that ''no determination may be reopened after the 3-year period,'' unless fraud or similar fault is involved. The commenter suggested that the text does not comport with the preamble comments which permit the intermediary to reopen after the 3-year period if the request for reopening is received by the intermediary towards the end of the 3-year period. Another commenter fully supported our proposal clarifying that a provider's request to reopen is timely even if received by the intermediary near the end of the 3-year deadline.

Response: We did not include regulations text language that would permit expressly an intermediary to issue a notice of reopening after the expiration of the 3-year reopening period when the request for reopening is received shortly before the expiration of the 3-year period. Accordingly, we are modifying language at § 405.1885(b)(2) to comport the text of the regulations with our proposed policy.

Comment: A commenter suggested that we should define ''fraud or similar fault,'' because it can be interpreted in many different ways. The commenter suggested that ''fraud'' should be defined as an intentional deception harming the government and resulting in a criminal conviction. ''Similar fault'' should be defined as an intentional deception harming the government and resulting in a judgment in a civil proceeding.

Response: We disagree that we need to define ''fraud or similar fault'' so that an intermediary will be able to better ascertain whether a determination may be reopened after the expiration of the 3-year reopening period. The term ''fraud or similar fault'' was inserted as original language in our reopening regulations, and we are not aware that intermediaries have had any problem in interpreting its meaning. Without defining the term in regulation, we note that when the intermediary invokes ''fraud'' as the reason for reopening beyond the 3-year period, the intermediary has concluded that the determination under review was procured by: (1) An intentionally false oral or written representation of a matter or fact; or (2) by concealment of a matter that should have been disclosed. On the other hand, ''similar fault'' covers determinations that do not rise to the level of fraud. For instance, an intermediary could find that a provider received money that it knew or reasonably should have known it was not entitled to retain.

Comment: A commenter suggested that a provider not be allowed to add issues to a reopening request after the 3-year period has expired.

Response: We note that current Medicare policy prohibits a provider from adding issues to a reopening request after the 3-year period has expired. Reopenings are issue specific; therefore, if a provider receives an NPR that pertains to issues A and B, and it requests a reopening on issue A within the 3-year limit, if it desires the intermediary to reopen issue B, it must also request a reopening of that issue within the 3-year period. Requesting a reopening for one issue does not, whether the intermediary is considering the request, has granted the request, or has issued a revised determination, toll the time for requesting a reopening for any other issue.

Comment: A commenter suggested that a provider would be required only to have ''reasonable'' accompanying documentation in support of a request for reopening, so that the intermediary, after the 3-year period has expired, could not deny the request due to insufficient support. According to the commenter, the intermediary should also be afforded a specific amount of time either to request additional documentation from the provider or to decide whether it wishes to reopen.

Response: We are not prescribing by regulation any particular documentation or evidence that needs to accompany a reopening request. Therefore, any request that is received by the intermediary within the applicable 3-year period and puts the intermediary on fair notice as to the matter or matters for which the provider is seeking reopening (including identifying the determination at issue) should satisfy the minimum requirements for requesting a reopening. Because it is within the intermediary's discretion whether to grant a request to reopen, however, a provider should strive to present the best case possible in support of its request to reopen, which may necessitate, in some cases, sending documentation or other evidence to the intermediary. Because of the large volume of work that the intermediaries process, we decline to impose specific timeframes on the intermediaries for the resolution of provider reopening requests.

Comment: One commenter wanted to know whether, if an intermediary reopens and revises a particular issue on a cost report, that issue would be subject to another 3-year reopening period.

Response: If an intermediary reopens and revises an issue in a cost reporting year, the revision may be appealed in accordance with § 405.1889. Moreover, a new 3-year reopening period would apply to the revised issue. Any issue not revised following a reopening does not carry with it any further appeal rights or a new reopening period with regard to that issue.

Comment: One commenter suggested that the reason that issues are added to Board cases (subsequent to the initial request for hearing) is that the reopening provisions have not been fairly applied in the past. The commenter suggested that the proposed rule reduces the amount of discretion intermediaries have in granting reopenings by prohibiting intermediaries from reopening issues based on a change in legal interpretation or policies.

Response: We disagree with the commenter. We believe that the reopening process is fair. We acknowledge that, because of the wide discretion intermediaries have in deciding whether to reopen or not to reopen, one intermediary may decide differently on a given provider reopening request than another intermediary would based on similar facts. Because reopenings are discretionary, rather than rely upon a reopening request being granted, providers should preserve their appeal rights by including in their request for hearing all issues that they believe were wrongly decided. Finally, we note that, as explained in the August 1, 2002 final rule (67 FR 50096), it has always been Medicare's policy to prohibit intermediaries from reopening based on

a change in legal interpretation or policy.

Comment: One commenter suggested that we incorrectly cited to two court decisions (*Foothill Presbyterian Hospital* v. *Shalala*, 152 F.3d 1132 (9th Cir. 1998) and *HCA Health Services of Oklahoma, Inc.* v. *Shalala*, 27 F.3d 614 (D.C. Cir. 1994)) when we proposed that the scope of appeal of a revised determination is limited to the specific revisions that were made in the determination. The commenter suggested that we are improperly attempting to alter through regulations the scope of the Board's jurisdiction, and that the Board is clearly able to define its own scope of jurisdiction, without interference by CMS.

Response: We disagree with the commenter. Our longstanding reopening policy, as contained in the regulations (that were, in fact, published prior to the formation of the Board) (see § 405.1889), specifies that the scope of appeal of a revised determination is limited to the specific revisions that were made in the revised determination. We cited the cases of *Foothill Presbyterian Hospital* v. *Shalala* and *HCA Health Services of Oklahoma, Inc.* v. *Shalala* as examples of court decisions that agreed that the scope of a provider's appeal of a revised determination is limited to the issues that were specifically revised. (We note that in those cases, the courts were not presented with the factual situation in which the provider was attempting to appeal, through an appeal of a revised NPR, a matter that was addressed in a reopening notice but not subsequently revised.) The Board has jurisdiction only over final determinations made by an intermediary or the Secretary, and only matters specifically revised are part of a final determination.

Comment: One commenter noted that there were no deadlines imposed on intermediaries to process reopening requests and issue revised determinations. The commenter suggested that it is unreasonable to have reopenings pending for more than a year, and recommended that we require intermediaries to complete their actions within 1 year of the date of the notice of reopening.

Response: As we stated previously, it would be inappropriate for us to require intermediaries to resolve reopening requests under strict time constraints. We cannot accurately gauge intermediary workloads (reopening requests comprise only a fraction of the workload) and, therefore, we cannot mandate specific timeframes for intermediaries in their processing of provider reopening requests.

W. Three Additional Proposals Under Consideration

In the proposed rule, we stated that we were considering amending the regulations on three matters that did not surface until very late in the development of the rule. They are as follows:

- An *ex parte* contact with a Board staff member concerning a procedural matter in a case should not be considered a prohibited *ex parte* communication.
- Upon receipt of a credible allegation that a party's counsel has a conflict of interest in the party's representation, the Board would be able to order the party to show cause why the case should not be dismissed or why other appropriate action should not be taken.
- Where an intermediary denies reimbursement for a claimed item without auditing the reimbursement effect of that claim, and the intermediary's denial is reversed by the Board, the Administrator, or a court (making the decision final and non-appealable), we may require the intermediary to determine the reimbursement effect of the claim prior to payment.

We are adopting the proposals. Specifically, we have added § 405.1868(f) to state that *ex parte* communications with Board staff concerning procedural matters are not prohibited. We added § 405.1868(g) to provide that upon receipt of a credible allegation that a party's representative has divulged to that party or to the Board information that was obtained during the course of the representative's relationship with an opposing party and that was intended by that party to be kept confidential, the Board will investigate the allegation. Where the Board determines that it is appropriate to do so, it may take remedial action against the party or the representative (such as prohibiting the representative from appearing before it, excluding such information from the record, or if the overall fairness of the hearing has been compromised, dismissing the case). We amended § 405.1803(d) to state that CMS may require the intermediary to audit any item at issue in an appeal or a civil action before any revised intermediary determination or additional Medicare payment, recoupment, or offset may be determined for an item under paragraph (d)(2) of that section. We added § 405.1831(e) and § 405.1871(b)(4), and amended § 405.1875(f)(5), to provide that, where the intermediary's denial of the relief that the provider seeks before the intermediary hearing officer(s), the Board or the Administrator was based on procedural grounds (for example, the alleged failure of the provider to satisfy a time limit) or was based on the alleged failure to supply adequate documentation to support the provider's claim, and the reviewing entity rules that the basis of the intermediary's denial is invalid, the reviewing entity will remand to the intermediary for the intermediary to make a determination on the merits of the provider's claim.

Comment: In response to our proposal to explicitly state that *ex parte* communications with Board staff concerning procedural matters are not prohibited *ex parte* communications, we received one comment, which was in favor of its adoption.

Response: We are adopting the proposal as new § 405.1868(f). Although *ex parte* communications concerning procedural matters are not prohibited, we strongly encourage parties to avoid them wherever possible. That is, a party should strive to copy the other party(ies) on any written correspondence with Board staff, and, where oral communication with Board staff is to take place, to include the other party(ies) (for example, joining them in a conference call), or, where it is not practical to do so, immediately convey the substance of the oral conversation to the other party(ies).

Comment: We received two comments on our proposal to give the Board the authority to order a party to show cause why it should not dismiss an appeal or take other action where the Board has credible evidence that the party's counsel may have a conflict of interest. One commenter was in favor of the proposal, whereas the second commenter stated that there was no legitimate basis for dismissing a provider's appeal due to a potential or even actual conflict on the part of the provider's representative, and the Board would have no legal authority to take punitive action against the provider. In addition, the latter commenter stated that the suggestion in the proposal that a conflict arose from any use of information obtained from another party while in that party's employ is overbroad and inappropriate because it fails to consider circumstances in which the information was not, or was not intended to be kept confidential, or in which disclosure was expressly permitted by the party from whom the information was obtained.

Response: Our proposal stemmed from our recognition that, not infrequently, persons well-versed in Medicare reimbursement may switch from being a provider representative to

an intermediary representative, or vice versa. In that situation, it would be inappropriate for a representative to use any confidential information obtained during the course of his or her former employment. By ''confidential information,'' we mean information that the representative is not authorized to disclose. We disagree that the Board would not have the authority to dismiss an appeal in a case in which it determines that the provider representative has a conflict of interest. The Board historically has had plenary power to dismiss appeals, even in the absence of a regulation so authorizing, for violation of procedural rules, such as the time in which to file a position paper. (See, for example, *Novacare, Inc.* v. *Thompson*, 357 F. Supp. 2d 268 (D.D.C. 2005)). We believe that we have the authority to allow the Board to dismiss an appeal, if the overall fairness of the hearing has been compromised, or take other appropriate action, based upon a determination by the Board that a provider representative or an intermediary representative has engaged in misconduct. We have adopted our proposal as new § 405.1868(g).

Comment: We received six comments on our third additional proposal. We received two comments on our specific proposal that, where an intermediary denies reimbursement without auditing the effect of the denial, and that determination is later reversed by a final decision of the Board, the Administrator or a court, CMS may require the intermediary to determine the reimbursement effect of the claim prior to payment. We noted that this proposal was similar to our proposal for auditing self-disallowed costs that are ultimately allowed. We received one comment in favor of this proposal and one comment questioning the scope of the audit. The latter commenter asked in particular what the scope of the audit would be in the example cited in the proposed rule concerning an exception to a provider's ESRD payment rate. The same commenter also asked what the scope of an audit would be in the case in which a provider successfully appeals the issue of whether Medicaid eligible days should be included in the numerator of the Medicaid fraction component of the DSH calculation. That is, would the scope of the audit be restricted to only the Medicaid eligible days issue, or would the intermediary be permitted to look at other potential DSH issues such as total days?

Response: We are adopting this part of the proposal at § 405.1803(d)(3). The scope of the audit will be determined by CMS (in accordance with the decision of the reviewing entity) and will be based on the particular issue(s) before the reviewing entity or the court. The purpose of the audit will be to determine the reimbursement impact of the issue(s) decided by the reviewing entity or court; the purpose is not to make additional adjustments or to reach other issues that were not appealed by the provider.

Comment: We received four comments on our related proposal that, where an intermediary or CMS determines that reimbursement for an item should be disallowed on one basis and that determination is later reversed, the intermediary should then have the opportunity to determine whether reimbursement should be denied for any other reason. We stated that it is potentially a waste of resources for a decision maker to consider all possible reasons why an item or request (for example, a provider's request for an exception to its ESRD payment rate) would not be allowed where the intermediary has a good faith belief that its determination is correct, and given that the determination may never be challenged or, if challenged, may be upheld. One commenter stated that this proposal, along with the greater body of proposed amendments, is designed to have a chilling effect on the willingness and capacity of providers to appeal legitimate concerns. Another commenter stated that providers expend great resources in preparing for an appeal, and that allowing intermediaries to create new arguments, even after a decision from the Board, would simply lead providers to forego meritorious appeals simply because the intermediary had greater resources than the provider. The appeals process would be futile if a provider could not ever obtain final relief due to the intermediary's repeated use of delay tactics. The third commenter was concerned that this proposal, if adopted, could be interpreted to allow CMS or the intermediary to re-challenge an issue following a Board decision, as long as the basis for the challenge was not originally raised. All issues related to a dispute should be considered in the appeal at the same time. The fourth commenter stated that the intermediary has full opportunity to raise whatever objections it has, with respect to a claimed cost, in connection with its audit and review of the provider's submitted cost report. In the event of an appeal, the intermediary has another opportunity to change or supplement its position in proceedings before the Board. The intermediary should not have a third or potentially endless opportunity, even after a final administrative or judicial decision on an appeal, to deny payment for reasons not raised before and outside of the usual 3-year reopening period. According to the commenter, this proposal is grossly unfair to providers, particularly in view of the fact that CMS holds the amount in controversy from the time an intermediary effects a disallowance until an appeal is resolved, and is contrary to the Secretary's purported concern about the backlog of pending appeals.

Response: We agree that intermediaries should not be able to delay indefinitely the resolution of an issue on appeal by making an endless series of objections. Our proposal was not designed to prolong unnecessarily cases before the Board or to discourage providers from pursuing appeals. Rather, it was intended to address the difficulties that intermediaries and CMS face in allocating a finite amount of resources among their many responsibilities. We continue to believe that, in the situation in which an intermediary makes a good faith determination that the provider is not entitled to the relief it seeks because it has failed to satisfy a condition that is a necessary prerequisite to that relief, it makes little sense for the intermediary to devote its resources to exploring whether the provider meets other necessary conditions for the relief it seeks. For example, if an intermediary determines that a provider is not entitled to claim an item because it failed to meet a statutory or regulatory deadline, the intermediary should not have to spend resources in determining whether the provider met the substantive requirements for entitlement to the item, to guard against the possibility that a court may declare the denial invalid. (Our proposal was motivated in part by the actual situation in which an intermediary disallowed a provider's claim for a loss on depreciation because the underlying transaction took place after December 1, 1997. The provider subsequently argued that the transaction took place prior to December 1, 1997, due to a special law enacted by the State legislature in 1998 to address specifically the transaction at issue, and also argued that our regulation interpreting the statute as preventing claims for losses on depreciation for transactions that occurred on or after December 1, 1997 was invalid. The provider indicated that it would argue to a court that, if it was successful in its claim that the transaction was timely, the intermediary should be prevented from arguing that the provider did not satisfy the

substantive requirements for claiming a loss on depreciation. The claim at issue involved approximately $30 million in Medicare reimbursement.) Likewise, if an intermediary determines that a provider has not met a clearly prescribed documentation requirement, and the Board agrees, but the provider is successful in convincing the Administrator or a court to overturn the Board's decision, the provider should not simply be awarded the reimbursement without the intermediary having the opportunity to determine whether the provider was entitled to it on the merits. We are adopting the proposal, but are limiting its applicability to the situation in which the intermediary makes an adjustment on the cost report, or otherwise denies the relief the provider seeks, for procedural reasons (for example, the alleged failure to meet a deadline) or lack of documentation. Where the reviewing entity disagrees with the basis for the denial, it must remand the case to the intermediary for a determination on the merits. We are adding new paragraph (e) to § 405.1831 and new paragraph (b)(4) to § 405.1871 and are amending § 405.1875(f)(5) to effectuate the finalized proposal.

X. Technical Revisions

We proposed certain technical revisions to the following sections: § 413.30(c)(1), § 413.30(c)(2), § 413.40(e)(5), § 413.64(j)(1), § 417.576, and § 417.810. We received no comments on our proposed technical revisions and are adopting them as proposed. We note that we inadvertently failed to include regulations text for our proposed revision to § 413.30(c)(2) and have corrected that omission in this final rule.

Y. Effective Date

This section is new. We proposed no specific effective date, but two commenters made suggestions for an effective date.

Comment: One commenter said that the effective date for the final rule should be for cost reporting periods beginning on or after at least 3 months after the rule is published in the **Federal Register**. In the alternative, the final rule should be effective with respect to cost reports, reopenings, and appeals filed, requested, or issued on or after at least 9 months after the rule is published in the **Federal Register**. Providers need time to put into effect, digest, and react to the massive changes in approach set forth in this final rule. Another commenter said that the final rule should not be applied retroactively to pending appeals. Particularly troublesome would be an application of the rules that would prohibit a provider from adding issues to an appeal more than 60 days after the filing deadline for the appeal. A retroactive application of the new 60-day limit would violate the due process rights of providers whose otherwise valid claims would be extinguished by a retroactive regulation. Even ''grandfathering'' current appeals would prejudice some providers. For example, if the proposals on requesting an extension of the time to request a Board hearing were effective upon the issuance of a final rule, providers that have relied on their ability to receive good cause for an extension to file an appeal may be barred from bringing the appeal if it is determined that the amount of time that has passed since the issuance of their NPR is longer than the ''reasonable time'' to file the appeal. The final rule, if enacted as proposed, would violate a provider's rights by changing the rules of procedure in the middle of the appeal process. The commenter recommended that we issue an interim final rule, which would not apply to currently pending appeals or to currently existing claims that could give rise to an appeal. Use of an interim final rule would allow the public an opportunity to comment on an appropriate effective date.

Response: We do not agree that it is necessary to make the rule effective for cost reporting periods beginning at some point after the effective date of the rule, or that it is necessary to publish this rule as an interim final rule or a final rule with comment. Although the proposed rule was published on June 25, 2004, giving providers adequate notice of the potential provisions of the final rule, we are taking certain precautions to ensure that no provider is disadvantaged by the timing of our procedural changes. First, the rule is generally effective 90 days after publication in the **Federal Register**. Second, we are providing special rules for adding issues to appeals pending as of the effective date, and for requesting an extension of time, for good cause, of the date to seek a Board or intermediary hearing officer hearing. For appeals pending before an intermediary hearing officer(s) or the Board prior to the effective date of this rule, a provider that wishes to add one or more issues to its appeal must do so by the expiration of the later of the following periods: (1) 60 days after the expiration of the applicable 180-day period prescribed in § 405.1811(a)(3) (for intermediary hearing officer hearings) or § 405.1835(a)(3) (for Board hearings); or (2) 60 days after the effective date of this rule. For appeals filed on or after the effective date of this rule, the provisions of § 405.1811(c) and § 405.1835(c) apply. With respect to requests for good cause extensions under § 405.1813 (intermediary hearing officer hearings) and § 405.1836 (Board hearings), providers that have not filed a timely appeal as of the effective date of this rule and that wish to seek an extension of the time limit for filing an appeal based on good cause, have an additional 60 days after the effective date of this rule to seek an extension without meeting the ''reasonable time'' requirements of revised § 405.1813 and § 405.1836 (but must meet all other requirements of those sections). Finally, and as noted above in section II.D.1. of this final rule, the requirement that a provider must self-disallow a specific item(s) by following the applicable procedures for filing a cost report under protest, if the provider seeks payment that it believes may not be allowable or may not be in accordance with Medicare policy, is effective for cost reporting periods ending on or after December 31, 2008.

Z. Children's Health Graduate Medical Education Program (CHGME)

This section is new. We made no proposals specific to appeals involving the CHGME program, but received one comment.

Comment: One commenter noted that our proposed rule did not address appeals that may be filed by children's hospitals under the CHGME program. The commenter stated that any appeal under the CHGME program must be placed on a ''fast track'' for the Board and the Health Resources and Services Administration Administrator. The commenter recommended that a specific set of regulations be created to specifically address the CHGME program's unique timeframes for appeals.

Response: The CHGME payment program, as authorized by section 340E of the Public Health Service Act, 42 U.S.C. 256e, provides funds to children's hospitals to address disparity in the level of Federal funding for children's hospitals that results from Medicare funding for graduate medical education. Public Law 106–310 amended the CHGME statute to extend the program through FY 2005. Under 42 U.S.C. 256e, a children's hospital with a CHGME program is a hospital with a Medicare provider agreement. Therefore, CHGME appeals are governed by Part 405, Subpart J—Expedited Determinations and Reconsiderations of Provider Service Terminations, and

Procedures for Inpatient Hospital Discharges. We do not believe it is necessary at this time to issue regulations that are specific to the CHGME program. Rather, the Board will schedule and hold hearings on any CHGME appeals that may be filed in accordance with the requirements of the regulations at 42 CFR Part 405 Subpart R—Provider Reimbursement Determinations and Appeals. We note that the statute does not require that CHGME appeals be placed on a ''fast track.'' However, the Board gives expedited treatment to CHGME appeals, because payments to children's hospitals are based on the hospital's share of the total amount of direct and indirect Medicare education funding available in any Federal fiscal year (FFY). This funding is part of a fixed payment pool that is distributed prior to the close of each FFY. As a result, appeals before the Board are heard on an accelerated hearing schedule so that a provider's reimbursement is accurately determined prior to the end of the FFY.

III. Provisions of the Final Rule

For purposes of this section, we are using the same lettering sequence that appeared in the proposed rule and in section II in this final rule. In each lettered section, we provide a listing of the changes from the proposed rule that we have made in this final rule. A detailed description of the proposals is contained in the proposed rule, and a detailed explanation regarding the changes appears at section II in the preamble to this final rule. Certain Minor technical revisions may not be listed in this section III or discussed above in section II.

B. Calculating Time Periods and Deadlines (§ 405.1801(a) and § 405.1801(d))

- Section 405.1801(a)—''Date of Receipt'' is revised.
- Section 405.1801(d)—''Calculating time periods and deadlines'' is revised.

D. Provider Hearing Rights (§ 405.1803(d), § 405.1811, and § 405.1835))

- Section 405.1811(a)(1)(ii) and § 405.1835(a)(1)(ii)—The provisions of these paragraphs are effective for cost reporting periods that end on or after December 31, 2007.
- Section 405.1811(b) and § 405.1835(b)—These paragraphs are clarified to provide that, where required information is not submitted with the hearing request, the intermediary hearing officer or Board, as applicable, may dismiss with prejudice the appeal, or take any other remedial action that the reviewing entity considers appropriate.
- Section 405.1835(c)(3)—We have deleted the language in this paragraph pertaining to a request to add issues following a reopening.
- Section 405.1811(b)(2)(i) and § 405.1835(b)(2)(i)—We have revised the hearing rights criteria in these paragraphs to allow a provider to explain why it is unable to determine whether payment is correct as a result of not having access to underlying information.
- Section 405.1835(b)(4)—We are adding this paragraph to require a provider under common ownership or control to furnish additional information regarding its parent corporation and related providers, and to provide: (1) A statement that no other provider to which it is related has a pending hearing request or appeal on any of the same issues contained in the provider's hearing request for the relevant timeframe; or (2) a statement that a pending appeal(s) exist(s), and the provider name(s) and provider number(s), and the case number(s) (if assigned), for such appeal(s).
- Miscellaneous—We have rectified, where appropriate, minor wording inconsistencies between § 405.1811, which pertains to intermediary hearings, and § 405.1835, which pertains to Board hearings.

