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RESERVATIONS: (202) 741–6008

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Presidential Documents

Title 3—

The President

Presidential Determination No. 2009–5 of October 17, 2008

Presidential Determination With Respect To Foreign Governments' Efforts Regarding Trafficking In Persons

Memorandum for the Secretary of State

Consistent with section 110 of the Trafficking Victims Protection Act of 2000 (Division A of Public Law 106–386), as amended, (the ''Act''), I hereby:

Make the determination provided in section 110(d)(1)(A)(i) of the Act, with respect to Burma, the Democratic People's Republic of Korea (DPRK), and Syria, not to provide certain funding for those countries' governments for Fiscal Year 2009, until such government complies with the minimum standards or makes significant efforts to bring itself into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act;

- Make the determination provided in section 110(d)(1)(A)(ii) of the Act, with respect to Cuba and Iran not to provide certain funding for those countries' governments for Fiscal Year 2009, until such government complies with the minimum standards or makes significant efforts to bring itself into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act;
- Make the determination provided in section 110(d)(3) of the Act, concerning the determination of the Secretary of State with respect to Moldova and Oman;
- Determine, consistent with section 110(d)(4) of the Act, with respect to Algeria, Fiji, Kuwait, Papua New Guinea, Qatar, Saudi Arabia, and Sudan, that provision to these countries' governments of all programs, projects, or activities of assistance described in sections 110(d) (1)(A)(i) and 110(d)(1)(B) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;
- Determine, consistent with section 110(d)(4) of the Act, with respect to the DPRK, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act that support the goals of the Six-Party talks would promote the purposes of the Act or is otherwise in the national interest of the United States; and
- Determine, consistent with section 110(d)(4) of the Act, with respect to Iran, that a partial waiver to allow funding for educational and cultural exchange programs described in section 110(d)(1)(A)(ii) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States.

You are hereby authorized and directed to submit this determination and the certification required by section 110(e) of the Act to the Congress and to publish this determination in the *Federal Register*.

THE WHITE HOUSE,
Washington, October 17, 2008

[FR Doc. E8–25816
Filed 10–27–08; 8:45 am]
Billing code 4710–10–P

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Presidential Documents

Title 3—

The President

Presidential Determination No. 2009–6 of October 20, 2008

Certifications Pursuant to the United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act (Public Law 110–369)

Memorandum for the Secretary of State

Pursuant to section 102(c) and section 204(a) of the United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, I hereby certify that:

1. Entry into force and implementation of the United States-India Agreement for Cooperation on Peaceful Uses of Nuclear Energy pursuant to its terms is consistent with the obligation of the United States under the Treaty on the Non-Proliferation of Nuclear Weapons not in any way to assist, encourage, or induce India to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and
2. It is the policy of the United States to work with members of the Nuclear Suppliers Group, individually and collectively, to agree to further restrict the transfers of equipment and technology related to the enrichment of uranium and reprocessing of spent nuclear fuel.

You are authorized and directed to publish this determination in the *Federal Register.*

THE WHITE HOUSE,
Washington, October 20, 2008

[FR Doc. E8–25826
Filed 10–27–08; 8:45 am]
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Rules and Regulations

Federal Register

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

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

[DHS Docket No. ICEB–2006–0004; ICE 2377–06]

[RIN 1653–AA50]

Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis

AGENCY: U.S. Immigration and Customs Enforcement, DHS.

ACTION: Supplemental final rule.

SUMMARY: The Department of Homeland Security (DHS) is finalizing the Supplemental Proposed Rule published on March 26, 2008 and reaffirming regulations providing a ''safe harbor'' from liability under section 274A of the Immigration and Nationality Act for employers that follow certain procedures after receiving a notice—either a ''no-match letter'' from the Social Security Administration (SSA), or a ''notice of suspect document'' from DHS—that casts doubt on the employment eligibility of their employees. DHS is also correcting a typographical error in the rule text promulgated in August 2007.

DATES: This final rule is effective as of October 28, 2008.

ADDRESSES: The comments on the supplemental proposed rule and the proposed rule on docket DHS Docket No. ICEB–2006–0004, may be reviewed by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.*

• In person at U.S. Immigration and Customs Enforcement, 500 12th St., SW., 5th Floor, Washington DC 20024. Contact Joe Jeronimo, U.S. Immigration and Customs Enforcement, Telephone: 202–732–3978 (not a toll-free number) for an appointment.