E. Provider Requests for Good Cause Extension of Time Period for Requesting Hearing (§ 405.1813 and § 405.1836)

- 405.1813(e)(1)—We have made a technical change concerning the component within CMS to which intermediary hearing officer decisions should be sent.
- Miscellaneous—We have made minor, non-substantive wording changes to make § 405.1813 and § 405.1836 consistent, wherever possible.

F. Intermediary Hearing Officer Jurisdiction (§ 405.1814)

- Section 405.1814(a)(1)(ii)—We have amended § 405.1814(a)(2) (and § 405.1840(a)(2) relating to Board jurisdiction) to explain that the preliminary determination of the scope of the reviewing entity's jurisdiction consists of a review as to whether the request for hearing was timely and whether the amount in controversy has been met.
- Miscellaneous—We made minor technical changes to other portions of § 405.1814 and conformed language in § 405.1814 to that in § 405.1840, wherever possible.

G. CMS Reviewing Official Procedure (§ 405.1834)

- Section 405.1834(d)(2)—This paragraph has been revised to provide that the 60-day period for noticing review begins from the date of the intermediary hearing officer decision.
- Section 405.1834(e)(2)—We have clarified that the CMS reviewing official's review of an intermediary hearing officer decision would not be limited to a hearing on the written record if certain criteria are met.
- Miscellaneous—We have made technical changes to proposed § 405.1834(b), § 405.1834(c) and § 405.1834(e)(3) concerning the component within CMS to which intermediary hearing officer/CMS reviewing official decisions should be sent.
- Section 405.1834(d)(1)—We clarified language pertaining to own motion review by the Administrator.
- Section 405.1834(e)(1)(i)—We have revised § 405.1834(e)(1) to state that the CMS reviewing official must give great weight to ''other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.''

H. Group Appeals (§ 405.1837)

- Section 405.1837(b)(1)—This paragraph is revised to clarify that commonly owned or operated providers must bring as a group appeal a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS rulings that is common to providers and that pertains to cost reporting periods ending in the same calendar year.
- Section 405.1837(b)(1) and § 405.1837(b)(2)—We have revised § 405.1837(b)(1) (with respect to mandatory group appeals) and § 405.1837(b)(2) (with respect to optional group appeals) to provide that one or more of the providers in the group may, as a matter of right, appeal more than one cost reporting period for purposes of meeting the $50,000 amount in controversy requirement, and, subject to the Board's discretion, may appeal more than one cost reporting period that is the subject of the group appeal for other purposes, such as convenience. Illustrative examples follow the text of § 405.1837(b)(1).
- Section 405.1837(b)(3)—This paragraph is revised to clarify that, whereas one or more commonly owned or operated providers may initiate a mandatory group appeal, at least two providers are required to initiate an optional group appeal.

• Section 405.1837(c)(2)—This paragraph was revised to use the term ''item'' rather than ''cost.''

• Section 405.1837(c)(4)(ii), § 405.1837(e)(2), § 405.1837(d)(3), and § 405.1837(d)(4)—We have revised § 405.1837(c)(4)(ii) and § 405.1837(e)(2), and have deleted § 405.1837(d)(4) in order to permit the Board to make jurisdictional determinations at any time. We have deleted proposed § 405.1837(d)(3) to permit the Board to conduct various proceedings prior to making jurisdictional findings.

• Section 405.1837(e)(1) and § 405.1837(e)(2)—We have deleted certain language in proposed § 405.1837(e)(2) and have revised § 405.1837(e)(1) to provide that, with respect to mandatory group appeals, absent a notice from the providers that the group is fully formed, the Board may issue an order requiring the providers to demonstrate that there is at least one commonly owned or controlled provider that is a potential addition to the group. With respect to optional group appeals, we have revised § 405.1837(e)(1) to provide that, absent a notice from the providers that the group is fully formed, the Board will issue an order that the group is fully formed or will issue general instructions that set forth a schedule for the closing of optional group appeals.

• Section 405.1837(e)(2)—This paragraph is revised to provide that the Board will not dismiss any group appeal hearing request for failure to meet the amount in controversy requirement until the Board has determined that the group is fully formed.

• Section 405.1837(e)(5), § 405.1837(e)(6)—We have deleted language from proposed § 405.1837(e)(5) that stated that the Board must grant a request to join a group appeal if the request is unopposed by the group members and is received by the Board prior to a final decision by the Board on the appeal. We have revised this paragraph to provide that, as a general rule, where a provider has appealed an issue through a group appeal, it may not subsequently request the Board to transfer that issue to a single provider appeal. We provide an exception to the general rule in the case of a group appeal that does not meet the jurisdictional requirements where the Board determines that the requirements for a group appeal are not met. We have moved the language in proposed § 405.1837(e)(6), which stated that a denial by the Board of a request to join a group is without prejudice to the provider bringing a separate appeal, to § 405.1837(e)(4). We have also incorporated proposed § 405.1837(e)(7) into § 405.1837(e)(4).

I. Amount in Controversy (§ 405.1839)

• Section 405.1839(c)(4)—We are adding this paragraph to provide that, where a provider has requested a hearing before an intermediary and the amount in controversy is subsequently determined to be at least $10,000, the appeal will be transferred to the Board. Where the amount in controversy changes to an amount less than the minimum for a Board appeal due to the settlement, transfer or abandonment of an issue, the Board retains jurisdiction. Where the amount in controversy changes to an amount less than the minimum for a Board appeal due to a more accurate assessment of the amount in controversy, the Board will not retain jurisdiction.

J. Board Jurisdiction (§ 405.1840)

• Section 405.1840(b)(1)—We have updated the regulatory citations to the coverage appeals process and the Quality Improvement Organization appeals process.

• Section 405.1840(c)(2) and § 405.1840(c)(3)—In paragraph § 405.1840(c)(2) we corrected a citation to a specific paragraph of § 405.1842, and in § 405.1840(c)(3), we clarified citations to specific paragraphs of § 405.1875.

• For a discussion of other changes we made to § 405.1840(a)(2), please refer to section III.F. (Intermediary Hearing Officer Jurisdiction) above.

K. Expedited Judicial Review (§ 405.1842)

• Section 405.1842(e)(3)(ii)—We have revised this paragraph to clarify that, upon receiving a request for EJR, the Board will have 30 days either to issue an EJR decision (if the request is complete) or issue a written notice to the provider that the provider has not submitted a complete request.

L. Parties to Proceedings in a Board Hearing or Intermediary Hearing (§ 405.1843 and § 405.1815)

• Section 405.1843(a) and § 405.1815—We have clarified in § 405.1843(a) and in § 405.1815 that it is the Board or the intermediary hearing officer (and not the intermediary) that determines whether an entity is a related organization of the provider, and that such a determination is made in accordance with the principles enunciated in § 413.17.

• Section 405.1843(b)—We have clarified this paragraph to state that, although the Board may call as a witness any employee or officer of HHS or CMS having personal knowledge of the facts and the issues in controversy in an appeal, the Department's Touhy regulations at 45 CFR, Part 2 apply as to whether that employee or officer will appear.

• Section 405.1843(e) and § 405.1843(f)—We have added § 405.1843(e) to provide that a non-party other than CMS may seek leave from the Board to file *amicus curiae* briefing papers with the Board. We have also added new § 405.1843(f) to provide that the Board may exclude from the record all or part of an *amicus curiae* briefing paper.

M. Quorum Requirements (§ 405.1845)

• Section 405.1845(d)(1) —We have clarified that a quorum is not required to issue a dismissal decision, which reflects current Board practice.

• Section 405.1845(f)(2), § 405.1845(g) and § 405.1845(h)—We have made a technical change to proposed § 405.1845(f)(2), and, for clarity, we have renumbered proposed § 405.1845(f)(3) as § 405.1845(g), and accordingly have renumbered proposed § 405.1845(g) as § 405.1845(h).

N. Board Proceedings Prior to Hearing; Discovery in Board and Intermediary Hearing Officer Proceedings (§ 405.1853 and § 405.1821)

• Section 405.1853(b)(2)—We removed the requirement that the Board must find ''good cause'' for extending the deadline for submitting a position paper.

• Section 405.1853(b)(3)—We clarified that the ''time frame to be decided by the Board,'' for purposes of submitting exhibits on the merits of the provider's claim, may be through a schedule specific to a given case or through general instructions. We also revised this paragraph to provide that the general rule, that any supporting exhibits regarding jurisdiction must accompany the position paper, is subject to a Board order or general instructions to the contrary.

• Section 405.1853(e)(2)(i)—This paragraph has been revised to provide that neither CMS, the Secretary nor any Federal agency is subject to the Board discovery process. A party may propound written interrogatories only to another party, and not to a non-party.

• Section 405.1853(e)(2)(ii)—This paragraph has been revised to specifically reference Rule 32(a)(3) of the FRCP governing the allowance of depositions in certain circumstances. We have also revised this paragraph to provide that the Department's Touhy regulations at 45 CFR, Part 2 (Testimony by employees and production of

documents in proceedings where the United States is not a party) will apply as to whether an employee or officer of CMS or HHS will appear at a deposition.

• Section 405.1853(e)(3)(i)—This paragraph has been revised to provide that (unless the time is extended by the Board), discovery requests must be served no later than 120 days before the initially scheduled starting date of the hearing.

• Section 405.1853(e)(3)(ii)—This paragraph has been revised to clarify language concerning when discovery may be ''conducted,'' and to provide that, in the absence of an order or instruction by the Board setting a schedule for the holding of a deposition, a party desiring to take a deposition shall give reasonable notice in writing to the deponent of a scheduled deposition, and unless the Board orders otherwise, the deposition may not be held any later than 45 days before the initially scheduled starting date of the Board hearing. Responses to interrogatories or requests for production of documents must be served no later than 45 days before the initially scheduled starting date of the Board hearing, unless the Board orders otherwise. The requirement that the Board must find ''good cause'' to extend the period for discovery has been deleted.

• Section 405.1853(e)(3)(iv)—We have deleted the requirement that the Board may extend the time to request, conduct, or respond to discovery only upon a showing by the requesting party that it was not dilatory or otherwise at fault.

• Section 405.1853(e)(3)(v)—We have clarified that, upon granting an extension request, the Board has the discretion to reschedule the hearing date (without being required to find that such rescheduling is ''necessary'').

• Section 405.1853(e)(4), § 405.1853(e)(5)(vii)—We have added clarifying language at § 405.1853(e)(5)(vii) to state that nothing in § 405.1853 authorizes the intermediary hearing officer or Board to compel any action from the Secretary or CMS. Accordingly, at § 405.1853(e)(4), we have revised language that stated that a non-party has the ''same'' rights as any party when responding to discovery requests.

• We have made corresponding changes throughout § 405.1821, with respect to discovery in intermediary hearing proceedings, where appropriate.

O. Subpoenas (§ 405.1857)

• We are adding language to proposed § 405.1857(a)(1)(i) to clarify that the Board may not issue a subpoena to CMS or to the Secretary (or to any Federal agency).

• Section 405.1857(a)(2)(i)—We have revised the deadline by which a request for a subpoena for discovery must be received by the Board from 90 days before the date of the hearing to 120 days of the initially scheduled starting date of the hearing.

• Section 405.1857(a)(3)(i)—We have revised the deadline for issuing a subpoena from 75 days before the date of the hearing to 90 days before the initially scheduled starting date of the Board hearing.

• Section 405.1857(a)(4)—We have eliminated the subparagraphs to § 405.1857(a)(4) and have revised this paragraph to provide that the Board may extend the deadlines for requesting a Board subpoena and for the Board to issue a subpoena without a finding of ''good cause.'' We have also revised this paragraph to provide that, if the Board grants an extension to the deadline for requesting a Board subpoena or for the Board to issue a subpoena, the Board has the discretion to reschedule the hearing date without a finding that it was ''necessary'' to do so.

• Section 405.1857(b)(3)—We have clarified this paragraph to state that the Board ''uses'' (rather than ''must comply'' with) the FRCP and the Federal Rules of Evidence for guidance.

• Section 405.1857(c)(3)—This section is redesignated from proposed § 405.1857(c)(4) and the references to HHS and CMS are removed.

• Section 405.1857(d)(2)(v)—With respect to the situation where a party or non-party seeks immediate review of a Board subpoena, and the Administrator may, but chooses not to, grant or take own motion review of the subpoena, we have revised the language that stated ''the Board's action stands'' to ''the Board's action is not immediately reviewable.''

Q. Board Actions in Response To Failure To Follow Board Rules (§ 405.1868)

• Section 405.1868(c)(1)—We have added this paragraph to provide that, if the intermediary fails to meet any filing or procedural deadlines or other Board requirements, the Board may issue a decision based on the written record submitted to that point or take other appropriate action.

• Section 405.1868(c)—We have added language at the end of this paragraph to clarify that the Board's authority, in the situation where an intermediary fails to meet a filing deadline or other requirement established by the Board, does not extend to, as a sanction, reversing or modifying the intermediary or Secretary determination or ruling against the intermediary on a disputed issue of law or fact.

• Miscellaneous—We have renumbered proposed § 405.1868(d)(3) as § 405.1868(e) and made corresponding numbering changes. We have also added § 405.1868(f) and § 405.1868(g) as a result of adopting the first and second of our ''Three Additional Proposals Under Consideration'' (see section II.W. of this final rule).

R. Scope of Board's Authority in a Hearing Decision (§ 405.1869 and § 405.1829)

• Section 405.1869(b)(2)(i), § 405.1869(b)(2)(ii)—We have deleted these paragraphs as superfluous.

S. Board Hearing Decision and Intermediary Hearing Decision (§ 405.1871, § 405.1831 and § 405.1833)

• Section 405.1871(a)(4) and *§ 405.1831(c)*—We are revising the proposed rule's reference to ''general CMS instructions'' to read ''other interpretive rules, general statements of policy, and rules of agency organization, procedure or practice established by CMS.''

• Section 405.1831(d)—We have made a technical change concerning the component within CMS where intermediary hearing officer decisions should be sent.

T. Administrator Review (§ 405.1875)

• Section 405.1875(b)(1) and § 405.1875(b)(5)—We have made a technical change, replacing ''general CMS instructions'' with ''other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.''

• Section 405.1875(e)(3)—We have clarified language to state that the Administrator's decision ''may'' (instead of ''must'') rely on certain authorities.

• Miscellaneous—We have made certain organizational changes to paragraphs § 405.1875(c)(1) and § 405.1875(c)(2), moving material from § 405.1875(c)(2) to § 405.1875(c)(1), and have made a number of minor wording changes.

U. Judicial Review (§ 405.1877)

• Minor technical changes were made to this section.

V. Reopening Procedures (§ 405.1885 Through § 405.1889)

• Section 405.1885(a)—Clarifying language has been added to emphasize that only the entity that made the

original determination or decision may conduct the reopening of the determination or decision.

• Section 405.1885(b)(2)—We added clarifying language to state that if a request for reopening is made timely, the request remains timely notwithstanding that the notice of reopening required by § 405.1887 is issued after the expiration of the 3-year period. We also clarified that the calculation of the date of receipt for a reopening request must be consistent with the definition of ''date of receipt'' in § 405.1801(a).

• Section 405.1885(c)(3)—We added clarifying language to provide that a matter may be reopened while it is pending on appeal before the Administrator.

W. Three Additional Proposals Under Consideration

• Section 405.1868(f)—We have added this section to address *ex parte* communications with Board staff.

• Section 405.1868(g)—We have added this section to provide the Board with authority to address allegations that a party's representative has divulged confidential information obtained during the course of the representative's relationship with an opposing party.

• Section 405.1803(d)—We have revised this section to state that CMS may require the intermediary to audit any item at issue in an appeal or a civil action before any revised intermediary determination or additional payment, recoupment, or offset may be determined under paragraph § 405.1803(d)(2) of that section.

• Section 405.1831(e) and § 405.1871(b)(4)(added) § 405.1875(f)(5)(amended)—We have added § 405.1831(e) and § 405.1871(b)(4), and have revised § 405.1875(f)(5), to provide that, where the intermediary's denial of relief was based on procedural grounds or on the failure to supply adequate supporting documentation, and the reviewing entity rules that the basis of the intermediary's denial is invalid, the reviewing entity will remand to the intermediary to make a determination on the merits.

X. Technical Revisions

• Section 413.30(c)(2)—We have added language, that was consistent with our proposal, but which was inadvertently omitted from the proposed text, to state that the time required by the intermediary to review a request for a SNF exception is considered good cause for the SNF to request an intermediary hearing.

Y. Effective Date

• The rule is generally effective 90 days after publication in the **Federal Register**.

• For appeals pending before an intermediary hearing officer(s) or the Board prior to the effective date of this rule, a provider that wishes to add one or more issues to its appeal must do so by the expiration of the later of the following periods:

++ Sixty days after the expiration of the applicable 180-day period prescribed in § 405.1811(a)(3) (for intermediary hearing officer hearings).

++ Section 405.1835(a)(3) (for Board hearings); or (ii) 60 days after the effective date of this rule. For appeals filed on or after the effective date of this rule, the provisions of § 405.1811(c) and § 405.1835(c) apply.

• With respect to requests for good cause extensions under § 405.1813 (intermediary hearing officer hearings) and § 405.1836 (Board hearings), providers that have not filed a timely appeal as of the effective date of this rule and that wish to seek an extension of the time limit for filing an appeal based on good cause, have an additional 60 days after the effective date of this rule to seek an extension without meeting the ''reasonable time'' requirements of revised § 405.1813 and § 405.1836 (but must meet all other requirements of those sections).

• As noted above in section II.D.1. of this final rule, the requirement that a provider must self-disallow a specific item(s) by following the applicable procedures for filing a cost report under protest, if the provider seeks payment that it believes may not be allowable or may not be in accordance with Medicare policy, is effective for cost reporting periods ending on or after December 31, 2008.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA of 1995 requires that we solicit comment on the following issues:

• The need for the information collection and its usefulness in carrying out the proper functions of our agency.

• The accuracy of our estimate of the information collection burden.

• The quality, utility, and clarity of the information to be collected.

• Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

For the purpose of discussion, below is a summary of the information collection requirements (ICRs) associated with the hearing process. Because these collection requirements are collected in accordance with an administration action or audit or both, they are not subject to the PRA, as stipulated under 5 CFR 1320.4.

A. Information Collection Requirements (ICRs)—The Introduction § 405.1801

Section 1801(b) states that in order to be paid for covered services furnished to Medicare beneficiaries, a provider must file a cost report with its intermediary as specified in § 413.24(f). For the purposes of this subpart, the term ''provider'' includes a hospital, hospice program, critical access hospital, comprehensive outpatient rehabilitation facility, renal dialysis facility, Federally qualified health center, home health agency, rural health clinic, skilled nursing facility, and any other entity included under the Act. The burden associated with this requirement is the time and effort associated with a provider completing and submitting a cost report. While this requirement is subject to the PRA, it is currently approved under the following OMB control numbers.

Provider type	OMB Control No.	Expiration date
Hospital	0938–0050	05/31/2008
Hospice Program	0938–0758	01/31/2008
Critical Access Hospital	0938–0050	05/31/2008
Comprehensive Outpatient Rehabilitation Facility	0938–0037	01/31/2008
Renal Dialysis Facility	0938–0236	**06/30/2007
Federally Qualified Health Center	0938–0107	06/30/2008

Provider type	OMB Control No.	Expiration date
Home Health Agency	0938–0022	**04/30/2007
Rural Health Clinic	0938–0107	06/30/2008
Skilled Nursing Facility	0938–0463	**04/30/2007

** We have initiated the OMB approval process to obtain reapproval of the currently approved information collection request.

B. ICRs Regarding the Right to Intermediary Hearing; Contents of, and Adding Issues to, Hearing Request § 405.1811

This section outlines the criteria a provider must meet to request an intermediary hearing. As stated in § 405.1811(b), a provider's request for an intermediary hearing must be submitted in writing to the intermediary. The request must demonstrate that the provider meets all of the requirements for an intermediary hearing, explain the dissatisfaction for each item at issue, and contain a copy of the intermediary or Secretary's determination under appeal.

In addition to the initial hearing request described in § 405.1811(b), § 405.1811(c) explains the criteria providers must meet to add issues to a hearing request that has already been filed. The specific Medicare payment issues must be submitted in writing to the intermediary hearing officer. The request to add additional issues to a hearing request must be received no later than 60 days after the expiration date of the applicable 180-day time limit.

The burden associated with the requirements listed in both § 405.1811(b) and § 405.1811(c) is the time and effort associated with drafting and submitting the written requests to the intermediary hearing officer. While these requirements impose burden, we believe they are exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

C. ICRs Regarding Good Cause Extension of the Time Limit for Requesting an Intermediary Hearing § 405.1813

As stated in § 405.1813(a)(3), an intermediary must dismiss any hearing requests received after the 180-day time limit, except that the hearing officer may extend the deadline if the provider demonstrates good cause. A provider must explain, in writing, why it could not file the hearing request in a timely manner.

The burden associated with this requirement is the time and effort associated with drafting and submitting the written request for a deadline extension. While this requirement imposes a burden, we believe it is exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

D. ICRs Regarding CMS Reviewing Official Procedure § 405.1834

Section 405.1834(a) states that a provider, dissatisfied with a final decision by the intermediary hearing officer(s), may request further administrative review of the decision. Section 405.1834(c) explains the submission criteria for such a request. The Office of Hearings cannot receive the request later than 60-days after the provider receives the final decision of the intermediary hearing officer. The request must be in writing with an attached copy of the intermediary hearing officer decision in question, and any additional supporting information.

The burden associated with this requirement is the time and effort associated with drafting the written request for further administrative review, gathering the necessary supporting information, and submitting the request to the Office of Hearings. While this requirement imposes burden, we believe it is exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

E. ICRs Right to Board Hearing; Contents of, and Adding Issues to, Hearing Request § 405.1835

Section 405.1835(a) discusses the criteria a provider must meet to request a Board hearing. Section 405.1835(b) states a provider's request for a Board hearing must be submitted in writing to the Board. In addition, § 405.1835(b) outlines the required contents of the written submission to the Board. The request must demonstrate that the provider meets all of the requirements for a Board hearing, explain the provider's dissatisfaction for each item at issue, and contain a copy of the intermediary or Secretary's determination under appeal.

Section 405.1835(c) explains the criteria providers must meet to add issues to a hearing request that has already been filed. The specific Medicare payment issues must be submitted in writing to the Board. The Board cannot receive the request to add additional issues to a hearing request later than 60-days after the expiration date of the applicable 180-day time limit.

The burden associated with the information collection requirements listed in both § 405.1835(b) and § 405.1835(c) is the time and effort required to draft and submit the written requests to the Board. While these requirements impose burden, we believe they are exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

F. ICRs Regarding Good Cause Extension of Time Limit for Requesting a Board Hearing § 405.1836

As stated in § 405.1836(a), the Board must dismiss any hearing requests received after the 180-day time limit. However, the Board may extend the deadline if the provider demonstrates good cause. A provider must explain, in writing, why it could not file the hearing request in a timely manner.

The burden associated with this requirement is the time and effort necessary to draft and submit a written explanation showing good cause. While this requirement imposes a burden, we believe it is exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

G. ICRs Regarding Group Appeals § 405.1837

Providers have the right to a Board hearing as an individual or as a part of a group appeal with other providers. Sections 405.1837(a)(1 through 3) list the eligibility criteria associated with submitting a Board hearing request as part of a group appeal. Section 405.1837(b) discusses the usage and filing of group appeals. Specifically, § 405.1837(b)(1) states that two or more providers under common ownership or control must bring a group appeal on an issue that is common to the providers and for which there is an aggregate amount in controversy of at least $50,000. Under § 405.1837(b)(2), two or more providers not under common ownership or control may bring a group appeal on an issue involving at least $50,000. A written request for a Board hearing as a group must be submitted in accordance with the criteria listed in § 405.1837(c).

Section 405.1837(e)(2) explains that the Board may make jurisdictional findings under § 405.1840 at any time. This section also explains that providers may request jurisdictional findings by notifying the Board in writing. The written request must notify the Board that the group appeal is fully formed or that the providers believe they have satisfied all of the requirements for a group appeal hearing request.

Section 405.1837(e)(4) states that a provider may submit a request to the Board to join a group appeal. The request must be granted by the Board unless it is opposed by any of the existing group members. In addition, the provider must make the request prior to Board issuance of one of the decisions specified in § 405.1875(a)(2).

While all of the aforementioned requirements in § 405.1837 impose burden, we believe they are exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

H. ICRs Regarding Amount in Controversy § 405.1839

Section 405.1839(a) discusses the amount in controversy requirements for single provider appeals. This requirement pertains to both intermediary hearings and Board hearings. The provider is required to demonstrate that if the appeal were successful, the provider's total program reimbursement for each cost reporting period under appeal increases by at least $1,000 but by less than $10,000 for an intermediary hearing or by at least $10,000 for a Board appeal.

Similarly, § 405.1839(b) explains that groups must satisfy the amount in controversy requirement as well. The group must demonstrate that in the event of a successful appeal, the total program reimbursement for the cost reporting periods under appeal increases by a minimum of $50,000.

All of the information collection requirements listed in § 405.1839 are exempt from the PRA as defined in 5 CFR 1320.4. The information collection is part of an administrative action. Information collections conducted or sponsored during the conduct of a criminal or civil action, or during the conduct of an administrative action, investigation, or audit are not subject to the PRA.

I. ICRs Regarding Expedited Judicial Review § 405.1842

The burden associated with this section is detailed in § 405.1842(d). Providers have the right to request expedited judicial review of a legal question relevant to a specific matter at issue in a Board appeal. The Board must have jurisdiction to conduct a hearing on the matter and must determine that it lacks the authority to decide a legal question. Specifically, a provider must submit a request in writing to the Board and to each party to the appeal. The request must contain the information specified in § 405.1842(d)(1) and § 405.1842(d)(2).

The burden associated with this requirement is the time and effort necessary for a provider to draft and submit the written request to the Board and to each party to the appeal. While this requirement imposes a burden, we believe it is exempt from the PRA as defined in 5 CFR 1320.4. Information collected during the conduct of a criminal investigation or civil action or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities is not subject to the PRA.

V. Regulatory Impact Statement

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA), September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995, Public Law No. 104–4, and Executive Order 13132.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). This rule does not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any one year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and we certify, that this rule will not have a significant economic impact on a substantial number of small entities. The only burden attached to this final rule is the information collection burden associated with filing a request for an intermediary or Board hearing. This proposed rule does not impose any new paperwork burdens on providers. It will merely require providers to prepare their hearing requests in a more expedited fashion. Moreover, this final rule will lessen the time it takes small entities to pursue appeals and receive decisions.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing analyses for section 1102(b) of the Act because we have determined, and we certify, that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals. Again, the only impact on small rural hospitals would be the potential increase in the amount of time a provider would need to file a request for an intermediary or Board hearing. This final rule does not impose any new paperwork burdens on providers. It merely proposes requiring providers to prepare their hearing requests in a more expedited fashion.

Moreover, this final rule will lessen the time it takes rural hospitals to pursue appeals and receive decisions.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This rule will have no consequential effect on the governments mentioned or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Because this regulation does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 417

Administrative practice and procedure, Grant programs-health, Health care, Health insurance, Health maintenance organizations (HMO), Loan programs-health, Medicare, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR Chapter IV as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

Subpart R—Provider Reimbursement Determinations and Appeals

■ 1. The authority citation for part 405, subpart R continues to read as follows:

Authority: Secs. 205, 1102, 1814(b), 1815(a), 1833, 1861(v), 1871, 1872, 1878, and 1886 of the Social Security Act (42 U.S.C. 405, 1302, 1395f(b), 1395g(a), 1395l, 1395x(v), 1395hh, 1395ii, 1395oo, and 1395ww).

■ 2. Section 405.1801 is amended by—
■ A. In paragraph (a), removing '' 's '' from Administrator's in the term ''Administrator's review''.
■ B. In paragraph (a), removing the definition of ''date of filing'' and ''date of submission of materials.''
■ C. In paragraph (a), adding a definition for ''CMS reviewing official.''
■ D. In paragraph (a), revising the definition for ''Date of receipt.''
■ E. In paragraph (a), adding the definitions of ''CMS reviewing official procedure'', ''Intermediary hearing officer(s)'', and ''Reviewing entity'' in alphabetical order.
■ E. Revising paragraph (b).
■ F. Adding a new paragraph (d).

The revisions and additions read as follows:

§ 405.1801 Introduction.

(a) Definitions. * * *

* * * * *

CMS reviewing official means the reviewing official provided for in § 405.1834.

CMS reviewing official procedure means the review provided for in § 405.1834.

* * * * *

Date of receipt means the date a document or other material is received by either of the following:

(1) *A party or an affected nonparty.* A party or an affected nonparty, such as CMS, involved in proceedings before a reviewing entity.

(i) As applied to a party or an affected nonparty, the phrase ''date of receipt'' in this definition is synonymous with the term ''notice,'' as that term is used in section 1878 of the Act and in this subpart.

(ii) For purposes of an intermediary hearing, if no intermediary hearing officer is appointed (or none is currently presiding), the date of receipt of materials sent to the intermediary hearing officer is presumed to be the date that the intermediary stamps ''Received'' on the materials.

(iii) The date of receipt by a party or affected nonparty of documents involved in proceedings before a reviewing entity is presumed to be 5 days after the date of issuance of an intermediary notice or a reviewing entity document. This presumption, which is otherwise conclusive, may be overcome if it is established by a preponderance of the evidence that such materials were actually received on a later date.

(2) *A reviewing entity.* For purposes of this definition, a reviewing entity is deemed to include the Office of the Attorney Advisor. The determination as to the date of receipt by the reviewing entity to which the document or other material was submitted is final and binding as to all parties to the appeal. The date of receipt of documents by a reviewing entity is presumed to be the date—

(i) Of delivery where the document or material is transmitted by a nationally-recognized next-day courier (such as the United States Postal Service's Express Mail, Federal Express, UPS, DHL, etc.); or

(ii) Stamped ''Received'' by the reviewing entity on the document or other submitted material (where a nationally-recognized next-day courier is not employed). This presumption, which is otherwise conclusive, may be overcome if it is established by clear and convincing evidence that the document or other material was actually received on a different date.

Intermediary hearing officer(s) means the hearing officer or panel of hearing officers provided for in § 405.1817.

Reviewing entity means the intermediary hearing officer(s), a CMS reviewing official, the Board, or the Administrator.

(b) *General rules.* (1) *Providers.* In order to be paid for covered services furnished to Medicare beneficiaries, a provider must file a cost report with its intermediary as specified in § 413.24(f) of this chapter. For purposes of this subpart, the term ''provider'' includes a hospital (as described in part 482 of this chapter), hospice program (as described in § 418.3 of this chapter), critical access hospital (CAH), comprehensive outpatient rehabilitation facility (CORF), renal dialysis facility, Federally qualified health center (FQHC), home health agency (HHA), rural health clinic (RHC), skilled nursing facility (SNF), and any other entity included under the Act. (FQHCs and RHCs are providers, for purposes of this subpart, effective with cost reporting periods beginning on or after October 1, 1991).

(2) *Other nonprovider entities participating in Medicare Part A.* (i) Providers of services, as well as, other entities (including, but not limited to health maintenance organizations (HMOs) and competitive medical plans (CMPs) (as described in § 400.200 of this chapter)) may participate in the Medicare program, but do not qualify as providers under the Act or this subpart.

(ii) Some of these non-provider entities are required to file periodic cost reports and are paid on the basis of information furnished in these reports. These non-provider entities may not obtain an intermediary hearing or a

Board hearing under section 1878 of the Act or this subpart.

(iii) Some other hearing will be available to these nonprovider entities, if the amount in controversy is at least $1,000.

(iv) For any nonprovider hearing, the procedural rules for a Board hearing set forth in this subpart are applicable to the maximum extent possible.

* * * * *

(d) *Calculating time periods and deadlines.* In computing any period of time or deadline prescribed or allowed under this subpart or authorized by a reviewing entity the following principles are applicable:

(1) The day of the act, event, or default from which the designated time period begins to run is not included.

(2) Each succeeding calendar day, including the last day, is included in the designated time period, except that, in calculating a designated period of time for an act by a reviewing entity, a day is not included where the reviewing entity is unable to conduct business in the usual manner due to extraordinary circumstances beyond its control such as natural or other catastrophe, weather conditions, fire, or furlough. In that case, the designated time period resumes when the reviewing entity is again able to conduct business in the usual manner.

(3) If the last day of the designated time period is a Saturday, a Sunday, a Federal legal holiday (as enumerated in Rule 6(a) of the Federal Rules of Civil Procedure), or a day on which the reviewing entity is unable to conduct business in the usual manner, the deadline becomes the next day that is not one of the aforementioned days.

(4) For purposes of paragraph (d) of this section, the reviewing entity is deemed to also include—

(i) The intermediary, if the intermediary hearing officer(s) is not yet appointed (or none is currently presiding); and

(ii) The Office of the Attorney Advisor.

■ 3. Section 405.1803 is amended by:

■ A. In the first sentence of paragraph (a) introductory text, remove the citation ''(see § 405.1835(b))'' and add ''(as described in § 405.1835(a)(3)(ii))'' in its place.

■ B. In the second sentence of paragraph (b), remove the phrase ''after the date of the notice.'' and add ''after the date of receipt of the notice.'' in its place.

■ C. Adding new paragraph (d).

The addition reads as follows:

§ 405.1803 Intermediary determination and notice of amount of program reimbursement.

* * * * *

(d) *Effect of certain final agency decisions and final court judgments; audits of self-disallowed and other items.*

(1) This paragraph applies to the following administrative decisions and court judgments:

(i) A final hearing decision by the intermediary (as described in § 405.1833 of this subpart) or the Board (as described in § 405.1871(b) of this subpart).

(ii) A final decision by a CMS reviewing official (as described in § 405.1834(f)(1) of this subpart) or the Administrator (as described in § 405.1875(e)(4) of this subpart) following review of a hearing decision by the intermediary or the Board, respectively.

(iii) A final, non-appealable judgment by a court on a Medicare reimbursement issue that the court rendered in accordance with jurisdiction under section 1878 of the Act (as described in § 405.1842 and § 405.1877 of this subpart).

(2) For any final agency decision or final court judgment specified in paragraph (d)(1) of this section, the intermediary must promptly, upon notification from CMS—

(i) Determine the effect of the final decision or judgment on the intermediary determination for the cost reporting period at issue in the decision or judgment; and

(ii) Issue any revised intermediary determination, and make any additional program payment, or recoup or offset any program payment (as described in § 405.371 of this subpart), for the period that may be necessary to implement the final decision or judgment on the specific matters at issue in the decision or judgment.

(3) CMS may require the intermediary to audit any item, including any self-disallowed item, at issue in an appeal or a civil action, before any revised intermediary determination or additional Medicare payment, recoupment, or offset may be determined for an item under paragraph (d)(2) of this section.

(4) For any final settlement agreement, whether for an appeal to the intermediary hearing officer(s) or the Board or for a civil action before a court, the intermediary must implement the settlement agreement in accordance with paragraphs (d)(2) and (d)(3) of this section, unless a particular administrative or judicial settlement agreement provides otherwise.

■ 4. Section 405.1811 is revised to read as follows:

§ 405.1811 Right to intermediary hearing; contents of, and adding issues to, hearing request.

(a) *Criteria.* A provider (but no other individual, entity, or party) has a right to an intermediary hearing, as a single provider appeal, for specific items claimed for a cost reporting period covered by an intermediary or Secretary determination for the period, but only if—

(1) The provider has preserved its right to claim dissatisfaction with the amount of Medicare payment for the specific item(s) at issue, by either—

(i) Including a claim for a specific item(s) on its cost report for a period if the provider seeks payment that it believes to be in accordance with Medicare policy; or

(ii) Effective with cost reporting periods that end on or after December 31, 2008, self-disallowing a specific item(s) by following the applicable procedures for filing a cost report under protest, if the provider seeks payment that it believes may not be allowable or may not be in accordance with Medicare policy (for example, if the intermediary lacks discretion to award the reimbursement the provider seeks for the item(s)),

(2) The amount in controversy (as determined in accordance with § 405.1839 of this subpart) is at least $1,000 but less than $10,000; and

(3) Unless the provider qualifies for a good cause extension under § 405.1813 of this subpart, the date of receipt by the intermediary of the provider's hearing request must be—

(i) No later than 180 days after the date of receipt by the provider of the intermediary or Secretary determination; or

(ii) When the intermediary determination is not issued (through no fault of the provider) within 12 months of the date of receipt by the intermediary of the provider's perfected cost report or amended cost report (as specified in § 413.24(f) of this chapter), no later than 180 days after the expiration of the 12-month period for issuance of the intermediary determination. The date of receipt by the intermediary of the provider's perfected cost report or amended cost report is presumed to be the date the intermediary stamped ''Received'' unless it is shown by a preponderance of the evidence that the intermediary received the cost report on an earlier date.

(b) *Contents of request for an intermediary hearing.* The provider's

request for an intermediary hearing must be submitted in writing to the intermediary, and the request must include the elements described in paragraphs (b)(1) through (b)(3) of this section. If the provider submits a hearing request that does not meet the requirements of (b)(1), (b)(2), or (b)(3) of this section, the intermediary hearing officer may dismiss with prejudice the appeal, or take any other remedial action he or she considers appropriate.

(1) A demonstration that the provider satisfies the requirements for an intermediary hearing as specified in paragraph (a) of this section, including a specific identification of the intermediary or Secretary determination under appeal.

(2) An explanation, for each specific item at issue (as described in paragraph (a)(1) of this section), of the provider's dissatisfaction with the intermediary or Secretary determination under appeal, including an account of—

(i) Why the provider believes Medicare payment is incorrect for each disputed item (or, where applicable, why the provider is unable to determine whether Medicare payment is correct because it allegedly does not have access to underlying information concerning the calculation of its payment); and

(ii) How and why the provider believes Medicare payment should be determined differently for each disputed item.

(iii) If the provider self-disallows a specific item, a description of the nature and amount of each self-disallowed item and the reimbursement sought for any item.

(3) A copy of the intermediary or Secretary determination under appeal, and any other documentary evidence the provider considers necessary to satisfy the hearing request requirements of paragraphs (b)(1) and (b)(2) of this section.

(c) *Adding issues to the hearing request.* After filing a hearing request in accordance with paragraphs (a) and (b) of this section, a provider may add specific Medicare payment issues to the original hearing request by submitting a written request to the intermediary hearing officer, only if the following requirements are met:

(1) The request to add issues complies with the requirements of paragraphs (a)(1) and (b) of this section as to each new issue.

(2) The specific matters at issue raised in the initial hearing request and the matters identified in subsequent requests to add issues, when combined, satisfy the requirements of paragraph (a)(2) of this section.

(3) The intermediary hearing officer receives the request to add issues no later than 60 days after the expiration of the applicable 180-day period prescribed in paragraph (a)(3) of this section.

■ 5. Section 405.1813 is revised to read as follows:

§ 405.1813 Good cause extension of time limit for requesting an intermediary hearing.

(a) A request for an intermediary hearing that is received by the intermediary after the applicable 180-day time limit prescribed in § 405.1811(a)(3) of this subpart must be dismissed by the intermediary hearing officer(s), except that the hearing officer(s) may extend the time limit upon a good cause showing by the provider.

(b) The intermediary hearing officer(s) may find good cause to extend the time limit only if the provider demonstrates in writing it could not reasonably have been expected to file timely due to extraordinary circumstances beyond its control (such as a natural or other catastrophe, fire, or strike), and the provider's written request for an extension is received by the intermediary hearing officer(s) within a reasonable time (as determined by the intermediary hearing officer(s) under the circumstances) after the expiration of the applicable 180-day limit prescribed in § 405.1811(a)(3) of this subpart.

(c) The intermediary hearing officer(s) may not grant a request for an extension under this section if—

(1) The provider relies on a change in the law, regulations, CMS Rulings, or general CMS instructions (whether based on a court decision or otherwise) or a CMS administrative ruling or policy as the basis for the extension request; or

(2) The date of receipt by the intermediary of the provider's extension request is later than 3 years after the date of the intermediary or other determination that the provider seeks to appeal.

(d) If an extension request is granted or denied under this section, the intermediary hearing officer(s) must give prompt written notice to the provider, and mail a copy to each party to the appeal. The notice must include an explanation of the reasons for the decision by the hearing officer(s) and the facts underlying the decision.

(e)(1) A decision denying an extension request under this section and dismissing the appeal is final and binding on the provider, unless the dismissal decision is reviewed by a CMS reviewing official in accordance with § 405.1834(b)(2)(i) of this subpart or reopened and revised by the intermediary hearing officer(s) in accordance with § 405.1885 through § 405.1889 of this subpart. The intermediary hearing officer(s) promptly mails the decision to the appropriate component of CMS (currently the Center for Medicare Management) (as specified in § 405.1834(b)(4) of this subpart).

(2) A decision granting an extension request under this section is not subject to immediate review by a CMS reviewing official (as described in § 405.1834(b)(3) of this subpart). Any decision may be examined during the course of CMS review of a final jurisdictional dismissal decision or a final hearing decision by the intermediary hearing officer(s) (as described in § 405.1834(b)(2)(i) and § 405.1834(b)(2)(ii) of this subpart).

■ 6. A new § 405.1814 is added to read as follows:

§ 405.1814 Intermediary hearing officer jurisdiction.

(a) *General rules.* (1) After a request for an intermediary hearing is filed under § 405.1811 of this subpart, the intermediary hearing officer(s) must do the following:

(i) Determine in accordance with paragraph (b) of this section whether or not it has jurisdiction to grant a hearing on each of the specific matters at issue in the hearing request.

(ii) Make a preliminary determination of the scope of its jurisdiction (that is, whether the request for hearing was timely, and whether the amount in controversy requirement has been met), if any, over the matters at issue in the appeal before conducting any of the following proceedings:

(A) Determining its authority to decide a legal question relevant to a matter at issue (as described in § 405.1829 of this subpart);

(B) Permitting discovery (as specified in § 405.1821 of this subpart); or

(C) Conducting a hearing (as specified in § 405.1819 of this subpart);

(2) The hearing officer(s) may revise a preliminary jurisdictional determination at any subsequent stage of the proceedings in an appeal, and it must promptly notify the parties of any revised determination.

(3) Under paragraph (c)(1) of this section, each intermediary hearing decision (as described in § 405.1831 of this subpart) must include a final jurisdictional finding for each specific matter at issue in the appeal.

(4) If the hearing officer(s) finally determines it lacks jurisdiction over every specific matter at issue in the appeal, it issues a jurisdictional

dismissal decision under paragraph (c)(2) of this section.

(5) Final jurisdictional findings and jurisdictional dismissal decisions by the hearing officer(s) are subject to the CMS reviewing official procedure in accordance with paragraph (d) of this section and § 405.1834(b)(2)(i) and (b)(2)(ii) of this subpart.

(b) *Criteria.* Except for the amount in controversy requirement, the jurisdiction of the intermediary hearing officer(s) to grant a hearing is determined separately for each specific matter at issue in the intermediary or Secretary determination for the cost reporting period under appeal. The hearing officer(s) has jurisdiction to grant a hearing over a specific matter at issue in an appeal only if the provider has a right to an intermediary hearing under § 405.1811. Certain matters at issue are removed from the jurisdiction of the intermediary hearing officer(s); these matters include, but are not limited to, the following:

(1) A finding in an intermediary determination that expenses incurred for certain items or services furnished by a provider to an individual are not payable under title XVIII of the Act because those items and services are excluded from coverage under section 1862 of the Act and part 411 of the regulations. Review of these findings is limited to the applicable provisions of sections 1155, 1869, and 1879(d) of the Act, and of subpart I of part 405 and subpart B of part 478, as applicable.

(2) Certain matters affecting payments to hospitals under the prospective payment system, as provided in section 1886(d)(7) of the Act and § 405.1804 of this subpart.

(3) Any self-disallowed item except as permitted in § 405.1811(a)(1)(ii) of this subpart.

(c) *Final jurisdictional findings, and jurisdictional dismissal decisions by intermediary hearing officer(s).* (1) In issuing a hearing decision under § 405.1831 of this subpart, the intermediary hearing officer(s) must make a final determination of its jurisdiction, or lack thereof, for each specific matter at issue in the hearing decision. Each intermediary hearing decision must include specific findings of fact and conclusions of law as to the jurisdiction of the hearing officer(s), or lack thereof, to grant a hearing on each matter at issue in the appeal.

(2) If the hearing officer(s) finally determines it lacks jurisdiction to grant a hearing for every specific matter at issue in an appeal, it must issue a jurisdictional dismissal decision. Each jurisdictional dismissal decision by the hearing officer(s) must include specific findings of fact and conclusions of law explaining the determination that there is no jurisdiction to grant a hearing on each matter at issue in the appeal. A copy of the jurisdictional dismissal decision must be mailed promptly to each party to the appeal.

(3) A jurisdictional dismissal decision by the intermediary hearing officer(s) under paragraph (c)(2) of this section is final and binding on the parties, unless the decision is reviewed by a CMS reviewing official in accordance with § 405.1834 of this subpart or reopened and revised by the intermediary hearing officer(s) in accordance with § 405.1885 through § 405.1889 of this subpart.

(d) *CMS reviewing official review.* Any finding by the intermediary hearing officer as to whether it has jurisdiction to grant a hearing on a specific matter at issue in an appeal is not subject to further administrative review, except as provided in this paragraph. The intermediary hearing officer's jurisdictional findings as to specific matters at issue in an appeal may be reviewed solely during the course of CMS reviewing official review of one of the intermediary hearing officer decisions specified in § 405.1834(b)(2) of this subpart.

■ 7. Section 405.1815 is revised to read as follows:

§ 405.1815 Parties to proceedings before the intermediary hearing officer(s).

When a provider files a request for an intermediary hearing in accordance with § 405.1811 of this subpart, the parties to all proceedings before the intermediary hearing officer(s) are the provider and, if applicable, any other entity found by the intermediary hearing officer(s) to be a related organization of the provider under the principles enunciated in § 413.17 of this chapter. The parties must be given reasonable notice of the time, date, and place of any intermediary hearing. Neither the intermediary nor CMS may be made a party to proceedings before the intermediary hearing officer(s).

■ 8. Section 405.1821 is revised to read as follows:

§ 405.1821 Prehearing discovery and other proceedings prior to the intermediary hearing.

(a) *Discovery rule: Time limits.* (1) Limited prehearing discovery may be permitted by the intermediary hearing officer(s) upon request of a party, provided the request is timely and the hearing officer(s) makes a preliminary finding of its jurisdiction over the matters at issue in accordance with § 405.1814(a) of this subpart.

(2) A prehearing discovery request is timely if the request by a party is served no later than 120 days before the initially scheduled starting date of the intermediary hearing, unless the intermediary hearing officer(s) extend the time for requesting discovery.

(3) In the absence of a specific schedule for responses set by the intermediary hearing officer(s), responses to interrogatories and requests for production of documents are due according to the schedule agreed upon by the party serving discovery and the party to which the discovery is directed. Responses by a party to interrogatories or requests for production of documents must be served no later than 45 days before the initially scheduled start of the intermediary hearing, unless the intermediary hearing officer(s) orders otherwise. Responses by a nonparty to requests for production of documents must be served no later than 75 days after the date the requests were served on the nonparty, unless the party requesting the documents and the nonparty to which the requests are directed agree on a different time for responding, or unless the intermediary hearing officer(s) extends the time for responding.

(4) Before ruling on a request to extend the time for requesting discovery or for responding to discovery, the hearing officer(s) must give the other parties to the appeal and any nonparty subject to a discovery request a reasonable period to respond to the extension request.

(5) If the extension request is granted, the hearing officer(s) sets a new deadline and has the discretion to reschedule the hearing date.

(b) *Discovery criteria.* (1) *General rule.* The intermediary hearing officer(s) may permit discovery of a matter that is relevant to the specific subject matter of the intermediary hearing, provided the matter is not privileged or otherwise protected from disclosure and the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate. In determining whether to permit discovery, and in fixing the scope and limits of any discovery, the hearing officer(s) uses the Federal Rules of Civil Procedure and Rules 401 and 501 of the Federal Rules of Evidence for guidance.

(2) *Limitations on discovery.* Any discovery before the intermediary hearing officer(s) is limited as follows:

(i) A party may request of another party, or of a nonparty other than CMS, the Secretary or any Federal agency, the reasonable production of documents for inspection and copying.

(ii) A party may request another party to respond to a reasonable number of written interrogatories.

(iii) A party may not request admissions, take oral or written depositions, or take any other form of discovery not permitted under this section.

(c) *Discovery procedures. Rights of nonparties: Motions to compel or for protective order.* (1) A party may request discovery of another party to the proceedings before the intermediary hearing officer(s) or of a nonparty other than CMS, HHS or other Federal agency. Any discovery request filed with the intermediary hearing officer(s) must be mailed promptly to the party or nonparty from which the discovery is requested, and to any other party to the intermediary hearing (as described in § 405.1815 of this subpart).

(2) If a discovery request is made of a nonparty to the intermediary hearing, the nonparty has the rights any party has in responding to a discovery request. The rights of the nonparty include, but are not limited to, the right to select and use any attorney or other representative, and to submit discovery responses, objections, or motions to the hearing officer(s).

(3) Each party and nonparty is required to make a good faith effort to resolve or narrow any discovery dispute, regardless of whether the dispute is with another party or a nonparty.

(i) A party may submit to the intermediary hearing officer(s) a motion to compel discovery that is permitted under this section, and a motion for a protective order regarding any discovery request may be submitted to the hearing officer(s) by a party or nonparty.

(ii) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute. A self-sworn declaration describing efforts to resolve or narrow a discovery dispute also must be included with any response to a motion to compel or for a protective order.

(iii) The hearing officer(s) must—

(A) Decide the motion in accordance with this section and any prior discovery ruling; and

(B) Issue and mail to each party and any affected nonparty a discovery ruling that grants or denies the motion to compel or for protective order in whole or in part, if applicable, the discovery ruling must specifically identify any part of the disputed discovery request upheld and any part rejected, and impose any limits on discovery the hearing officer(s) finds necessary and appropriate. Nothing in this section authorizes the intermediary hearing officer to compel any action from the Secretary or CMS.

(d) *Reviewability of discovery or disclosure rulings.* (1) *General rule.* A discovery ruling issued in accordance with paragraph (c)(3) of this section, or a disclosure ruling (such as one issued at a hearing), is not subject to immediate review by a CMS official (as described in § 405.1834(b)(3) of this subpart). A discovery ruling may be examined solely during the course of CMS review under § 405.1834 of this subpart of a jurisdictional dismissal decision (as described in § 405.1814(c)(2) of this subpart) or a hearing decision (as described in § 405.1831 of this subpart) by the intermediary hearing officer(s).

(2) *Exception.* To the extent a ruling authorizes discovery or disclosure of a matter for which an objection based on privilege or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the intermediary hearing officer(s), that portion of the discovery or disclosure ruling may immediately be reviewed by a CMS reviewing official in accordance with § 405.1834(b)(3).

(i) Upon notice to the intermediary hearing officer that the provider intends to seek immediate review of a ruling, or that the intermediary or other affected nonparty intends to suggest that the Administrator through the CMS reviewing official, take own motion review of the ruling, the intermediary hearing officer stays all proceedings affected by the ruling.

(ii) The intermediary hearing officer must determine, under the circumstances of a given case, the length of any stay, but in no event may the stay be less than 15 days.

(iii) If the Administrator through the CMS reviewing official—

(A) Grants a request for review, or takes own motion review, of a ruling, the ruling is stayed until such time as the CMS reviewing official issues a written decision that affirms, reverses, modifies, or remands the intermediary hearing officer's ruling.

(B) Does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ruling is not subject to immediate review.

(e) *Prehearing conference.* The intermediary hearing officer(s) has discretion to schedule a prehearing conference. A prehearing conference may be conducted in person or telephonically, at the discretion of the intermediary hearing officer(s). When a panel of intermediary hearing officers is designated, the panel may appoint one or more hearing officers to act for the panel for any prehearing conference or any matter addressed at the conference.

■ 9. Section 405.1827 is revised to read as follows:

§ 405.1827 Record of proceedings before the intermediary hearing officer(s).

(a) The intermediary hearing officer(s) must maintain a complete record of all proceedings in an appeal.

(b) The record consists of all documents and any other tangible materials timely submitted to the hearing officer(s) by the parties to the appeal and by any nonparty (as described in § 405.1821(c) of this subpart), along with all correspondence, rulings, orders, and decisions (including the final decision) issued by the hearing officer(s).

(c) The record must include a complete transcription of the proceedings at any intermediary hearing.

(d) A copy of the transcription must be made available to any party upon request.

■ 10. Section 405.1829 is amended by—

■ A. Revising the section heading.

■ B. In paragraph (a), the parenthetical phrase ''(see 42 CFR 401.108)'' is removed and add ''(as described in § 401.108 of this chapter)'' in its place.

■ C. Revising paragraph (b).

The revisions are to read as follows:

§ 405.1829 Scope of authority of intermediary hearing officer(s).

* * * * *

(b)(1) If the intermediary hearing officer(s) has jurisdiction to conduct a hearing on the specific matters at issue under § 405.1811, and the legal authority to fully resolve the matters in a hearing decision (as described in § 405.1831 of this subpart), the hearing officer(s) must affirm, modify, or reverse the intermediary's findings on each specific matter at issue in the intermediary or Secretary determination for the cost year under appeal.

(2) The intermediary hearing officer(s) also may make additional revisions on specific matters regardless of whether the intermediary considered the matters in issuing the intermediary determination for the cost year, provided the hearing officer(s) does not consider or decide any specific matter for which it lacks jurisdiction (as described in § 405.1814(b) of this subpart) or which was not timely raised in the provider's hearing request.

(3) The authority of the intermediary hearing officer(s) under this paragraph to make the additional revisions is limited to those revisions necessary to fully resolve a specific matter at issue if—

(i) The hearing officer(s) has jurisdiction to grant a hearing on the specific matter under § 405.1811 and § 405.1814 of this subpart; and

(ii) The specific matter was timely raised in an initial request for an intermediary hearing filed in accordance with § 405.1811(b) of this subpart or in a timely request to add issues to an appeal submitted in accordance with § 405.1811(c) of this subpart.

■ 11. Section 405.1831 is revised to read as follows:

§ 405.1831 Intermediary hearing decision.

(a) If the intermediary hearing officer(s) finds jurisdiction (as described in § 405.1814(a) of this subpart) and conducts a hearing the intermediary hearing officer(s) must promptly issue a written hearing decision.

(b) The intermediary hearing decision must be based on the evidence from the intermediary hearing (as described in § 405.1823 of this subpart) and other evidence as may be included in the record (as described in § 405.1827 of this subpart).

(c) The decision must include findings of fact and conclusions of law on jurisdictional issues (as described in § 405.1814(c)(1) of this subpart) and on the merits of the provider's reimbursement claims, and include appropriate citations to the record evidence and to the applicable law, regulations, CMS Rulings, and other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.

(d) A copy of the decision must be mailed promptly to the intermediary, to each party and to the appropriate component of CMS (which currently is the Center for Medicare Management).

(e) When the intermediary's denial of the relief that the provider seeks before the intermediary hearing officer(s) was based on procedural grounds (for example, the alleged failure of the provider to satisfy a time limit), or was based on the alleged failure to supply adequate documentation to support the provider's claim, and the intermediary hearing officer(s) rule(s) that the basis of the intermediary's denial is invalid, the intermediary hearing officer(s) remands to the intermediary for the intermediary to make a determination on the merits of the provider's claim.

■ 12. Section 405.1833 is revised to read as follows:

§ 405.1833 Effect of intermediary hearing decision.

An intermediary hearing decision issued in accordance with § 405.1831 of this subpart is final and binding on all parties to the intermediary hearing and the intermediary unless the hearing decision is reviewed by a CMS reviewing official in accordance with § 405.1834 of this subpart or reopened and revised by the intermediary hearing officer(s) in accordance with § 405.1885 through § 405.1889 of this subpart. Final intermediary hearing decisions are subject to the provisions of § 405.1803(d) of this subpart.

■ 13. A new § 405.1834 is added to read as follows:

§ 405.1834 CMS reviewing official procedure.

(a) *Scope.* A provider that is a party to, and dissatisfied with, a final decision by the intermediary hearing officer(s), upon submitting a request that meets the requirements of paragraph (c) of this section, is entitled to further administrative review of the decision, or the decision may be reviewed at the discretion of the Administrator. No other individual, entity, or party has the right to the review. The review is conducted on behalf of the Administrator by a designated CMS reviewing official who considers whether the decision of the intermediary hearing officer(s) is consistent with the controlling legal authority (as described in § 405.1834(e)(1) of this subpart) and the evidence in the record. Based on the review, the CMS reviewing official issues a decision on behalf of the Administrator.

(b) *General rules.* (1) A CMS reviewing official may immediately review any final decision of the intermediary hearing officer(s) as specified in paragraph (b)(2) of this section.

(i) Nonfinal decisions and other nonfinal actions by the intermediary hearing officer(s) are not immediately reviewable, except as provided in paragraph (b)(3) of this section.

(ii) The CMS reviewing official exercises this review authority in response to a request from a provider party to the appeal that meets the requirements of paragraph (c) of this section or may exercise his or her discretion to take own motion review.

(2) A CMS reviewing official may immediately review the following:

(i) Any final jurisdictional dismissal decision by the intermediary hearing officer(s), including any finding that the provider failed to demonstrate good cause for extending the time in which to request a hearing (as described in § 405.1813(e)(1) and § 405.1814(c)(3) of this subpart).

(ii) Any final intermediary hearing decision (as described in § 405.1831 of this subpart).

(3) Nonfinal decisions and other nonfinal actions by the intermediary hearing officer(s) are not subject to the CMS reviewing official procedure until the intermediary hearing officer(s) issues a final decision as specified in paragraph (b)(2) of this section (as described in § 405.1813(e)(2), § 405.1814(c) and (d), and § 405.1821(d)(1) of this subpart), except that the CMS reviewing official may immediately review a ruling, authorizing discovery or disclosure of a matter, where there is a claim of privilege or other protection from disclosure such as case preparation, confidentiality, or undue burden.

(4) In order to facilitate the Administrator's exercise of this review authority, the intermediary hearing officer(s) must promptly send copies of any decision specified in paragraph (b)(2) of this section or § 405.1821(d)(2) of this subpart to the appropriate component of CMS (currently the Center for Medicare Management).

(i) All requests for review by a CMS reviewing official and all written submissions to a CMS reviewing official under paragraphs (c) and (d) of this section also must be sent to the appropriate component of CMS.

(ii) The appropriate CMS component examines each intermediary hearing officer decision that is reviewable under paragraph (b)(2) of this section or § 405.1821(d)(2) of this subpart, along with any review requests and any other submissions made by a party in accordance with the provisions of this section, in order to assist the Administrator's exercise of this review authority.

(c) *Request for review.* (1) A provider's request for review by a CMS reviewing official is granted if—

(i) The date of receipt by the appropriate CMS component of the review request is no later than 60 days after the date of receipt by the provider of the intermediary hearing officer decision; or

(ii) The request seeks review of a decision listed in paragraph (b)(2) of this section, and the provider complies with the requirements of paragraph (c)(2) of this section.

(2) The provider must submit its request for review in writing, attach a copy of the intermediary decision for which it seeks review and include a brief description of all of the following:

(i) Those aspects of the intermediary hearing officer decision with which the provider is dissatisfied.

(ii) The reasons for the provider's dissatisfaction.

(iii) Any argument or record evidence the provider believes supports its position.

(iv) Any additional, extra-record evidence relied on by the provider, along with a demonstration that such evidence was improperly excluded from the intermediary hearing (as described in § 405.1823 of this subpart).

(3) A provider request for immediate review of an intermediary hearing officer ruling authorizing discovery or disclosure in accordance with paragraph (b)(3) of this section must—

(i) Be made as soon as practicable after the ruling is made, but in no event later than 5 business days after the date it received notice of the ruling; and

(ii) State the reason(s) why the ruling is in error and the potential harm that may be caused if immediate review is not granted.

(d) *Own motion review.* (1) The Administrator has discretion to take own motion review of an intermediary hearing officer decision (regardless of whether the decision was favorable or unfavorable to the provider) or other reviewable action.

(2) In order to exercise this authority, the CMS reviewing official must, no later than 60 days after the date of the intermediary hearing officer's decision, notify the parties and the intermediary that he or she intends to review the intermediary hearing officer decision or other reviewable action.

(3) In the notice, the CMS reviewing official identifies with particularity the issues that are to be reviewed, and gives each party (as described in § 405.1815 of this subpart) and affected nonparty a reasonable period to comment on the issues through a written submission complying with paragraph (c)(2) of this section.

(e) *Review procedure.* (1) In reviewing an intermediary hearing officer decision specified in paragraph (b)(2) of this section, the CMS reviewing official must—

(i) Comply with all applicable law, regulations, and CMS Rulings (as described in § 401.108 of this chapter), and afford great weight to other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS;

(ii) Subject to paragraph (e)(1)(iii) of this section, limit the review to the record of the proceedings before the intermediary hearing officer(s) (as described in § 405.1827 of this subpart) and any written submissions by the parties under paragraphs (c)(2) or (d) of this section; and

(iii) Consider additional, extra-record evidence only if he or she determines that the evidence was improperly excluded from the intermediary hearing (as described in § 405.1823 of this subpart).

(2) Review of an intermediary decision specified in paragraph (b)(2) of this section is limited to a hearing on the written record in accordance with paragraph (e)(1)(ii) of this section, unless the CMS reviewing official determines that—

(i) Additional, extra-record evidence may be considered in accordance with paragraph (e)(1)(iii) of this section;

(ii) An oral hearing is necessary for consideration of the extra-record evidence; and

(iii) It is not necessary or appropriate to remand the matter to the intermediary hearing officer(s).

(3) Upon completion of the review of an intermediary hearing decision specified in paragraph (b)(2) of this section, the CMS reviewing official issues a written decision that affirms, reverses, modifies, or remands the intermediary hearing decision. A copy of the decision must be mailed promptly to each party, to the intermediary, and to the appropriate component of CMS (currently the Center for Medicare Management).

(f) *Effect of a decision: Remand.* (1) A decision of affirmation, reversal, or modification by the CMS reviewing official is final and binding on each party and the intermediary. No further review or appeal of a decision is available, but the decision may be reopened and revised by a CMS reviewing official in accordance with § 405.1885 through § 405.1889 of this subpart. Decisions of a CMS reviewing official are subject to the provisions of § 405.1803(d) of this subpart. A decision by a CMS reviewing official remanding an appeal to the intermediary hearing officer(s) for further proceedings under paragraph (f)(2) of this section is not a final decision.

(2) A remand to the intermediary hearing officer(s) by the CMS reviewing official must—

(i) Vacate the intermediary hearing officer decision;

(ii) Be governed by the same criteria that apply to remands by the Administrator to the Board under § 405.1875(f)(2) of this subpart, and require the intermediary hearing officer(s) to take specific actions on remand; and

(iii) Result in the intermediary hearing officer(s) taking the actions required on remand and issuing a new intermediary hearing decision in accordance with § 405.1831 and § 405.1833 of this subpart.

■ 14. Section 405.1835 is revised to read as follows:

§ 405.1835 Right to Board hearing; contents of, and adding issues to, hearing request.

(a) *Criteria.* A provider (but no other individual, entity, or party) has a right to a Board hearing, as a single provider appeal, for specific items claimed for a cost reporting period covered by an intermediary or Secretary determination, only if—

(1) The provider has preserved its right to claim dissatisfaction with the amount of Medicare payment for the specific item(s) at issue, by either—

(i) Including a claim for specific item(s) on its cost report for the period where the provider seeks payment that it believes to be in accordance with Medicare policy; or

(ii) Effective with cost reporting periods that end on or after December 31, 2008, self-disallowing the specific item(s) by following the applicable procedures for filing a cost report under protest, where the provider seeks payment that it believes may not be allowable or may not be in accordance with Medicare policy (for example, if the intermediary lacks discretion to award the reimbursement the provider seeks for the item(s)).

(2) The amount in controversy (as determined in accordance with § 405.1839 of this subpart) is $10,000 or more; and

(3) Unless the provider qualifies for a good cause extension under § 405.1836 of this subpart, the date of receipt by the Board of the provider's hearing request is—

(i) No later than 180 days after the date of receipt by the provider of the intermediary or Secretary determination; or

(ii) If the intermediary determination is not issued (through no fault of the provider) within 12 months of the date of receipt by the intermediary of the provider's perfected cost report or amended cost report (as specified in § 413.24(f) of this chapter), no later than 180 days after the expiration of the 12 month period for issuance of the intermediary determination. The date of receipt by the intermediary of the provider's perfected cost report or amended cost report is presumed to be the date the intermediary stamped ''Received'' unless it is shown by a preponderance of the evidence that the intermediary received the cost report on an earlier date.

(b) *Contents of request for a Board hearing.* The provider's request for a

Board hearing must be submitted in writing to the Board, and the request must include the elements described in paragraphs (b)(1) through (b)(4) of this section. If the provider submits a hearing request that does not meet the requirements of paragraphs (b)(1), (b)(2), or (b)(3) of this section, the Board may dismiss with prejudice the appeal, or take any other remedial action it considers appropriate.

(1) A demonstration that the provider satisfies the requirements for a Board hearing as specified in paragraph (a) of this section, including a specific identification of the intermediary's or Secretary's determination under appeal.

(2) An explanation (for each specific item at issue, see paragraph (a)(1) of this section) of the provider's dissatisfaction with the intermediary's or Secretary's determination under appeal, including an account of all of the following:

(i) Why the provider believes Medicare payment is incorrect for each disputed item (or, where applicable, why the provider is unable to determine whether Medicare payment is correct because it does not have access to underlying information concerning the calculation of its payment).

(ii) How and why the provider believes Medicare payment must be determined differently for each disputed item.

(iii) If the provider self-disallows a specific item, a description of the nature and amount of each self-disallowed item and the reimbursement or payment sought for the item.

(3) A copy of the intermediary or Secretary determination under appeal, and any other documentary evidence the provider considers necessary to satisfy the hearing request requirements of paragraphs (b)(1) and (b)(2) of this section.

(4) With respect to a provider under common ownership or control, the name and address of its parent corporation, and a statement that—

(i) To the best of the provider's knowledge, no other provider to which it is related by common ownership or control, has pending a request for a Board hearing pursuant to this section or pursuant to § 405.1837(b)(1) on any of the same issues contained in the provider's hearing request for a cost reporting period that falls within the same calendar year as the calendar year covered by the provider's hearing request; or

(ii) Such a pending appeal(s) exist(s), the provider name(s), provider number(s), and the case number(s) (if assigned), for such appeal(s).

(c) *Adding issues to the hearing request.* After filing a hearing request in accordance with paragraphs (a) and (b) of this section, a provider may add specific Medicare payment issues to the original hearing request by submitting a written request to the Board, only if the following requirements are met:

(1) The request to add issues complies with the requirements of paragraphs (a)(1) and (b) of this section as to each new issue.

(2) The specific matters at issue raised in the initial hearing request and the matters identified in subsequent requests to add issues, when combined, satisfy the requirements of paragraph (a)(2) of this section.

(3) The Board receives the request to add issues no later than 60 days after the expiration of the applicable 180-day period prescribed in paragraph (a)(3) of this section.

■ 15. Section 405.1836 is added to read as follows:

§ 405.1836 Good cause extension of time limit for requesting a Board hearing.

(a) A request for a Board hearing that the Board receives after the applicable 180-day time limit prescribed in § 405.1835(a)(3) of this subpart must be dismissed by the Board, except that the Board may extend the time limit upon a good cause showing by the provider.

(b) The Board may find good cause to extend the time limit only if the provider demonstrates in writing it can not reasonably be expected to file timely due to extraordinary circumstances beyond its control (such as a natural or other catastrophe, fire, or strike), and the provider's written request for an extension is received by the Board within a reasonable time (as determined by the Board under the circumstances) after the expiration of the applicable 180-day limit specified in § 405.1835(a)(3).

(c) The Board may not grant a request for an extension under this section if—

(1) The provider relies on a change in the law, regulations, CMS Rulings, or general CMS instructions (whether based on a court decision or otherwise) or a CMS administrative ruling or policy as the basis for the extension request; or

(2) The date of receipt by the Board of the provider's extension request is later than 3 years after the date of the intermediary or other determination that the provider seeks to appeal.

(d) If an extension request is granted or denied under this section, the Board must give prompt written notice to the provider, and mail a copy of the notice to each party to the appeal. The notice must include a detailed explanation of the reasons for the decision by the Board and the facts underlying the decision.

(e)(1) If the Board denies an extension request and determines it lacks jurisdiction to grant a hearing for every specific matter at issue in an appeal, it must issue a Board dismissal decision dismissing the appeal for lack of Board jurisdiction. This decision by the Board must be in writing and include the explanation of the extension request denial required under paragraph (d) of this section, in addition to specific findings of fact and conclusions of law explaining the Board's determination that it lacks jurisdiction to grant a hearing on each matter at issue in the appeal (as described in § 405.1840(c) of this subpart). A copy of the Board's dismissal decision must be mailed promptly to each party to the appeal (as described in § 405.1843 of this subpart).

(2) A Board dismissal decision under paragraph (e)(1) of this section is final and binding on the parties, unless the decision is reversed, affirmed, modified, or remanded by the Administrator under § 405.1875(a)(2)(ii) and § 405.1875(e) or § 405.1875(f) of this subpart, no later than 60 days after the date of receipt by the provider of the Board's decision.

(i) This Board decision is inoperative during the 60-day period for review of the decision by the Administrator, or in the event the Administrator reverses, affirms, modifies, or remands that decision, within the period.

(ii) A Board decision under paragraph (e)(1) of this section that is otherwise final and binding may be reopened and revised by the Board in accordance with § 405.1885 through § 405.1889 of this subpart.

(3) The Administrator may review a Board decision granting an extension request solely during the course of an Administrator review of one of the Board decisions specified as final, or deemed final by the Administrator, under § 405.1875(a)(2) of this subpart.

(4) A finding by the Board or the Administrator that the provider did or did not demonstrate good cause for extending the time for requesting a Board hearing is not subject to judicial review.

■ 16. Section 405.1837 is revised to read as follows:

§ 405.1837 Group appeals.

(a) *Right to Board hearing as part of a group appeal; criteria.* A provider (but no other individual, entity, or party) has a right to a Board hearing, as part of a group appeal with other providers, for specific items claimed for a cost reporting period covered by an intermediary or Secretary determination for the period, only if—

(1) The provider satisfies individually the requirements for a Board hearing under § 405.1835(a), except for the $10,000 amount in controversy requirement under § 405.1835(a)(2) of this subpart;

(2) The matter at issue in the group appeal involves a single question of fact or interpretation of law, regulations, or CMS Rulings that is common to each provider in the group; and

(3) The amount in controversy is, in the aggregate, $50,000 or more, as determined in accordance with § 405.1839 of this subpart.

(b) *Usage and filing of group appeals.* (1) *Mandatory use of group appeals.*

(i) Two or more providers under common ownership or control that wish to appeal to the Board a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS Rulings that is common to the providers, and that arises in cost reporting periods that end in the same calendar year, and for which the amount in controversy is $50,000 or more in the aggregate, must bring the appeal as a group appeal.

(ii) One or more of the providers under common ownership or control may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for purposes of meeting the $50,000 amount in controversy requirement, and, subject to the Board's discretion, may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for other purposes, such as convenience.

(iii) A group appeal involving two or more providers under common ownership or control must consist entirely of providers under common (to all) ownership or control.

(iv)(A) *Example 1:* A, B, C and D are commonly owned providers that wish to appeal issue X. This issue was adjusted on A, B and C's CY 2004 cost reports, and on D's CY 2005 cost report. The amount in controversy is more than $50,000 in the aggregate for providers A, B and C, and more than $10,000 for provider D. Providers A, B and C must appeal issue X as a group appeal. Provider D may pursue an individual appeal to the Board under the procedures set forth in § 405.1835 of this subpart, or if the Board agrees, Provider D may join the group appeal. (If Provider D joins the group appeal, the calendar years in the group appeal would then be 2004 and 2005, and any provider related to Providers A through D by common ownership or control would be required to appeal issue X for its cost reporting period ending in 2004 or 2005 through the group appeal.)

(B) *Example 2:* A, B and C are commonly owned providers that wish to appeal issue X. This issue was adjusted on A, B and C's CY 2004 cost reports. The amount in controversy is less than $50,000 in the aggregate for providers A, B and C ($10,000 for A, $10,000 for B and $7,000 for C). Providers A, B and C cannot appeal issue X as a group appeal. Provider A, if it wishes, and provider B, if it wishes, may pursue an individual appeal to the Board under the procedures set forth in § 405.1835 of this subpart. Provider C may not pursue an individual appeal to the Board, because the amount in controversy is less than $10,000; however, it may pursue an appeal to the intermediary under the procedures set forth in § 405.1811 of this subpart.

(2) *Optional group appeals.* (i) Two or more providers not under common ownership or control may bring a group appeal before the Board under this section, if the providers wish to appeal to the Board a specific matter at issue that involves a question of fact or interpretation of law, regulations, or CMS Rulings that is common to the providers. Alternatively, any provider may appeal to the Board any issues in a single provider appeal brought under § 405.1835 of this subpart.

(ii) One or more of the providers bringing a group appeal under this paragraph may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for purposes of meeting the $50,000 amount in controversy requirement, and, subject to the Board's discretion, may appeal more than one cost reporting period with respect to the issue that is the subject of the group appeal for other purposes, such as convenience.

(3) *Initiating a group appeal.* With respect to group appeals brought under paragraph (b)(1) of this section, one or more commonly owned or operated providers must make a written request for a Board hearing as a group appeal in accordance with paragraph (c) of this section. Any group appeal filed by a single provider must be joined by related providers on common issues in accordance with paragraphs (b)(1) and (e) of this section. With respect to group appeals brought under paragraph (b)(2) of this section, two or more providers may submit—

(i) A written request for a Board hearing as a group appeal in accordance with paragraph (c) of this section; or

(ii) A request to the Board in accordance with paragraph (e)(4) of this section that a specific matter at issue in a single provider appeal, filed previously under § 405.1835 of this subpart, be transferred from the single appeal to a group appeal.

(c) *Contents of request for a group appeal.* The request for a Board hearing as a group appeal must be submitted in writing to the Board, and the request must include all of the following:

(1) A demonstration that the request satisfies the requirements for a Board hearing as a group appeal, as specified in paragraph (a) of this section.

(2) An explanation (for each specific item at issue; see § 405.1835(a)(1)) of each provider's dissatisfaction with its intermediary or Secretary determination under appeal, including an account of—

(i) Why the provider believes Medicare payment is incorrect for each disputed item;

(ii) How and why the provider believes Medicare payment must be determined differently for each disputed item; and

(iii) If the provider self-disallows a specific item, a description of the nature and amount of each self-disallowed item and the reimbursement sought for each item.

(3) A copy of each intermediary or Secretary determination under appeal, and any other documentary evidence the providers consider necessary to satisfy the hearing request requirements of paragraphs (c)(1) and (c)(2) of this section, and a precise description of the one question of fact or interpretation of law, regulations, or CMS Rulings that is common to the particular matters at issue in the group appeal; and

(4) A statement that—

(i) The providers believe they have satisfied all of the requirements for a group appeal hearing request under paragraph (a) of this section and requesting the Board to proceed to make jurisdictional findings in accordance with § 405.1840; or

(ii) The Board is requested to defer making jurisdictional findings until the providers request the findings in accordance with paragraph (e)(2) of this section.

(d) *Board's preliminary response to group appeal hearing requests.* (1) Upon receipt of a group appeal hearing request, the Board must take any necessary ministerial steps.

(2) The steps, include, for example—

(i) Acknowledging the request;

(ii) Assigning a case number to the appeal; or

(iii) If applicable, transferring a specific matter at issue from a single provider appeal filed under § 405.1835 of this subpart to a group appeal filed under this section.

(e) *Group appeal procedures pending full formation of the group and issuance of a Board decision.* (1) A provider (or providers) may file a group appeal hearing request with the Board under this section before each provider member of the group identifies or complies with paragraphs (a)(1) and

(a)(2) of this section, or before the group satisfies the $50,000 amount in controversy requirement under paragraph (a)(3) of this section. Proceedings before the Board in any partially formed group appeal are subject to the provisions of paragraphs (e)(2), (e)(3), and (e)(4) of this section. The Board will determine that a group appeal brought under paragraph (b)(1) of this section is fully formed upon a notice in writing from the group that it is fully formed. Absent such a notice from the group, the Board may issue an order, requiring the group to demonstrate (within a period of not less than 15 days) that at least one commonly owned or controlled provider has preserved the issue for appeal by claiming the relevant item on its cost report or by self-disallowing the item, but has not yet received its final determination with respect to the item for a cost year that is within the same calendar year as that covered by the group appeal (or that it has received its final determination with respect to the item for that period, and is still within the time to request a hearing on the issue). The Board determines that a group appeal brought under paragraph (b)(2) of this section is fully formed upon a notice in writing from the group that it is fully formed, or following an order from the Board that in its judgment, that the group is fully formed, or through general instructions that set forth a schedule for the closing of group appeals brought under paragraph (b)(2) of this section. When the Board has determined that a group appeal brought under paragraph (b)(1) of this section is fully formed, absent an order from the Board modifying its determination, no other provider under common ownership or control may appeal to the Board the issue that is the subject of the group appeal with respect to a cost reporting period that falls within the calendar year(s) covered by the group appeal.

(2) The Board may make jurisdictional findings under § 405.1840 at any time, including, but not limited to, following a request by the providers for the jurisdictional findings. The providers may request jurisdictional findings by notifying the Board in writing that the group appeal is fully formed, or that the providers believe they have satisfied all of the requirements for a group appeal hearing request, and the Board may proceed to make jurisdictional findings. The providers must include with the notice any additional information or documentary evidence that is required for group appeal hearing requests. The Board does not dismiss a group appeal hearing request for failure to meet the $50,000 amount in controversy requirement until the Board has determined, in accordance with paragraph (e)(1) of this section, that the group is fully formed.

(3) If the Board makes a preliminary determination of jurisdiction to conduct a hearing as a group appeal under this section, the Board then takes any further actions in the appeal it finds to be appropriate under this subpart (as described in § 405.1840(a) of this subpart). The Board may take further actions, even though the providers in the appeal may wish to add other providers to the group in accordance with paragraph (e)(4) of this section. The Board must make separate jurisdictional findings for each cost reporting period added subsequently to the group appeal (as described in § 405.1837(a) and § 405.1839(b) of this subpart).

(4) A provider may submit a request to the Board to join a group appeal anytime before the Board issues one of the decisions specified in § 405.1875(a)(2). By submitting a request, the provider agrees that, if the request is granted, the provider is bound by the Board's actions and decision in the appeal. If the Board denies a request, the Board's action is without prejudice to any separate appeal the provider may bring in accordance with § 405.1811 of this subpart, § 405.1835 of this subpart, or this section. For purposes of determining timeliness for the filing of any separate appeal and for the adding of issues to such appeal, the date of receipt of the provider's request to form or join the group appeal is considered the date of receipt for purposes of meeting the applicable 180-day period prescribed in § 405.1835(a)(3) of this subpart.

(5)(i) Except as specified in paragraph (ii) of this paragraph, when a provider has appealed an issue through electing to form, or joining, a group appeal under the procedures set forth in this section, it may not subsequently request that the Board transfer that issue to a single provider appeal brought in accordance with § 405.1811 or § 405.1835 of this subpart.

(ii) *Exception.* When the Board determines that the requirements for a group appeal are not met (that is, when there has been a failure to meet the amount in controversy or the common issue requirement), it transfers the issue that was the subject of the group appeal to a single provider appeal (or appeals) for the provider (or providers) that meets (or meet) the requirements for a single provider appeal.

(f) *Limitations on group appeals.* (1) After the date of receipt by the Board of a group appeal hearing request under paragraph (c) of this section, a provider may not add other questions of fact or law to the appeal, regardless of whether the question is common to other members of the appeal (as described in § 405.1837(a)(2) and (g) of this subpart).

(2) The Board may not consider, in one group appeal, more than one question of fact, interpretation of law, regulations, or CMS Rulings that is common to each provider in the appeal. If the Board finds jurisdiction over a group appeal hearing request under § 405.1840 of this subpart—

(i) The Board must determine whether the appeal involves specific matters at issue that raise more than one factual or legal question common to each provider; and

(ii) When the appeal is found to involve more than one factual or legal question common to each provider, the Board must assign a separate case number to the appeal of each common factual or legal question and conduct further proceedings in the various appeals separately for each case.

(g) *Issues not common to the group appeal.* A provider involved in a group appeal that also wishes to appeal a specific matter that does not raise a factual or legal question common to each of the other providers in the group must file a separate request for a single provider hearing in accordance with § 405.1811 or § 405.1835 of this subpart, or file a separate request for a hearing as part of a different group appeal under this section, as applicable.

■ 17. Section 405.1839 is revised to read as follows:

§ 405.1839 Amount in controversy.

(a) *Single provider appeals.* (1) In order to satisfy the amount in controversy requirement under § 405.1811(a)(2) of this subpart for an intermediary hearing or the amount in controversy requirement under § 405.1835(a)(2) of this subpart for a Board hearing for a single provider, the provider must demonstrate that if its appeal were successful, the provider's total program reimbursement for each cost reporting period under appeal increases by at least $1,000 but by less than $10,000 for an intermediary hearing, or by at least $10,000 for a Board hearing, as applicable.

(2) *Aggregation of claims.* For purposes of satisfying the applicable amount in controversy requirement for a single provider appeal to the intermediary or the Board, the provider may aggregate claims for additional program payment for more than one

specific matter at issue, provided each specific claim and issue is for the same cost reporting period. Aggregation of claims from more than one cost reporting period to meet the applicable amount in controversy requirement is prohibited, even if a specific claim or issue recurs in the appeal for multiple cost years.

(b) *Group appeals.* (1) In order to satisfy the amount in controversy requirement under § 405.1837(a)(3) of this subpart for a Board hearing as a group appeal, the group must demonstrate that if its appeal were successful, the total program reimbursement for the cost reporting periods under appeal increases, in the aggregate, by at least $50,000.

(2) *Aggregation of claims.* (i) For purposes of satisfying the amount in controversy requirement, group members are not allowed to aggregate claims involving different issues.

(A) A group appeal must involve a single question of fact or interpretation of law, regulations, or CMS Ruling that is common to each provider (as described in § 405.1837(a)(2) of this subpart).

(B) The single issue that is common to each provider may exist over different cost reporting periods.

(ii) For purposes of satisfying the amount in controversy requirement, a provider may appeal multiple cost reporting periods and different providers in the group may appeal different cost reporting periods.

(c) *Limitations on change in Medicare reimbursement.* (1) In order to satisfy the applicable amount in controversy requirement for a single provider appeal or a group appeal, an appeal favorable to the provider(s) on all specific matters at issue in the appeal increases program reimbursement for the provider(s) in the cost reporting period(s) at issue by an amount that equals or exceeds the applicable amount in controversy threshold.

(2) The applicable amount in controversy requirement is not satisfied if the result of a favorable appeal decreases program reimbursement for the provider(s) in the cost reporting year(s) at issue in the appeal.

(3) Any effects that a favorable appeal might have on program reimbursement for the provider(s) in cost reporting period(s) not at issue in the appeal have no bearing on whether the amount in controversy requirement is satisfied for the cost year(s) at issue in the appeal.

(4) When a provider (or group of providers) has requested a hearing before an intermediary under § 405.1811 of this subpart, and the amount in controversy is subsequently determined to be at least $10,000 (for example, due to a reassessment of the amount in controversy by the intermediary hearing office or due to adding an issue), the appeal is transferred to the Board. The Board is not bound by any jurisdictional finding of the intermediary hearing officer(s).

(5) When a provider or group of providers has requested a hearing before the Board under § 405.1835 or § 405.1837 of this subpart, and the amount in controversy changes to an amount less than the minimum for a Board appeal due to—

(A) The settlement or partial settlement of an issue, transfer of an issue to a group appeal, or the abandonment of an issue in an individual appeal, the change in the amount in controversy does not deprive the Board of jurisdiction.

(B) A more accurate assessment of the amount in controversy, the Board does not retain jurisdiction.

■ 18. A new § 405.1840 is added to read as follows:

§ 405.1840 Board jurisdiction.

(a) *General rules.* (1) After a request for a Board hearing is filed under § 405.1835 or § 405.1837 of this part, the Board must determine in accordance with paragraph (b) of this section, whether or not it has jurisdiction to grant a hearing on each of the specific matters at issue in the hearing request.

(2) The Board must make a preliminary determination of the scope of its jurisdiction (that is, whether the request for hearing was timely, and whether the amount in controversy requirement has been met), if any, over the matters at issue in the appeal before conducting any of the following proceedings:

(i) Determining its authority to decide a legal question relevant to a matter at issue (as described in § 405.1842 of this subpart).

(ii) Permitting discovery (as described in § 405.1853 of this subpart).

(iii) Issuing a subpoena (as described in § 405.1857 of this subpart).

(iv) Conducting a hearing (as described in § 405.1845 of this subpart).

(3) The Board may revise a preliminary determination of jurisdiction at any subsequent stage of the proceedings in a Board appeal, and must promptly notify the parties of any revised determination. Under paragraph (c)(1) of this section, each expedited judicial review (EJR) decision (as described in § 405.1842 of this subpart) and hearing decision (as described in § 405.1871 of this subpart) by the Board must include a jurisdictional finding for each specific matter at issue in the appeal.

(4) If the Board finally determines it lacks jurisdiction over every specific matter at issue in the appeal, the Board must issue a dismissal decision under paragraph (c)(2) of this section.

(5) Final jurisdictional findings and dismissal decisions by the Board under paragraphs (c)(1) and (c)(2) of this section are subject to Administrator and judicial review in accordance with paragraph (d) of this section.

(b) *Criteria.* Except with respect to the amount in controversy requirement, the jurisdiction of the Board to grant a hearing must be determined separately for each specific matter at issue in each intermediary or Secretary determination for each cost reporting period under appeal. The Board has jurisdiction to grant a hearing over a specific matter at issue in an appeal only if the provider has a right to a Board hearing as a single provider appeal under § 405.1835 of this subpart or as part of a group appeal under § 405.1837 of this subpart, as applicable. Certain matters at issue are removed from jurisdiction of the Board. These matters include, but are not necessarily limited to, the following:

(1) A finding in an intermediary determination that expenses incurred for certain items or services furnished by a provider to an individual are not payable under title XVIII of the Act because those items or services are excluded from coverage under section 1862 of the Act and Part 411 of the regulations. Review of these findings is limited to the applicable provisions of sections 1155, 1869, and 1879(d) of the Act and of Subpart I of Part 405 and Subpart B of Part 478 of the regulations, as applicable.

(2) Certain matters affecting payments to hospitals under the prospective payment system, as provided in section 1886(d)(7) of the Act and § 405.1804 of this subpart.

(3) Any self-disallowed cost, except as permitted in § 405.1835(a)(1)(ii) and § 405.1837(a)(1) of this subpart.

(c) *Board's jurisdictional findings and jurisdictional dismissal decisions.* (1) In issuing an EJR decision under § 405.1842 of this subpart or a hearing decision under § 405.1871 of this subpart, as applicable, the Board must make a separate determination of whether it has jurisdiction for each specific matter at issue in each intermediary or Secretary determination under appeal. A decision by the Board must include specific findings of fact and conclusions of law as to whether the Board has jurisdiction to grant a hearing on each matter at issue in the appeal.

(2) Except as provided in § 405.1836(e)(1) and § 405.1842(f)(2)(i) of this subpart, where the Board determines it lacks jurisdiction to grant a hearing for every specific matter at issue in an appeal, it must issue a dismissal decision dismissing the appeal for lack of Board jurisdiction. The decision by the Board must include specific findings of fact and conclusions of law explaining the Board's determination that it lacks jurisdiction to grant a hearing on each matter at issue in the appeal. A copy of the Board's decision must be mailed promptly to each party to the appeal (as described in § 405.1843 of this subpart).

(3) A dismissal decision by the Board under paragraph (c)(2) of this section is final and binding on the parties unless the decision is reversed, affirmed, modified or remanded by the Administrator under § 405.1875(a)(2)(ii) and § 405.1875(e) or § 405.1875(f) of this subpart, no later than 60 days after the date of receipt by the provider of the Board's decision. The Board decision is inoperative during the 60-day period for review of the decision by the Administrator, or in the event the Administrator reverses, affirms, modifies or remands that decision within that period. A final Board decision under paragraphs (c)(2) and (c)(3) of this section may be reopened and revised by the Board in accordance with § 405.1885 through § 405.1889 of this subpart.

(d) *Administrator and judicial review.* Any finding by the Board as to whether it has jurisdiction to grant a hearing on a specific matter at issue in an appeal is not subject to further administrative and judicial review, except as provided in this paragraph. The Board's jurisdictional findings as to specific matters at issue in an appeal may be reviewed solely during the course of Administrator review of one of the Board decisions specified as final, or deemed to be final by the Administrator, under § 405.1875(a)(2) of this subpart, or during the course of judicial review of a final agency decision as described in § 405.1877(a) of this subpart, as applicable.

§ 405.1841 [Removed]

■ 19. Section 405.1841 is removed.

■ 20. Section 405.1842 is revised to read as follows:

§ 405.1842 Expedited judicial review.

(a) *Basis and scope.* (1) This section implements provisions in section 1878(f)(1) of the Act that give a provider the right to seek EJR of a legal question relevant to a specific matter at issue in a Board appeal if there is Board jurisdiction to conduct a hearing on the matter (as described in § 405.1840 of this subpart), and the Board determines it lacks the authority to decide the legal question (as described in § 405.1867 of this subpart, explains the scope of the Board's legal authority).

(2) A provider may request a Board decision that the provider is entitled to seek EJR or the Board may consider issuing a decision on its own motion. Each EJR decision by the *Board* must include a specific jurisdictional finding on the matter(s) at issue, and, where the Board determines that it does have jurisdiction on the matter(s) at issue, a separate determination of the Board's authority to decide the legal question(s).

(3) The Administrator may review the Board's jurisdictional finding, but not the Board's authority determination.

(4) The provider has a right to seek EJR of the legal question under section 1878(f)(1) of the Act only if—

(i) The final EJR decision of the Board or the Administrator, as applicable, includes a finding of Board jurisdiction over the specific matter at issue and a determination by the Board that it has no authority to decide the relevant legal question; or

(ii) The Board fails to make a determination of its authority to decide the legal question no later than 30 days after finding jurisdiction over the matter at issue and notifying the provider that the provider's EJR request is complete.

(b) *General.* (1) *Prerequisite of Board jurisdiction.* The Board (or the Administrator) must find that the Board has jurisdiction over the specific matter at issue before the Board may determine its authority to decide the legal question.

(2) *Initiating EJR procedures.* A provider or group of providers may request the Board to grant EJR of a specific matter or matters under appeal, or the Board on its own motion may consider whether to grant EJR of a specific matter or matters under appeal. Under paragraph (c) of this section, the Board may initiate own motion consideration of its authority to decide a legal question only if the Board makes a preliminary finding that it has jurisdiction over the specific matter at issue to which the legal question is relevant. Under paragraphs (d) and (e) of this section, a provider may request a determination of the Board's authority to decide a legal question, but the 30-day period for the Board to make a determination under section 1878(f)(1) of the Act does not begin to run until the Board finds jurisdiction to conduct a hearing on the specific matter at issue in the EJR request and notifies the provider that the provider's request is complete.

(c) *Board's own motion consideration.* (1) If the Board makes a finding that it has jurisdiction to conduct a hearing on a specific matter at issue in accordance with § 405.1840(a) of this part, it may then consider on its own motion whether it lacks the authority to decide a legal question relevant to the matter at issue.

(2) The Board must initiate its own motion consideration by issuing a written notice to each of the parties to the appeal (as described in § 405.1843 of this subpart). The notice must—

(i) Identify each specific matter at issue for which the Board has made a finding that it has jurisdiction under § 405.1840(a) of this part, and for each specific matter, identify each relevant statutory provision, regulation, or CMS Ruling; and

(ii) Specify a reasonable period of time for the parties to respond in writing.

(3) After considering any written responses made by the parties to its notice of own motion consideration, the Board must determine whether it has sufficient information to issue an EJR decision for each specific matter and legal question included in the notice. If necessary, the Board may request additional information regarding its jurisdiction or authority from a party (or parties), and the Board must give any other party a reasonable opportunity to comment on any additional submission. Once the Board determines it needs no further information from the parties (or that any information has not been rendered timely), it must issue an EJR decision in accordance with paragraph (f) of this section.

(d) *Provider requests.* A provider (or, in the case of a group appeal, a group of providers) may request a determination by the Board that it lacks the authority to decide a legal question relevant to a specific matter at issue in an appeal. A provider must submit a request in writing to the Board and to each party to the appeal (as described in § 405.1843 of this subpart), and the request must include—

(1) For each specific matter and question included in the request, an explanation of why the provider believes the Board has jurisdiction under § 405.1840 of this subpart over each matter at issue and no authority to decide each relevant legal question; and

(2) Any documentary evidence the provider believes supports the request.

(e) *Board action on provider requests.* (1) If the Board makes a finding that it has jurisdiction to conduct a hearing on a specific matter at issue in accordance

with § 405.1840(a) of this part, then (and only then) it must consider whether it lacks the authority to decide a legal question relevant to the matter at issue. The Board is required to make a determination of its authority to decide the legal question raised in a review request under paragraph (d)(1) of this section by issuing an EJR decision no later than 30 days after receiving a complete provider request as defined in paragraph (e)(2) of this section.

(2) *Requirements of a complete provider request.* A complete provider request for EJR consists of the following:

(i) A request for an EJR decision by the provider(s).

(ii) All of the information and documents found necessary by the Board for issuing a decision in accordance with paragraph (f) of this section.

(3) *Board's response to provider requests.* After receiving a provider request for an EJR decision, the Board must review the request, along with any responses to the request submitted by other parties to the appeal (as described in § 405.1843 of this subpart). The Board must respond to the provider(s) as follows:

(i) Upon receiving a complete provider request, issue an EJR decision in accordance with paragraph (f) of this section no later than 30 days after receipt of the complete provider request. If the Board does not issue a decision within that 30-day period, the provider has a right to file a complaint in Federal district court in order to obtain EJR over the specific matter(s) at issue.

(ii) If the provider has not submitted a complete request, issue no later than 30 days after receipt of the incomplete request a written notice to the provider describing in detail the further information that the provider must submit in order to complete the request.

(f) *Board's decision on EJR: Criteria for granting EJR.* Subject to paragraph (h)(3) of this section, the Board is required to issue an EJR decision following either the completion of the Board's own motion consideration under paragraph (c) of this section, or a notice issued by the Board in accordance with paragraph (e)(3)(i) of this section.

(1) The Board's decision must grant EJR for a legal question relevant to a specific matter at issue in a Board appeal if the Board determines the following conditions are satisfied:

(i) The Board has jurisdiction to conduct a hearing on the specific matter at issue in accordance with § 405.1840 of this subpart.

(ii) The Board lacks the authority to decide a specific legal question relevant to the specific matter at issue because the legal question is a challenge either to the constitutionality of a provision of a statute, or to the substantive or procedural validity of a regulation or CMS Ruling.

(2) The Board's decision must deny EJR for a legal question relevant to a specific matter at issue in a Board appeal if any of the following conditions are satisfied:

(i) The Board determines that it does not have jurisdiction to conduct a hearing on the specific matter at issue in accordance with § 405.1840 of this subpart.

(ii) The Board determines it has the authority to decide a specific legal question relevant to the specific matter at issue because the legal question is neither a challenge to the constitutionality of a provision of a statute, nor a challenge to the substantive or procedural validity of a regulation or CMS Ruling.

(iii) The Board does not have sufficient information to determine whether the criteria specified in paragraph (f)(1)(i) or (f)(1)(ii) of this section are met.

(3) A copy of the Board's decision must be sent promptly to—

(i) Each party to the Board appeal (as described in § 405.1843 of this subpart) and

(ii) The Office of the Attorney Advisor.

(g) *Further review after the Board issues an EJR decision.* (1) *General rules.*

(i) Under § 405.1875(a)(2)(iii) of this subpart, the Administrator may review, on his or her own motion, or at the request of a party, the jurisdictional component only of the Board's EJR decision.

(ii) Any review by the Administrator is limited to the question of whether there is Board jurisdiction over the specific matter at issue; the Administrator may not review the Board's determination of its authority to decide the legal question.

(iii) An EJR decision by the Board becomes final and binding on the parties unless the decision is reversed, affirmed, modified, or remanded by the Administrator under § 405.1875(a)(2)(iii) and § 405.1875(e) or § 405.1875(f) of this subpart no later than 60 days after the date of receipt by the provider of the Board's decision.

(iv) A Board decision is inoperative during the 60-day period for review by the Administrator, or in the event the Administrator reverses, affirms, modifies, or remands that decision within that period.

(v) Any right of the provider to obtain EJR from a Federal district court is specified at paragraphs (g)(2) and (g)(3) of this section (when the Board issues a timely EJR decision) and paragraph (g)(4) of this section (in the absence of a timely Board decision).

(vi) A final Board decision under paragraph (f) of this section, and a final Administrator decision made upon review of a final Board decision (as described in § 405.1875(a)(2) and (e) of this subpart) may be reopened and revised in accordance with § 405.1885 through § 405.1889 of this subpart.

(2) *Board grants EJR.* If the Board grants EJR, the provider may file a complaint in a Federal district court in order to obtain EJR of the legal question. If the Administrator renders, no later than 60 days after the date of receipt by the provider of the Board's decision granting EJR, a decision finding that the Board has no jurisdiction over the matter at issue, the Board's decision is rendered nonfinal and the provider has no right to obtain judicial review based on the Board's decision (as described in § 405.1877(a)(3) and (b)(3) of this subpart).

(3) *Board denies EJR.* If the Board's decision denies EJR because the Board finds that it has the authority to decide the legal question relevant to the matter at issue, the Administrator may not review the Board's authority determination, and the provider has no right to obtain EJR. If the Board denies EJR based on a finding that it lacks jurisdiction over the specific matter, the provider has no right to obtain EJR unless—

(i) The Administrator renders timely a final decision reversing the Board, finding the Board has jurisdiction over the matter at issue, and remanding to the Board; or

(ii) A court reverses the Board's or Administrator's decision as to jurisdiction, the Administrator remands to the Board, and the Board subsequently issues on remand from the Administrator an EJR decision granting EJR on the basis that it lacks the authority to decide the legal question.

(4) *No timely EJR decision.* The Board must issue an EJR decision no later than 30 days after the date of a written notice under paragraph (e)(3)(i) of this section, when the provider submits a complete request for EJR. If the Board does not issue an EJR decision within a 30-day period, the provider(s) has a right to seek EJR under section 1878(f)(1) of the Act.

(h) *Effect of final EJR decisions and lawsuits on further Board proceedings.* (1) *Final decisions granting EJR.* If the final decision of the Board (or the Administrator), as applicable (as described in § 405.1842(g)(1) and

§ 405.1875(e)(4) of this subpart), grants EJR, the Board may not conduct any further proceedings on the legal question. The Board must dismiss—

(i) The specific matter at issue from the appeal.

(ii) The entire appeal if there are no other matters at issue that are within the Board's jurisdiction and can be fully decided by the Board.

(2) *Final decisions denying EJR.* If the final decision:

(i) Of the Board denies EJR solely on the basis that the Board determines it has the authority to decide the legal question relevant to the specific matter at issue, the Board must conduct further proceedings on the legal question and issue a decision on the matter at issue in accordance with this subpart.

Exception: If the provider(s) file(s) a lawsuit pertaining to the legal question, and for a period that is covered by the Board's decision denying EJR, the Board may not conduct any further proceedings under this subpart on the legal question or the matter at issue before the lawsuit is finally resolved.

(ii) Of the Board (or the Administrator) denies EJR on the basis that the Board lacks jurisdiction over the specific matter at issue, the Board (or the Administrator) must, as applicable, dismiss the specific matter at issue from the appeal, or dismiss the appeal entirely if there are no other matters at issue that are within the Board's jurisdiction and can be fully decided by the Board. If only the specific matter(s) is dismissed from the appeal, judicial review may be had only after a final decision on the appeal is made by the Board or Administrator, as applicable (as described in § 405.1840(d) and § 405.1877(a) of this subpart). If the Board or the Administrator, as applicable, dismisses the appeal entirely, the decision is subject to judicial review under § 405.1877(a) of this subpart.

(3) *Provider lawsuits.* (i) If the provider files a lawsuit seeking judicial review (whether on the basis of the EJR provisions of section 1878(f)(1) of the Act or on some other basis) pertaining to a legal question that is allegedly relevant to a specific matter at issue in a Board appeal to which the provider is a party and that is allegedly not within the Board's authority to decide, the Office of the Attorney Advisor must promptly provide the Board with written notice of the lawsuit and a copy of the complaint.

(ii) If the lawsuit is filed after a final EJR decision by the Board or the Administrator, as applicable (as described in § 405.1842(g)(1) and § 405.1875(e)(4) of this subpart), on the legal question, the Board must carry out the applicable provisions of paragraphs (h)(1) and (h)(2) of this section in any pending Board appeal on the specific matter at issue.

(iii) If the lawsuit is filed before a final EJR decision is issued on the legal question, the Board may not conduct any further proceedings on the legal question or the matter at issue until the lawsuit is resolved.

■ 21. Section § 405.1843 is revised to read as follows:

§ 405.1843 Parties to proceedings in a Board appeal.

(a) When a provider files a request for a hearing before the Board in accordance with § 405.1835 or § 405.1837 of this subpart, the parties to all proceedings in the Board appeal include the provider, an intermediary, and, where applicable, any other entity found by the Board to be a related organization of the provider under the principles enunciated in § 413.17 of this chapter.

(b) Neither the Secretary nor CMS may be made a party to proceedings in a Board appeal.

(1) The Board may call as a witness any employee or officer of the Department of Health and Human Services or CMS having personal knowledge of the facts and the issues in controversy in an appeal.

(2) The regulations at 45 CFR Part 2 (Testimony by employees and production of documents in proceedings where the United States is not a party) apply as to whether such employee or officer will appear.

(c) An intermediary may designate a representative from the Secretary or CMS, who may be an attorney, to represent the intermediary in proceedings before the Board.

(d) Although CMS is not a party to proceedings in a Board appeal, there may be instances where CMS determines that the administrative policy implications of a case are substantial enough to warrant comment from CMS (as described in § 405.1863 of this subpart). CMS—

(1) May file *amicus curiae* (friend of the court) briefing papers with the Board in accordance with a schedule to be determined by the Board.

(2) Must promptly mail copies of any documents filed with the Board to each party to the appeal.

(e) A nonparty other than CMS may seek leave from the Board to file *amicus curiae* briefing papers with the Board.

(f) The Board may exclude from the record all or part of an amicus curiae briefing paper. When the Board excludes from the record all or part of an amicus curiae briefing paper submitted by CMS, it states for the record its reason(s) in writing.

■ 22. Section 405.1845 is amended by—

■ A. Revising the section heading.

■ B. Revising paragraphs (c) and (d).

■ C. Adding paragraphs (e) through (h)

The revisions and additions read as follows:

§ 405.1845 Composition of Board; hearings, decisions, and remands.

* * * * *

(c) *Composition of the Board.* The Secretary designates one member of the Board as Chairperson. The Chairperson coordinates and directs the administrative activities of the Board and the conduct of proceedings before the Board. CMS provides administrative support for the Board. Under the direction of the Chairperson, the Board is solely responsible for the content of its decisions.

(d) *Quorum.* (1) The Board must have a quorum in order to issue one of the decisions specified as final, or deemed final by the Administrator, under § 405.1875(a)(2)(i), (a)(2)(iii), and (a)(2)(iv), but a quorum is not required for other Board actions.

(2) Three Board members, at least one of whom is representative of providers, are required in order to constitute a quorum.

(3) The opinion of the majority of those Board members issuing a decision specified as final, or deemed as final by the Administrator, under § 405.1875(a)(2), constitutes the Board's decision.

(e) *Hearings.* The Board may conduct a hearing and issue a hearing decision (as described in § 405.1871 of this subpart) on a specific matter at issue in an appeal, provided it finds jurisdiction over the matter at issue in accordance with § 405.1840 of this part and determines it has the legal authority to fully resolve the issue (as described in § 405.1867 of this subpart).

(f) *Oral hearings.* (1) In accordance with paragraph (d) of this section, the Board does not need a quorum in order to hold an oral hearing (as described in § 405.1851 of this subpart). The Chairperson of the Board may designate one or more Board members to conduct an oral hearing (where less than a quorum conducts the hearing). Because the presence of all Board members is not required at an oral hearing, the Board, at its discretion, may hold more than one oral hearing at a time.

(2) *Waiver of oral hearings.* With the intermediary's agreement and the Board's approval, the provider (or, in the case of group appeals, the group of providers) and any related organizations

(as described in § 405.1843(a) of this subpart) may waive any right to an oral hearing and stipulate that the Board may issue a hearing decision on the written record. An on-the-written-record hearing consists of all the evidence and written argument or comments submitted to the Board and included in the record (as described in § 405.1865 of this subpart).

(g) *Hearing decisions.* The Board's hearing decision must be based on the transcript of any oral hearing before the Board, any matter admitted into evidence at a hearing or deemed admissible evidence for the record (as described in § 405.1855 of this subpart), and any written argument or comments timely submitted to the Board (as described in § 405.1865 of this subpart).

(h) *Remands.* (1) Except as provided in paragraph (h)(3) of this section, a Board remand order may be reviewed solely during the course of Administrator review of one of the Board decisions specified in § 405.1875(a)(2) of this subpart), or of judicial review of a final agency decision as described in § 405.1877(a) and (c)(3) of this part, as applicable.

(2) The Board may order a remand requiring specific actions of a party to the appeal. In ordering a remand, the Board must—

(i) Specify any actions required of the party and explain the factual and legal basis for ordering a remand;

(ii) Issue the remand order in writing; and

(iii) Mail the remand order promptly to the parties and any affected nonparty, such as CMS, to the appeal.

(3) A Board remand order is not subject to immediate Administrator review unless the Administrator determines that the remand order might otherwise evade his or her review (as described in § 405.1875(a)(2)(iv) of this subpart).

■ 23. Section 405.1853 is revised to read as follows:

§ 405.1853 Board proceedings prior to any hearing; discovery.

(a) *Preliminary narrowing of the issues.* Upon receiving notification that a request for a Board hearing is submitted, the intermediary must—

(1) Promptly review both the materials submitted with the provider hearing request, and the information underlying each intermediary or Secretary determination for each cost reporting period under appeal.

(2) Expeditiously attempt to join with the provider in resolving specific factual or legal issues and submitting to the Board written stipulations setting forth the specific issues that remain for Board resolution based on the review; and

(3) Ensure that the evidence it considered in making its determination, or, where applicable, the evidence the Secretary considered in making his or her determination, is included in the record.

(b) *Position papers.* (1) After any preliminary narrowing of the issues, the parties must file position papers in order to narrow the issues further. In each case, and as appropriate, the Board establishes the deadlines as to when the provider(s) and the intermediary must submit position papers to the Board.

(2) The Board has the discretion to extend the deadline for submitting a position paper. Each position paper must set forth the relevant facts and arguments regarding the Board's jurisdiction over each remaining matter at issue in the appeal (as described in § 405.1840 of this subpart), and the merits of the provider's Medicare payment claims for each remaining issue.

(3) In the absence of a Board order or general instructions to the contrary, any supporting exhibits regarding Board jurisdiction must accompany the position paper. Exhibits regarding the merits of the provider's Medicare payment claims may be submitted in a timeframe to be decided by the Board through a schedule applicable to a specific case or through general instructions.

(c) *Initial status conference.* (1) Upon review of the parties' position papers, one or more members of the Board may conduct an initial status conference. An initial status conference may be conducted in person or telephone, at the discretion of the Board.

(2) The Board may use the status conference to discuss any of the following:

(i) Simplification of the issues.

(ii) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement.

(iii) Stipulations and admissions of fact or as to the content and authenticity of documents.

(iv) Whether the parties can agree to submission of the case on a stipulated record.

(v) Whether a party may waive appearance at an oral hearing and submit only documentary evidence (the admissibility of which is subject to objection from other parties) and written argument.

(vi) Limitation of the number of witnesses.

(vii) Scheduling dates for the exchange of witness lists and of proposed exhibits.

(viii) Discovery as permitted under this section.

(ix) The time and place for the hearing.

(x) Potential settlement of some or all of the issues.

(xi) Other matters that the Board deems necessary and appropriate. The Board may issue any orders at the conference found necessary and appropriate to narrow the issues further and expedite further proceedings in the appeal.

(3) After the status conference, the Board may—

(i) Issue in writing a report and order specifying what transpired and formalizing any orders issued at the conference; and

(ii) Require the parties to submit (jointly or otherwise) a proposed report and order, in order to facilitate issuance of a final report and order.

(d) *Further status conferences.* Upon a party's request, or on its own motion, the Board may conduct further status conferences where it finds the proceedings necessary and appropriate.

(e) *Discovery.* (1) *General rules.* (i) Discovery is limited in Board proceedings.

(ii) The Board may permit discovery of a matter that is relevant to the specific subject matter of the Board hearing, provided the matter is not privileged or otherwise protected from disclosure and the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate.

(iii) Any discovery initiated by a party must comply with all requirements and limitations of this section, and with any further requirements or limitations ordered by the Board.

(iv) The applicable provisions of the Federal Rules of Civil Procedure and Rules 401 and 501 of the Federal Rules of Evidence serve as guidance for any discovery that is permitted under this section or by Board order.

(2) *Limitations on discovery.* Any discovery before the Board is limited as follows:

(i) A party may request of another party, or of a nonparty other than CMS, the Secretary or any Federal agency, the reasonable production of documents for inspection and copying.

(ii) A party may also request another party to respond to a reasonable number of written interrogatories.

(iii)(A) A party may not take the deposition, upon oral or written examination, of another party or a nonparty, unless the proposed deponent agrees to the deposition or the Board finds that the proposed deposition is necessary and appropriate under the

criteria set forth in Federal Rules of Civil Procedure 26 and 32(a)(3) in order to secure the deponent's testimony for a Board hearing.

(B) The regulations at 45 CFR Part 2 (Testimony by employees and production of documents in proceedings where the United States is not a party) apply as to whether an employee or officer of CMS or HHS will appear for a deposition.

(iv) A party may not request admissions or take any other form of discovery not authorized under this section.

(3) *Time limits.* (i) A party's discovery request is timely if the date the request is served on another party or nonparty, as applicable, is no later than 120 days before the initially scheduled starting date of the Board hearing, unless the Board extends the time for the request.

(ii)(A) *Depositions.* (*1*) In the absence of an order or instruction by the Board setting a schedule for the holding of a deposition, a party desiring to take a deposition must give reasonable notice in writing to the deponent of a scheduled deposition.

(*2*) A deposition may not be held any later than 45 days before the initially scheduled starting of the Board hearing, unless the Board orders otherwise.

(B) *Responses.* (*1*) In the absence of a Board order or general instructions of the Board setting a schedule for responses, responses to interrogatories and requests for production of documents are due according to the schedule agreed upon by the party serving discovery and the party to which the discovery is directed or within the time allotted by the Federal Rules of Civil Procedure.

(*2*) Responses by a party to interrogatories, and responses by a party or nonparty to requests for production of documents must be served no later than 45 days before the initially scheduled starting date of the Board hearing, unless the Board orders otherwise.

(iii) Before ruling on a request to extend the time for requesting discovery or for conducting or responding to discovery, the Board must give the other parties to the appeal and any nonparty subject to a discovery request a reasonable period to respond to the extension request.

(iv) The Board has the discretion to extend the time in which to request discovery or conduct or respond to discovery.

(v) If the Board grants the extension request, it sets a new discovery deadline and has the discretion to reschedule the hearing date.

(4) *Rights of nonparties.* If a discovery request is made of a nonparty to the Board appeal, the nonparty has the rights any party has in responding to a discovery request. The rights of the nonparty include, but are not limited to, the right to select and use any attorney or other representative, and to submit discovery responses, objections, or motions to the Board.

(5) *Motions to compel or for protective order.* (i) Each party is required to make a good faith effort to resolve or narrow any discovery dispute, regardless of whether the dispute is with another party or a nonparty.

(ii) A party may submit to the Board a motion to compel discovery that is permitted under this section or any Board order, and a party or nonparty may submit a motion for a protective order regarding any discovery request to the Board.

(iii) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute.

(iv) A self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute must be included with any response to a motion to compel or for protective order.

(v) The Board must decide any motion in accordance with this section and any prior discovery ruling.

(vi)(A) The Board must issue and mail to each party and any affected nonparty a discovery ruling that grants or denies, in whole or in part, the motion to compel or the motion for a protective order, if applicable.

(B) The discovery ruling must—

(*1*) Specifically identify any part of the disputed discovery request upheld and any part rejected, and

(*2*) Impose any limits on discovery the Board finds necessary and appropriate.

(vii) Nothing in this section authorizes the Board to compel any action from the Secretary or CMS.

(6) *Reviewability of discovery and disclosure rulings.* (i) *General rule.* A Board discovery ruling, or a Board disclosure ruling, such as one issued at a hearing, is not subject to immediate review by the Administrator (as described in § 405.1875(a)(3) of this subpart). The ruling may be reviewed solely during the course of Administrator review of one of the Board decisions specified as final or deemed to be final, by the Administrator, under § 405.1875(a)(2)of this subpart, or of judicial review of a final agency decision as described in § 405.1877(a) and (c)(3) of this subpart, as applicable.

(ii) *Exception.* To the extent a ruling authorizes discovery or disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the Board, that portion of the discovery or disclosure ruling may be reviewed immediately by the Administrator in accordance with § 405.1875(a)(3)(i) of this subpart. Upon notice to the Board that a party or nonparty, as applicable, intends to seek Administrator review of the ruling,—

(A)(*1*) The Board must stay all proceedings affected by the ruling.

(*2*) The Board determines the length of the stay under the circumstances of a given case, but in no event may the length of the stay be less than 15 days after the day on which the Board received notice of the party or nonparty's intent to seek Administrator review.

(B) If the Administrator—

(1) Grants a request for review, or takes own motion review, of a ruling, the ruling is stayed until the time the Administrator issues a written decision that affirms, reverses, modifies, or remands the Board's ruling.

(2) Does not grant a request or take own motion review within the time allotted for the stay, the stay is lifted and the ruling is not subject to immediate review.

■ 24. Section 405.1857 is revised to read as follows:

§ 405.1857 Subpoenas.

(a) *Time limits.* (1) The Board may issue a subpoena—

(i) To a party to a Board appeal or to a nonparty other than CMS or the Secretary or any Federal agency, requiring the attendance and testimony of witnesses or the production of documents for inspection and copying, provided the Board makes a preliminary finding of its jurisdiction over the matters at issue in accordance with § 405.1840(a) of this subpart.

(ii) At the request of a party for purposes of discovery (as described in § 405.1853 of this subpart) or an oral hearing (as described in § 405.1845 of this subpart); and

(iii) On its own motion solely for purposes of a hearing.

(2) The date of receipt by the Board of a party's subpoena request may not be any later than for subpoenas requested for purposes of—

(i) Discovery, 120 days before the initially scheduled starting date of the Board hearing; and

(ii) An oral hearing, 45 days before the scheduled starting date of the Board hearing.

(3) Subject to paragraph (4) of this section, the Board may not issue a subpoena any later than for purposes of a—

(i) Discovery subpoena, 90 days before the initially scheduled starting date of the Board hearing; and

(ii) Hearing subpoena, whether issued at a party's request or on the Board's own motion, 30 days before the scheduled starting date of the Board hearing.

(4) The Board may extend the deadlines specified in paragraphs (a)(2) and (a)(3) of this section provided the Board gives each party to the appeal and any nonparty subject to the subpoena request or subpoena a reasonable period of time to comment on any proposed extension. If the Board extends a deadline, it retains the discretion to reschedule the hearing date.

(b) *Criteria.* (1) *Discovery subpoenas.* The Board may issue a subpoena for purposes of discovery if all of the following are applicable:

(i) The subpoena was requested in accordance with the requirements of paragraph (c)(1) of this section.

(ii) The party's discovery request complies with the applicable provisions of § 405.1853(e) of this part.

(iii) A subpoena is necessary and appropriate to compel a response to the discovery request.

(2) *Hearing subpoenas.* The Board may issue a subpoena for purposes of an oral hearing if—

(i) The party's subpoena request meets the requirements of paragraph (c)(1) of this section;

(ii) A subpoena is necessary and appropriate to compel the attendance and testimony of witnesses or the production of documents for inspection or copying, provided the testimony or documents are relevant and material to a matter at issue in the appeal but not unduly repetitious (as described in § 405.1855 of this subpart); and

(iii) The subpoena does not compel the disclosure of matter that is privileged or otherwise protected from disclosure for reasons such as case preparation, confidentiality, or undue burden.

(iv) The subpoena does not impose undue burden or expense on the party or nonparty subject to the subpoena, and is not otherwise unreasonable or inappropriate.

(3) *Guiding principles.* In determining whether to issue, quash, or modify a subpoena under this section, the Board uses the applicable provisions of the Federal Rules of Civil Procedure and Rules 401 and 501 of the Federal Rules of Evidence for guidance.

(c) *Procedures.* (1) *Subpoena requests.* The requesting party must mail any subpoena request submitted to the Board promptly to the party or nonparty subject to the subpoena, and to any other party to the Board appeal. The request must—

(i) Identify with particularity any witnesses (and their addresses, if known) or any documents (and their location, if known) sought by the subpoena, and the means, time, or location for securing any witness testimony or documents;

(ii) Describe specifically, in the case of a hearing subpoena, the facts any witnesses, documents, or tangible materials are expected to establish, and why those facts cannot be established without a subpoena; and

(iii) Explain why a subpoena is appropriate under the criteria prescribed in paragraph (b) of this section.

(2) *Contents of subpoenas.* A subpoena issued by the Board, whether on its own motion or at the request of a party, must be in writing and either sent promptly by the Board to the party or nonparty subject to the subpoena by certified mail or overnight delivery (and to any other party and affected nonparty to the appeal by regular mail), or hand-delivered. Each subpoena must—

(i) Be issued in the name of the Board, and include the case number and name of the appeal;

(ii) Provide notice that—

(A) The subpoena is issued in accordance with section 1878(e) of the Act and § 405.1857 of this subpart; and

(B) CMS must pay the fees and the mileage of any witnesses, as provided in section 205(d) of the Act.

(iii) If applicable, require named witnesses to attend a particular proceeding at a certain time and location and to testify on specific subjects; and

(iv) If applicable, require the production of specific documents for inspection or copying at a certain time and location.

(3) *Rights of nonparties.* If a nonparty to the Board appeal is subject to the subpoena or subpoena request, the nonparty has the rights any party has in responding to a subpoena or subpoena request. The rights of the nonparty include, but are not limited to, the right to select and use any attorney or other representative, and to submit responses, objections, motions, or any other pertinent materials to the Board regarding the subpoena or subpoena request.

(4) *Board action on subpoena requests and motions.* After issuing a subpoena or receiving a subpoena request, the Board must do the following:

(i) Give the party or nonparty subject to the subpoena or subpoena request a reasonable period of time for the submission of any responses, objections, or motions.

(ii) Consider the subpoena or subpoena request, and any responses, objections, or motions related thereto, under the criteria specified in paragraph (b) of this section.

(iii)(A) Issue in writing and mail promptly to each party and any affected nonparty an order granting or denying any motion to quash or modify a subpoena, or granting or denying any subpoena request in whole or in part; and

(B) Issue, if applicable, an original or modified subpoena in accordance with paragraph (c)(2) of this section.

(d) *Reviewability.* (1) *General rules.* (i) If the Board issues, quashes, or modifies, or refuses to issue, quash, or modify, a subpoena under paragraphs (c)(2) or (c)(4) of this section, the Board's action is not subject to immediate review by the Administrator (as described in § 405.1875(a)(3) of this subpart).

(ii) Any Board action on a subpoena may be reviewed solely during the course of Administrator review of one of the Board decisions specified in § 405.1875(a)(2) of this subpart, or of judicial review of a final agency decision as described in § 405.1877(a) and (c)(3) of this subpart, as applicable.

(2) *Exception.* (i) To the extent a subpoena compels disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the Board, the Administrator may review immediately that portion of the subpoena in accordance with § 405.1875(a)(3)(ii) of this subpart.

(ii) Upon notice to the Board that a party or nonparty, as applicable, intends to seek Administrator review of the subpoena, the Board must stay all proceedings affected by the subpoena.

(iii) The Board determines the length of the stay under the circumstances of a given case, but in no event may the stay be less than 15 days after the day on which the Board received notice of the party or nonparty's intent to seek Administrator review.

(iv) If the Administrator grants a request for review, or takes own motion review, of the subpoena, the subpoena or portion of the subpoena, as applicable, is stayed until the time as the Administrator issues a written decision that affirms, reverses, modifies,

or remands the Board's action on the subpoena.

(v) If the Administrator does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the Board's action is not immediately reviewable.

(e) *Enforcement.* (i) If the Board determines, whether on its own motion or at the request of a party, that a party or nonparty subject to a subpoena issued under this section has refused to comply with the subpoena, the Board may request the Administrator to seek enforcement of the subpoena in accordance with section 205(e) of the Act.

(ii) Any enforcement request by the Board must consist of a written notice to the Administrator describing in detail the Board's findings of noncompliance and its specific request for enforcement, and providing a copy of the subpoena and evidence of its receipt by certified mail by the party or nonparty subject to the subpoena.

(iii) The Board must promptly mail a copy of the notice and related documents to the party or nonparty subject to the subpoena, and to any other party and affected nonparty to the appeal.

■ 25. Section 405.1865 is revised to read as follows:

§ 405.1865 Record of administrative proceedings.

(a)(1) The Board and, if applicable, the Administrator must maintain a complete record of all proceedings in each appeal.

(2) For proceedings before the Board, the administrative record consists of all evidence, documents and any other tangible materials submitted by the parties to the appeal and by any nonparty (as described in § 405.1853(e)(4) and § 405.1857(c)(3) of this subpart), along with all Board correspondence, rulings, subpoenas, orders, and decisions.

(3) The term ''record'' is intended to encompass both the unappended record and any appendix to the record (as described in § 405.1865(b) of this subpart).

(4) The record includes a complete transcription of the proceedings at any oral hearing before the Board.

(5) A copy of any transcription must be made available to any party upon written request.

(b) Any evidence ruled inadmissible by the Board (as described in § 405.1855 of this subpart) and any other submitted matter that the Board declines to consider (whether as untimely or otherwise) must be, to the extent practicable, clearly identified and segregated in an appendix to the record for purposes of any further review (as described in § 405.1875 and § 405.1877 of this subpart).

(c) To the extent applicable, the administrative record also includes all documents (including written submissions) and any other tangible materials to the Administrator by the parties to the appeal or by any nonparty (as described in § 405.1853(e)(4) and § 405.1857(c)(3) of this subpart), in addition to all correspondence from the Administrator or the Office of the Attorney Advisor and all rulings, orders, and decisions by the Administrator. The provisions of paragraph (b) of this section also pertain to any proceedings before the Administrator, to the extent the Administrator finds evidence inadmissible or declines to consider a specific matter (whether as untimely or otherwise).

§ 405.1867 [Amended]

■ 26. Section 405.1867 is amended by revising the section heading and the first sentence to read as follows:

§ 405.1867 Scope of Board's legal authority.

In exercising its authority to conduct proceedings under this subpart, the Board must comply with all the provisions of Title XVIII of the Act and regulations issued thereunder, as well as, CMS Rulings issued under the authority of the Administrator as described in § 401.108 of this subchapter. * * *.

■ 27. A new § 405.1868 is added to read as follows:

§ 405.1868 Board actions in response to failure to follow Board rules.

(a) The Board has full power and authority to make rules and establish procedures, not inconsistent with the law, regulations, and CMS Rulings, that are necessary or appropriate to carry out the provisions of section 1878 of the Act and of the regulations in this subpart. The Board's powers include the authority to take appropriate actions in response to the failure of a party to a Board appeal to comply with Board rules and orders or for inappropriate conduct during proceedings in the appeal.

(b) If a provider fails to meet a filing deadline or other requirement established by the Board in a rule or order, the Board may—

(1) Dismiss the appeal with prejudice;

(2) Issue an order requiring the provider to show cause why the Board should not dismiss the appeal; or

(3) Take any other remedial action it considers appropriate.

(c) If an intermediary fails to meet a filing deadline or other requirement established by the Board, the Board may—

(1) Take other actions that it considers appropriate, such as—

(i) Issuing a decision based on the written record submitted to that point; or

(ii) Issuing a written notice to CMS describing the intermediary's actions and requesting that CMS take appropriate action, such as review of the intermediary's compliance with the contractual requirements of § 421.120, § 421.122, and § 421.124 of this chapter; and

(2) Not use its authority to take an action such as, a sanction, reversing or modifying the intermediary's or Secretary's determination for the cost reporting period under appeal, or ruling against the intermediary on a disputed issue of law or fact in the appeal.

(d)(1) If the Board dismisses the appeal with prejudice under this section, it must issue a dismissal decision dismissing the appeal. The decision by the Board must be in writing and include an explanation of the reason for the dismissal. A copy of the Board's dismissal decision must be mailed promptly to each party to the appeal (as described in § 405.1843 of this subpart).

(2) A dismissal decision by the Board is final and binding on the parties unless the decision is reversed, affirmed, modified, or remanded by the Administrator under § 405.1875(a)(2)(ii), and § 405.1875(e) or § 405.1875(f) of this part, no later than 60 days after the date of receipt by the provider of the Board's decision.

(i) The Board decision is inoperative during the 60-day period for review by the Administrator, or in the event the Administrator reverses, affirms, modifies, or remands the decision within the period.

(ii) The Board may reopen and revise a final Board decision in accordance with § 405.1885 through § 405.1889 of this subpart.

(e)(1) Any action taken by the Board under this section other than dismissal of the appeal is not subject to immediate Administrator review (as described in § 405.1875(a)(3) of this subpart) or judicial review (as described in § 405.1877(a)(3) of this subpart).

(2) A Board action other than dismissal of the appeal may be reviewed solely during the course of Administrator review of one of the Board decisions specified as final, or deemed to be final by the Administrator, under § 405.1875(a)(2) of this subpart or of judicial review of a final agency

decision as described in § 405.1877(a) of this subpart, as applicable.

(f) *Ex parte* communications with Board staff concerning procedural matters are not prohibited.

(g) Upon receipt of a credible allegation that a party's representative has divulged to that party, or to the Board information that was obtained during the course of the representative's relationship (such as legal counsel or employee) with an opposing party and that was intended by that party to be kept confidential, the Board—

(1) Investigates the allegation; and

(2) May take remedial action when it determines that it is appropriate to do so, against the party or the representative (such as prohibiting the representative from appearing before it, excluding such information from the record, or if the overall fairness of the hearing has been compromised, dismissing the case).

■ 28. Section 405.1869 is revised as follows:

§ 405.1869 Scope of Board's authority in a hearing decision.

(a) If the Board has jurisdiction to conduct a hearing on a specific matter at issue under section 1878(a) or (b) of the Act and § 405.1840 of this subpart, and the legal authority to fully resolve the matter in a hearing decision (as described in § 405.1842(f), § 405.1867, and § 405.1871 of this subpart), section 1878 of the Act, and paragraph (a) of this section give the Board the power to affirm, modify, or reverse the intermediary's findings on each specific matter at issue in the intermediary determination for the cost reporting period under appeal, and to make additional revisions on specific matters regardless of whether the intermediary considered the matters in issuing the intermediary determination. The Board's power to make additional revisions in a hearing decision does not authorize the Board to consider or decide a specific matter at issue for which it lacks jurisdiction (as described in § 405.1840(b) of this subpart) or which was not timely raised in the provider's hearing request. The Board's power under section 1878(d) of the Act and paragraph (a) of this section to make additional revisions is limited to those revisions necessary to resolve fully a specific matter at issue if—

(1) The Board has jurisdiction to grant a hearing on the specific matter at issue under section 1878(a) or (b) of the Act and § 405.1840 of this subpart; and

(2) The specific matter at issue was timely raised in an initial request for a Board hearing filed in accordance with § 405.1835 or § 405.1837 of this subpart, as applicable, or in a timely request to add issues to a single provider appeal submitted in accordance with § 405.1835(c) of this subpart.

(b)(1) If the Board has jurisdiction to conduct a hearing on a specific matter at issue solely under § 405.1840 and § 405.1835 or § 405.1837 of this subpart, as applicable, and the legal authority to fully resolve the matter in a hearing decision (as described in § 405.1842(f), § 405.1867, and § 405.1871 of this subpart), the Board is authorized to do the following:

(i) Affirm, modify, or reverse the intermediary's or Secretary's findings on each specific matter at issue in the intermediary or Secretary determination under appeal.

(ii) Make additional revisions on each specific matter at issue regardless of whether the intermediary considered these revisions in issuing the intermediary determination under appeal, provided the Board does not consider or decide a specific matter for which it lacks jurisdiction (as described in § 405.1840(b) of this subpart) or that was not timely raised in the provider's hearing request.

(2) The Board's authority under this section to make the additional revisions is limited to those revisions necessary to resolve a specific matter at issue.

■ 29. Section 405.1871 is revised to read as follows:

§ 405.1871 Board Hearing Decision.

(a)(1) If the Board finds jurisdiction over a specific matter at issue and conducts a hearing on the matter (as described in § 405.1840(a) and § 405.1845(e) of this subpart), the Board must issue a hearing decision deciding the merits of the specific matter at issue.

(2) A Board hearing decision must be in writing and based on the admissible evidence from the Board hearing and other admissible evidence and written argument or comments as may be included in the record and accepted by the Board (as described in § 405.1845(g) and § 405.1865 of this subpart).

(3) The decision must include findings of fact and conclusions of law regarding the Board's jurisdiction over each specific matter at issue (see § 405.1840(c)(1)), and whether the provider carried its burden of production of evidence and burden of proof by establishing, by a preponderance of the evidence, that the provider is entitled to relief on the merits of the matter at issue.

(4) The decision must include appropriate citations to the record evidence and to the applicable law, regulations, CMS Rulings, and other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS. Where the Board's decision reverses or modifies an intermediary determination on an issue for which the policy expressed in an interpretive rule (other than a regulation or a CMS Ruling), general statement of policy or rule of agency organization, procedure or practice established by CMS would be dispositive of that issue (if followed by the Board), the Board decision must explain how it gave great weight to such interpretive rule or other such instruction but did not uphold the intermediary's determination on the issue.

(5) A copy of the decision must be mailed promptly to each party to the appeal.

(b)(1) A Board hearing decision issued in accordance with paragraph (a) of this section is final and binding on the parties to the Board appeal unless the hearing decision is reversed, affirmed, modified, or remanded by the Administrator under § 405.1875(a)(2)(i), § 405.1875(e), and § 405.1875(f) of this subpart, no later than 60 days after the date of receipt by the provider of the Board's decision.

(2) A Board hearing decision is inoperative during the 60-day period for review of the decision by the Administrator, or in the event the Administrator reverses, affirms, modifies, or remands that decision within the period.

(3) A Board hearing decision that is final under paragraph (b)(1) of this section is subject to the provisions of § 405.1803(d) of this subpart, unless the decision is the subject of judicial review (as described in § 405.1877 of this subpart).

(4) A final Board decision under paragraph (a) and (b) of this section may be reopened and revised by the Board in accordance with § 405.1885 through § 405.1889 of this subpart.

(5) When the intermediary's denial of the relief that the provider seeks before the Board is based on procedural grounds (for example, the alleged failure of the provider to satisfy a time limit) or is based on the alleged failure to supply adequate documentation to support the provider's claim, and the Board rules that the basis of the intermediary's denial is invalid, the Board remands to the intermediary for the intermediary to make a determination on the merits of the provider's claim.

§ 405.1873 [Removed].

■ 30. Section 405.1873 is removed and reserved.

■ 31. Section 405.1875 is revised to read as follows:

§ 405.1875 Administrator review.

(a) *Basic rule: Time limit for rendering Administrator decisions, Board decisions, and action subject to immediate review.* The Administrator, at his or her discretion, may immediately review any decision of the Board specified in paragraph (a)(2) of this section. Nonfinal decisions or actions by the Board are not immediately reviewable, except as provided in paragraph (a)(3) of this section. The Administrator may exercise this discretionary review authority on his or her own motion, or in response to a request from: a party to the Board appeal; CMS; or, in the case of a matter specified in paragraph (a)(3)(i) or (a)(3)(ii) of this section, another affected nonparty to a Board appeal. All requests for Administrator review and any other submissions to the Administrator under paragraph (c) of this section must be sent to the Office of the Attorney Advisor. The Office of the Attorney Advisor must examine each Board decision specified in paragraph (a)(2) of this section, and each matter described in § 405.1845(h)(3), § 405.1853(e)(6)(ii), or § 405.1857(d)(2) of this subpart, of which it becomes aware, together with any review requests or any other submission made in accordance with the provisions of this section, in order to assist the Administrator's exercise of this discretionary review authority. The Board is required to send to the Office of the Attorney Advisor a copy of each decision specified in paragraphs (a)(2)(i) and (a)(2)(iii) of this section upon issuance of the decision.

(1) The date of rendering any decision after the review by the Administrator must be no later than 60 days after the date of receipt by the provider of a reviewable Board decision or action. For purposes of this section, the date of rendering is the date the Administrator signs the decision, and not the date the decision is mailed or otherwise transmitted to the parties.

(2) The Administrator may immediately review:

(i) A Board hearing decision (as described in § 405.1871 of this subpart).

(ii) A Board dismissal decision (as described in § 405.1836(e)(1) and (e)(2), § 405.1840(c)(2) and (c)(3), § 405.1868(d)(1) and (d)(2) of this subpart).

(iii) A Board EJR decision, but only the question of whether there is Board jurisdiction over a specific matter at issue in the decision; the Administrator may not review the Board's determination in a decision of its authority to decide a legal question relevant to the matter at issue (as described in § 405.1842(h) of this subpart).

(iv) Any other Board decision or action deemed to be final by the Administrator.

(3) Any decision or action by the Board not specified in paragraph (a)(2)(i) through (a)(2)(iii) of this section, or not deemed to be final by the Administrator under paragraph (a)(2)(iv) of this section, is nonfinal and not subject to Administrator review until the Board issues one of the decisions specified in paragraph (a)(2) of this section, except the Administrator may review immediately the following matters:

(i) A Board ruling authorizing discovery or disclosure of a matter for which an objection was made based on privilege or other protection from disclosure such as case preparation, confidentiality, or undue burden (as described in § 405.1853(e)(6)(ii) of this subpart).

(ii) A Board subpoena compelling disclosure of a matter for which an objection was made based on privilege or other protection from disclosure such as case preparation, confidentiality, or undue burden (as described in § 405.1857(d)(2) of this subpart).

(b) *Illustrative list of criteria for deciding whether to review.* In deciding whether to review a Board decision or other matter specified in paragraphs (a)(2) and (a)(3) of this section, either on his or her own motion or in response to a request for review, the Administrator considers criteria such as whether it appears that—

(1) The Board made an erroneous interpretation of law, regulation, CMS Ruling, or other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.

(2) A Board hearing decision meets the requirements of § 405.1871(a) of this subpart.

(3) The Board erred in refusing to admit certain evidence or in not considering other submitted matter (as described in § 405.1855 and § 405.1865(b) of this subpart), or in admitting certain evidence.

(4) The case presents a significant policy issue having a basis in law and regulations, and review is likely to lead to the issuance of a CMS Ruling or other directive needed to clarify a statutory or regulatory provision.

(5) The Board has incorrectly found, assumed, or denied jurisdiction over a specific matter at issue or extended its authority in a manner not provided for by statute, regulation, CMS Ruling, or other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.

(6) The decision or other action of the Board requires clarification, amplification, or an alternative legal basis.

(7) A remand to the Board may be necessary or appropriate under the criteria prescribed in paragraph (f) of this section.

(c) *Procedures.* (1) *Review requests.* (i)(A) A party to a Board appeal or CMS may request Administrator review of a Board decision specified in paragraph (a)(2) of this section or a matter described in paragraph (a)(3) of this section.

(B) A nonparty other than CMS may request Administrator review solely of a matter described in paragraph (a)(3)(i) or (a)(3)(ii) of this section.

(ii) The date of receipt by the Office of Attorney Advisor of any review request must be no later than 15 days after the date the party making the request received the Board's decision or other reviewable action.

(iii) A request for review (or a response to a request) must be submitted in writing, identify the specific issues for which review is requested, and explain why review is or is not appropriate, under the criteria specified in paragraph (b) of this section or for some other reason.

(iv) A copy of any review request (or response to a request) must be mailed promptly to each party to the appeal, the Office of the Attorney Advisor, and, as applicable, CMS, and any other affected nonparty.

(2) *Exception to time for requesting review.* If a party, or nonparty, as applicable, seeks immediate review of a matter described in § 405.1875(a)(3)(i) or (a)(3)(ii) of this subpart, the request for review must be made as soon as practicable, but in no event later than 5 business days after the day the party or nonparty seeking review received notice of the ruling or subpoena. The request must state the reason(s) why the ruling was in error and the potential harm that may be caused if immediate review is not granted.

(3) *Notice of review.* (i) When the Administrator decides to review a Board decision or other matter specified in paragraphs (a)(2) or (a)(3) of this section, respectively, whether on his or her own motion or upon request, the Administrator must send a written notice to the parties, CMS, and any other affected nonparty stating that the Board's decision is under review, and indicating the specific issues that are being considered.

(ii) The Administrator may decline to review a Board decision or other matter, or any issue in a decision or matter, even if a request for review is submitted in accordance with paragraph (c)(1) or (c)(2) of this section.

(4) *Written submissions on review.* If the Administrator accepts review of the Board's decision or other reviewable action, a party, CMS, or, another affected nonparty that requested review solely of a matter described in paragraph (a)(3)(i) or (a) (3)(ii) of this section, may tender written submissions regarding the review.

(i) The date of receipt by the Office of the Attorney Advisor of any material must be no later than 15 days after the date the party, CMS or other affected nonparty submitting comments received the Administrator's notice under paragraph (c)(3) of this section, taking review of the Board decision or other reviewable matter.

(ii) Any submission must be limited to the issues accepted for Administrator review (as identified in the notice) and be confined to the record of Board proceedings (as described in § 405.1865 of this subpart). The submission may include—

(A) Argument and analysis supporting or taking exception to the Board's decision or other reviewable action;

(B) Supporting reasons, including legal citations and excerpts of record evidence, for any argument and analysis submitted under paragraph (c)(4)(ii)(A) of this section;

(C) Proposed findings of fact and conclusions of law;

(D) Rebuttal to any written submission filed previously with the Administrator in accordance with paragraph (c)(4) of this section; or

(E) A request, with supporting reasons, that the decision or other reviewable action be remanded to the Board.

(d) *Ex parte communications prohibited.* All communications from any party, CMS, or other affected nonparty, concerning a Board decision (or other reviewable action) that is being reviewed or may be reviewed by the Administrator must—

(1) Be in writing.

(2) Contain a certification that copies were served on all other parties, CMS, and any other affected nonparty, as applicable.

(3) Include, but are not limited to—

(i) Requests for review and responses to requests for review submitted under paragraph (c)(1) or (c)(2) of this section; and

(ii) Written submissions regarding review submitted under paragraph (c)(4) of this section. The Administrator does not consider any communication that does not meet these requirements or is not submitted within the required time limits.

(e) *Administrator's decision.* (1) Upon completion of any review, the Administrator may render a written decision that—

(i) For purposes of review of a Board decision specified in paragraph (a)(2) of this section, affirms, reverses, or modifies the Board's decision, or vacates that decision and remands the case to the Board for further proceedings in accordance with paragraph (f)(1)(i) of this section; or

(ii) For purposes of review of a matter described in paragraph (a)(3) of this section, affirms, reverses, modifies, or remands the Board's discovery or disclosure ruling, or subpoena, as applicable, and remands the case to the Board for further proceedings in accordance with paragraph (f)(1)(ii) of this section.

(2) The date of rendering of any decision by the Administrator must be no later than 60 days after the date of receipt by the provider of the Board's decision or other reviewable action. The Administrator must promptly mail a copy of his or her decision to the Board, to each party to the appeal, to CMS, and, if applicable, to any other affected nonparty.

(3) Any decision by the Administrator may rely on—

(i) Applicable provisions of the law, regulations, CMS Rulings, and other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.

(ii) Prior decisions of the Board, the Administrator, and the courts, and any other law that the Administrator finds applicable, whether or not cited in materials submitted to the Administrator.

(iii) The administrative record for the case (as described in § 405.1865 of this subpart).

(iv) Generally known facts that are not subject to reasonable dispute.

(4) A timely decision by the Administrator that affirms, reverses, or modifies one of the Board decisions specified in paragraph (a)(2) of this section is final and binding on each party to the Board appeal (as described in § 405.1877(a)(4) of this subpart).

(i) If the final Administrator decision follows review of a Board hearing decision, the Administrator's decision is subject to the provisions of § 405.1803(d) of this subpart, unless that final decision is the subject of judicial review (as described in § 405.1877 of this subpart).

(ii) The Administrator, in accordance with § 405.1885 through § 405.1889 of this subpart, may reopen and revise a final Administrator decision.

(iii) A decision by the Administrator remanding a matter to the Board for further proceedings in accordance with paragraph (f) of this section is not a final decision for purposes of judicial review (as described in § 405.1877(a)(4) of this subpart) or the provisions of § 405.1803(d).

(f) *Remand.* (1) A remand to the Board by the Administrator has the effect for purposes of review—

(i) With respect to a Board decision specified in paragraph (a)(2) of this section, vacating the Board's decision and requiring further proceedings in accordance with the Administrator's decision and this subpart; or

(ii) With respect to a matter described in paragraph (a)(3) of this section, affirming, reversing, modifying, or remanding the Board's remand order, discovery ruling, or subpoena, as applicable, and returning the case to the Board for further proceedings in accordance with the Administrator's decision and this subpart.

(2) The Administrator may direct the Board to take further action for the development of additional facts or new issues, or to consider the applicability of laws or regulations other than those considered by the Board. The following are not acceptable bases for remand:

(i) Presentation of evidence existing at the time of the Board hearing that was known or reasonably may be known.

(ii) Introduction of a favorable court ruling, regardless of whether the ruling was made or was available at the time of the Board hearing or at the time the Board issued its decision.

(iii) Change in a party's representation, regardless when made.

(iv) Presentation of an alternative legal basis concerning an issue in dispute.

(v) Attempted retraction of a waiver of a right, regardless when made.

(3) After remand, the Board must take the actions required in the Administrator's remand order and issue a new decision in accordance with paragraph (f)(1)(i) of this section, or issue under paragraph (f)(1)(ii) of this section an initial decision or a further remand order, discovery ruling, or subpoena ruling, as applicable.

(4) Administrator review of any decision or other action by the Board after remand is, to the extent applicable, subject to the provisions of paragraphs (a)(2) or (a)(3) of this section.

(5) In addition to ordering a remand to the Board, the Administrator may order a remand to any component of

HHS or CMS or to an intermediary under appropriate circumstances, including, but not limited to, for the purpose of effectuating a court order (as described in § 405.1877(g)(2) of this subpart). When the intermediary's denial of the relief, that the provider sought before the Board and that is under review by the Administrator, was based on procedural grounds (such as the alleged failure of the provider to satisfy a time limit) or was based on the alleged failure to supply adequate documentation to support the provider's claim, and the Administrator rules that the basis of the intermediary's denial is invalid, the Administrator remands to the intermediary for the intermediary to make a determination on the merits of the provider's claim.

■ 32. Section 405.1877 is revised to read as follows:

§ 405.1877 Judicial review.

(a) *Basis and scope.* (1) Notwithstanding the provisions of 5 U.S.C. 704 or any other provision of law, sections 205(h) and 1872 of the Act provide that a decision or other action by a reviewing entity is subject to judicial review solely to the extent authorized by section 1878(f)(1) of the Act. This section, along with the EJR provisions of § 405.1842 of this subpart, implements section 1878(f)(1) of the Act.

(2) Section 1878(f)(1) of the Act provides that a provider has a right to obtain judicial review of a final decision of the Board, or of a timely reversal, affirmation, or modification by the Administrator of a final Board decision, by filing a civil action in accordance with the Federal Rules of Civil Procedure in a Federal district court with venue no later than 60 days after the date of receipt by the provider of a final Board decision or a reversal, affirmation, or modification by the Administrator. The Secretary (and not the Administrator or CMS itself, or the intermediary) is the only proper defendant in a civil action brought under section 1878(f)(1) of the Act.

(3) A Board decision is final and subject to judicial review under section 1878(f)(1) of the Act only if the decision—

(i) Is one of the Board decisions specified in § 405.1875(a)(2)(i) through (a)(2)(iii) of this subpart or, in a particular case, is deemed to be final by the Administrator under § 405.1875(a)(2)(iv) of this subpart; and

(ii) Is not reversed, affirmed, modified, or remanded by the Administrator under § 405.1875(e) and § 405.1875(f) of this subpart within 60 days of the date of receipt by the provider of the Board's decision. A provider is not required to seek Administrator review under § 405.1875(c) first in order to seek judicial review of a Board decision that is final and subject to judicial review under section 1878(f)(1) of the Act.

(4) If the Administrator timely reverses, affirms, or modifies one of the Board decisions specified in § 405.1875(a)(2)(i) through (a)(2)(iii) of this subpart or deemed to be final by the Administrator in a particular case under § 405.1875(a)(2)(iv) of this subpart, the Administrator's reversal, affirmation, or modification is the only decision subject to judicial review under section 1878(f)(1) of the Act. A remand of a Board decision by the Administrator to the Board vacates the decision. Neither the Board's decision nor the Administrator's remand is a final decision subject to judicial review under section 1878(f)(1) of the Act (as described in § 405.1875(e)(4), § 405.1875(f)(1), and § 405.1875(f)(4) of this subpart).

(b) *Determining when a civil action may be filed.* (1) *General rule.* Under section 1878(f)(1) of the Act, the 60-day periods for Administrator review of a decision by the Board, and for judicial review of any final Board decision, respectively, both begin to run on the same day. Paragraphs (b)(2), (b)(3) and (b)(4) of this section identify how various actions or inaction by the Administrator within the 60-day review period determine the scope and timing of any right a provider may have to judicial review under section 1878(f)(1) of the Act.

(2) *Administrator declines review.* If the Administrator declines any review of a Board decision specified in § 405.1875(a)(2) of this subpart, whether through inaction or in a written notice issued under § 405.1875(c)(3) of this subpart, the provider must file any civil action seeking judicial review of the Board's final decision under section 1878(f)(1) of the Act no later than 60 days after the date of receipt by the provider of the Board's decision.

(3) *Administrator accepts review and renders timely decision.* When the Administrator decides to review, in a notice under § 405.1875(c)(3) of this subpart, any issue in a Board decision specified as final, or deemed as final by the Administrator, under § 405.1875(a)(2) of this subpart, and he or she subsequently renders a decision within the 60-day review period (as described in § 405.1875(a)(1) of this subpart), the provider has no right to obtain judicial review of the Board's decision under section 1878(f)(1) of the Act.

(i) If the Administrator timely reverses, affirms, or modifies the Board's decision, the provider's only right under section 1878(f)(1) of the Act is to request judicial review of the Administrator's decision by filing a civil action no later than 60 days after the date of receipt by the provider of the Administrator's decision (as described in § 405.1877(a)(3) of this subpart).

(ii) If the Administrator timely vacates the Board's decision and remands for further proceedings (as described in § 405.1875(f)(1)(i) of this subpart), a provider has no right to judicial review under section 1878(f)(1) of the Act of the Board's decision or of the Administrator's remand (as described in § 405.1877(a)(3) of this subpart).

(4) *Administrator accepts review and timely decision is not rendered.* If the Administrator decides to review, in a notice under § 405.1875(c)(3) of this subpart, any issue in a Board decision specified as final, or deemed to be final by the Administrator, under § 405.1875(a)(2), but he or she does not render a decision within the 60-day review period, this subsequent inaction constitutes an affirmation of the Board's decision by the Administrator, for purposes of the time in which to seek judicial review. In this case, the provider must file any civil action requesting judicial review of the Administrator's final decision under section 1878(f)(1) of the Act no later than 60 days after the expiration of the 60-day period for a decision by the Administrator under § 405.1875(a)(1) and § 405.1875(e)(2) of this subpart.

(c) *Statutory limitations on and preclusion of judicial review.* The Act limits or precludes judicial review of certain matters at issue. Limitations on and preclusions of judicial review include the following:

(1) A finding in an intermediary determination that expenses incurred for items and services furnished by a provider to an individual are not payable under title XVIII of the Act because those items or services are excluded from coverage under section 1862 of the Act, and the regulations at 42 CFR Part 411, is not reviewable by the Board (as described in § 405.1840(b)(1) of this subpart) and is not subject to judicial review under section 1878(f)(1) of the Act; the finding is subject to judicial review solely in accordance with the applicable provisions of sections 1155, 1869, and 1879(d) of the Act, and of Subpart I of Part 405 and Subpart B of Part 478, as applicable.

(2) Certain matters affecting payments to hospitals under the prospective payment system are completely

removed from administrative and judicial review, as provided in section 1886(d)(7) of the Act, and § 405.1804 and § 405.1840(b)(2) of this subpart.

(3) Any Board remand order, or discovery or disclosure ruling or subpoena specified in § 405.1875(a)(3)(i) through (a)(3)(ii) of this subpart, or a decision by the Administrator following immediate review of a Board remand order, discovery ruling, or subpoena, is not subject to immediate judicial review under section 1878(f)(1) of the Act. Judicial review of all nonfinal Board actions, including any such Board remand order, discovery or disclosure ruling, or subpoena (except as provided in § 405.1857(e) of this subpart), is limited to review of a final agency decision as described in § 405.1877(a) of this subpart.

(d) *Group appeals.* If a final decision is issued by the Board or rendered by the Administrator, as applicable, in any group appeal brought under § 405.1837, those providers in the group appeal that seek judicial review of the final decision under section 1878(f)(1) of the Act must file a civil action as a group (as described in § 405.1877(e)(2) of this subpart) for the specific matter at issue and common factual or legal question that was addressed in the final agency decision in the group appeal.

(e) *Venue for civil actions.* (1) *Single provider appeals.* A civil action under section 1878(f)(1) of the Act requesting judicial review of a final decision of the Board or the Administrator, as applicable, in a single provider appeal under § 405.1835 of this subpart must be brought in the District Court of the United States for the judicial district in which the provider is located or in the United States District Court for the District of Columbia.

(2) *Group appeals.* A civil action under section 1878(f)(1) of the Act seeking judicial review of a final decision of the Board or the Administrator, as applicable, in a group appeal under § 405.1837 of this subpart must be brought in the District Court of the United States for the judicial district in which the greatest number of providers participating in both the group appeal and the civil action are located or in the United States District Court for the District of Columbia.

(f) *Service of process.* Process must be served as described under 45 CFR Part 4.

(g) *Remand by a court.* (1) *General rule.* Under section 1874 of the Act, and § 421.5(b) of this chapter, the Secretary is the real party in interest in a civil action seeking relief under title XVIII of the Act. The Secretary has delegated to the Administrator the authority under section 1878(f)(1) of the Act to review decisions of the Board and, as applicable, render a final agency decision. If a court, in a civil action brought by a provider against the Secretary as the real party in interest regarding a matter pertaining to Medicare payment to the provider, orders a remand for further action by the Secretary, any component of HHS or CMS, or the intermediary, the remand order must be deemed, except as provided in paragraph (g)(3) of this section, to be directed to the Administrator in the first instance, regardless of whether the court's remand order refers to the Secretary, the Administrator, the Board, any other component of HHS or CMS, or the intermediary.

(2) *Procedures.* (i) Upon receiving notification of a court remand order, the Administrator must prepare an appropriate remand order and, if applicable, file the order in any Board appeal at issue in the civil action.

(ii) The Administrator's remand order must—

(A) Describe the specific requirements of the court's remand order;

(B) Require compliance with those requirements by the pertinent component of HHS or CMS or by the intermediary, as applicable; and

(C) Remand the matter to the appropriate entity for further action.

(iii) After the entity named in the Administrator's remand order completes its response to that order, the entity's response after remand is subject to further proceedings before the Board or the Administrator, as applicable, in accordance with this subpart. For example—

(A) If the intermediary issues a revised intermediary determination after remand, the provider may request a Board hearing on the revised determination (as described in § 405.1803(d) and § 405.1889 of this subpart); or,

(B) If the intermediary hearing officer(s) or the Board issues a new decision after remand, a decision may be reviewed by a CMS reviewing official or the Administrator, respectively (as described in § 405.1834 and § 405.1875(f)(4) of this subpart).

(3) *Exception.* The provisions of paragraphs (g)(1) and (g)(2) of this section do not apply to the extent they may be inconsistent with the court's remand order or any other order of the court regarding the civil action.

(h) *Implementation of final court judgment.* (1) When a final, non-appealable court judgment is issued in a civil action brought by a provider against the Secretary as the real party in interest regarding a matter affecting Medicare payment, a court judgment is subject to the provisions of § 405.1803(d) of this subpart.

(2) The provisions of paragraph (h)(1) of this section do not apply to the extent they may be inconsistent with the court's final judgment or any other order of a court regarding the civil action.

■ 33. Section 405.1885 is revised to read as follows:

§ 405.1885 Reopening an intermediary determination or reviewing entity decision.

(a) *General.* (1) A Secretary determination, an intermediary determination, or a decision by a reviewing entity (as described in § 405.1801(a) of this subpart) may be reopened, for findings on matters at issue in a determination or decision, by CMS (with respect to Secretary determinations), by the intermediary (with respect to intermediary determinations) or by the reviewing entity that made the decision (as described in § 405.1885(c) of this subpart).

(2) A determination or decision may be reopened either through own motion of CMS (for Secretary determinations), the intermediary or reviewing entity, by notifying the parties to the determination or decision (as specified in § 405.1887), or by granting the request of the provider affected by the determination or decision.

(3) An intermediary's discretion to reopen or not reopen a matter is subject to a contrary directive from CMS to reopen or not reopen that matter.

(4) If CMS directs an intermediary to reopen a matter, reopening is considered an own motion reopening by the intermediary. A reopening may result in a revision of any matter at issue in the determination or decision.

(5) If a matter is reopened and a revised determination or decision is made, a revised determination or decision is appealable to the extent provided in § 405.1889 of this subpart.

(6) A determination or decision to reopen or not to reopen a determination or decision is not a final determination or decision within the meaning of this subpart and is not subject to further administrative review or judicial review.

(b) *Time limits.* (1) *Own motion reopening of a determination not procured by fraud or similar fault.* An own motion reopening is timely only if the notice of intent to reopen (as described in § 405.1887 of this subpart) is mailed no later than 3 years after the date of the determination or decision that is the subject of the reopening. The date the notice is mailed is presumed to

be the date indicated on the notice unless it is shown by a preponderance of the evidence that the notice was mailed on a later date.

(2) *Request for reopening of a determination not based on fraud or similar fault.*

(i) A reopening made upon request is timely only if the request to reopen is received by CMS, the intermediary, or reviewing entity, as appropriate, no later than 3 years after the date of the determination or decision that is the subject of the requested reopening. The date of receipt by CMS, the intermediary, or the reviewing entity of the request to reopen is conclusively presumed to be the date of delivery by a nationally-recognized next-day courier, or the date stamped ''Received'' by CMS, the intermediary or the reviewing entity (where a nationally-recognized next-day courier is not employed), unless it is shown by clear and convincing evidence that CMS, the intermediary, or the reviewing entity received the request on an earlier date.

(ii) A request to reopen does not toll the time in which to appeal an otherwise appealable determination or decision.

(iii) A request to reopen that is received within the 3-year period described in this paragraph is timely, notwithstanding that the notice of reopening required under § 405.1887 of this subpart is issued after such 3-year period.

(3) *Reopening of a determination procured by fraud or similar fault.* A Secretary or intermediary determination or decision by the reviewing entity may be reopened and revised at any time if it is established that the determination or decision was procured by fraud or similar fault of any party to the determination or decision.

(c) *Jurisdiction for reopening.* Jurisdiction for reopening an intermediary determination or intermediary hearing decision rests exclusively with the intermediary or intermediary hearing officer(s) that rendered the determination or decision (or, when applicable, with the successor intermediary), subject to a directive from CMS to reopen or not reopen the determination or decision. Jurisdiction for reopening a Secretary determination, CMS reviewing official decision, a Board decision, or an Administrator decision rests exclusively with CMS, the CMS reviewing official, Board or Administrator, respectively.

(1) *CMS-directed reopenings.* CMS may direct an intermediary or intermediary hearing officer(s) to reopen and revise any matter, subject to the time limits specified in paragraph (b) of this section, and subject to the limitation expressed in paragraph (c)(2) of this section, by providing explicit direction to the intermediary or intermediary hearing officer(s) to reopen and revise.

(i) *Examples.* An intermediary determination or intermediary hearing decision must be reopened and revised if CMS provides explicit notice to the intermediary that the intermediary determination or the intermediary hearing decision is inconsistent with the applicable law, regulations, CMS ruling, or other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS in effect, and as CMS understood those legal provisions, at the time the determination or decision was rendered by the intermediary. CMS may also direct the intermediary to reopen a particular intermediary determination or decision in order to implement a final agency decision (as described in § 405.1833, § 405.1871(b) and § 405.1875 of this subpart), a final, non-appealable court judgment § 405.1877, or an agreement to settle an administrative appeal or a lawsuit, regarding the same determination or decision.

(ii) [Reserved]

(2) *Prohibited reopenings.* A change of legal interpretation or policy by CMS in a regulation, CMS ruling, or other interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS, whether made in response to judicial precedent or otherwise, is not a basis for reopening a CMS or intermediary determination, an intermediary hearing decision, a CMS reviewing official decision, a Board decision, or an Administrator decision, under this section.

(3) *Reopening by CMS or intermediary of determination currently on appeal to the Board or Administrator.* CMS or an intermediary may reopen, on its own motion or on request of the provider(s), a Secretary or intermediary determination that is currently pending on appeal before the Board or Administrator.

(i) The scope of the reopening may include any matter covered by the determination, including those specific matters that are appealed to the Board or the Administrator.

(ii) The intermediary must send a copy of the notice required under § 405.1887(a) to the Board or to the Administrator, through the Office of the Attorney Advisor, specifically informing that the matter(s) to be addressed by the reopening is currently under appeal to the Board or to the Administrator or is covered by the same determination that is under appeal.

(4) *Reopening of determination within the time for appealing that determination to the Board.* CMS or an intermediary may reopen, on its own motion or on request of the provider(s), a Secretary or intermediary determination for which no appeal was taken to the Board, but for which the time to appeal to the Board has not yet expired, by sending the notice specified in § 405.1887(a) of this subpart.

■ 34. Section 405.1887 is revised to read as follows:

§ 405.1887 Notice of reopening; effect of reopening.

(a) In exercising its reopening authority under § 405.1885, CMS (for Secretary determinations), the intermediary or the reviewing entity, as applicable, must provide written notice to all parties to the determination or decision that is the subject of the reopening. Notices of—

(1) Reopening by a CMS reviewing official or the Board must be sent promptly to the Administrator.

(2) Intermediary reopenings of determinations that are currently pending before the Board or the Administrator must meet the requirements specified in § 405.1885(c)(3) and (c)(4) of this subpart.

(b) Upon receipt of the notice required under § 405.1887(a) of this subpart, the parties to the prior Secretary or intermediary determination or decision by a reviewing entity, as applicable, must be allowed a reasonable period of time in which to present any additional evidence or argument in support of their positions.

(c) Upon concluding its reopening, CMS, the intermediary or the reviewing entity, as applicable, must provide written notice promptly to all parties to the determination or decision that is the subject of the reopening, informing the parties as to what matter(s), if any, is revised, with a complete explanation of the basis for any revision.

(d) A reopening by itself does not extend appeal rights. Any matter that is reconsidered during the course of a reopening, but is not revised, is not within the proper scope of an appeal of a revised determination or decision (as described in § 405.1889 of this subpart).

■ 35. Section 405.1889 is revised to read as follows:

§ 405.1889 Effect of a revision; issue-specific nature of appeals of revised determinations and decisions.

(a) If a revision is made in a Secretary or intermediary determination or a

decision by a reviewing entity after the determination or decision is reopened as provided in § 405.1885 of this subpart, the revision must be considered a separate and distinct determination or decision to which the provisions of § 405.1811, § 405.1834, § 405.1835, § 405.1837, § 405.1875, § 405.1877 and § 405.1885 of this subpart are applicable.

(b)(1) Only those matters that are specifically revised in a revised determination or decision are within the scope of any appeal of the revised determination or decision.

(2) Any matter that is not specifically revised (including any matter that was reopened but not revised) may not be considered in any appeal of the revised determination or decision.

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END–STAGE RENAL DISEASE SERVICES; OPTIONAL PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

■ 36. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1861(v)(1)(A), and 1871 of the Social Security Act (42 U.S.C. 1302, 1395x(v)(1)(A), and 1395hh).

■ 37. The heading for part 413 is revised to read as set forth above.

■ 38. Section 413.30 is amended by revising the last sentence in each of paragraphs (c)(1) and (c)(2) to read as follows:

§ 413.30 Limitations on payable costs.

* * * * *

(c) * * *

(1) * * *. The time required by CMS to review the request is considered good cause for the granting of an extension of the time limit for requesting an intermediary hearing or a Provider Reimbursement Review Board (Board) hearing as specified in § 405.1813 and § 405.1836 of this chapter, respectively.

(2) * * *. The time required by the intermediary to review the request is considered good cause for the granting of an extension of the time limit for requesting an intermediary hearing or a Board hearing as specified in § 405.1813 and § 405.1836 of this chapter, respectively.

* * * * *

■ 39. Section 413.40 is amended by revising paragraph (e)(5) to read as follows:

§ 413.40 Ceiling on the rate of increase in hospital inpatient costs.

* * * * *

(e) * * *

(5) *Extending the time limit for review of NPR.* The time required to review the request is considered good cause for the granting of an extension of the time limit for requesting an intermediary hearing or a Board hearing as specified in § 405.1813 and § 405.1836 of this chapter, respectively.

* * * * *

■ 40. Section 413.64 is amended by revising the last sentence in paragraph (j)(1) to read as follows:

§ 413.64 Payments to providers: Specific rules.

* * * * *

(j) * * *

(1) * * *. The interest begins to accrue on the first day of the first month following the 180-day period described in § 405.1835(a)(3)(i) or (a)(3)(ii) of this chapter, as applicable.

* * * * *

PART 417—HEALTH MAINTENANCE ORGANIZATIONS, COMPETITIVE MEDICAL PLANS, AND HEALTH CARE PREPAYMENT PLANS

■ 41. The authority citation for part 417 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh), secs. 1301, 1306, and 1310 of the Public Health Service Act (42 U.S.C. 300e, 300e–5, and 300e–9); and 31 U.S.C. 9701.

§ 417.576 [Amended]

■ 42. In § 417.576—A. Amend paragraph (d)(4) by removing the phrase ''a hearing in accordance with subpart R of part 405 of this chapter'' and adding in its place ''a hearing in accordance with the requirements specified in § 405.1801(b)(2) of this chapter''; and

■ B. Amend paragraph (e)(2) by removing the phrase ''a hearing under subpart R of part 405 of this chapter'' and adding in its place ''a hearing in accordance with the requirements specified in § 405.1801(b)(2) of this chapter''.

§ 417.810 [Amended]

■ 43. In § 417.810—

■ A. Amend paragraph (c)(2) by removing the phrase ''a hearing as provided in part 405, subpart R of this chapter'' and adding in its place ''a hearing in accordance with the requirements specified in § 405.1801(b)(2) of this chapter''; and

■ B. Amend paragraph (d)(3) by removing the phrase ''a hearing on the determination under the provisions of part 405, subpart R of this chapter'' and adding in its place ''a hearing in accordance with the requirements specified in § 405.1801(b)(2) of this chapter''

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 6, 2007.

Kerry Weems,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: February 5, 2008.

Michael O. Leavitt,

Secretary.

[Editorial Note: The Office of the Federal Register received this document on May 15, 2008.]

[FR Doc. E8–11227 Filed 5–22–08; 8:45 am]

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The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

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