FOR FURTHER INFORMATION CONTACT: Joe Jeronimo, U.S. Immigration and Customs Enforcement, 500 12th St., SW., 5th Floor, Washington DC 20024. Telephone: 202–732–3978 (not a toll-free number).

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PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

I. Docket

Comments on the supplemental proposed rule, the proposed rule, and the Small Entity Impact Analysis may be viewed online at *http://www.regulations.gov* (docket ICEB–2006–0004), or in person at U.S. Immigration and Customs Enforcement, Department of Homeland Security, 500 12th St., SW., 5th Floor, Washington, DC 20024, by appointment. To make an appointment to review the docket, call telephone number 202–732–3979 (not a toll-free number).

II. Background

A. History of the Rulemaking

DHS published a proposed rule in June 2006 that proposed a method for employers to limit the risk of being found to have knowingly employed unauthorized aliens after receiving a letter from the SSA—known as a ''no-match letter''—notifying them of mismatches between names and social security numbers provided by their employees and the information in SSA's database, or after receiving a letter from DHS—called a ''notice of suspect document''—that casts doubt on their employees' eligibility to work. 71 FR 34281 (June 14, 2006). A sixty-day public comment period ended on August 14, 2006.

DHS received approximately 5,000 comments on the proposed rule from a variety of sources, including labor unions, not-for-profit advocacy organizations, industry trade groups, private attorneys, businesses, and other interested organizations and individuals. The comments varied considerably; some commenters strongly supported the rule as proposed, and others were critical of the proposed rule and suggested changes. See *http://www.regulations.gov,* docket number ICEB–2006–0004.

DHS published a final rule on August 15, 2007, setting out safe harbor procedures for employers that receive SSA no-match letters or DHS notices. 72 FR 45611 (Aug. 15, 2007). Each comment received was reviewed and considered in the preparation of the August 2007 Final Rule. The August

2007 Final Rule addressed the comments by issue rather than by referring to specific commenters or comments.

On August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations and others filed suit seeking to enjoin implementation of the August 2007 Final Rule in the United States District Court for the Northern District of California. *AFL–CIO* v. *Chertoff,* No. 07–4472–CRB, D.E. 1 (N.D. Cal. Aug. 29, 2007). The district court granted plaintiffs' initial motion for a temporary restraining order, *AFL–CIO* v. *Chertoff,* D.E. 21 (N.D. Cal. Aug. 31, 2007) (order granting motion for temporary restraining order and setting schedule for briefing and hearing on preliminary injunction), and on October 10, 2007 granted plaintiffs' motion for preliminary injunction. *AFL–CIO* v. *Chertoff,* 552 F.Supp.2d 999 (N.D. Cal. 2007) (order granting motion for preliminary injunction).

The district court concluded that plaintiffs had raised serious questions about three aspects of the August 2007 Final Rule. Specifically, the court questioned whether DHS had: (1) Supplied a reasoned analysis to justify what the court viewed as a change in the Department's position—that a no-match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized; (2) exceeded its authority (and encroached on the authority of the Department of Justice (DOJ)) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (1986), 8 U.S.C. 1324b; and (3) violated the Regulatory Flexibility Act, 5 U.S.C 601 *et seq.,* by not conducting a regulatory flexibility analysis. 552 F.Supp.2d at 1006. Following its entry of the preliminary injunction, the district court stayed proceedings in the litigation. *See AFL–CIO* v. *Chertoff,* D.E. 149 (N.D. Cal. Dec. 14, 2007) (minute entry).

DHS published a supplemental notice of proposed rulemaking in March 2008 to address the specific issues raised by the court in the preliminary injunction order. 73 FR 15944, 45, 46–47 (March 26, 2008). In the supplemental proposed rulemaking, DHS reviewed past government communications about SSA no-match letters to clarify the history of the Department's policy on the significance of those letters, and supplied additional ''reasoned analysis'' in support of the policy set forth in the rule. 73 FR at 15947–50. DHS also clarified that the authority to interpret and enforce the anti-discrimination provisions of the IRCA rests with DOJ, 73 FR at 15950–51, and provided an initial regulatory flexibility analysis, 73 FR at 15951, 52–54, including a small entities analysis. Docket ICEB–2006–0004–0233.

The public comment period on the supplemental proposed rule ended on April 25, 2008. DHS received approximately 2,950 comments on the supplemental proposed rule from a variety of sources, including labor unions, not-for-profit advocacy organizations, industry trade groups, private attorneys, businesses, and other interested organizations and individuals.

A number of public comments were the product of mass-mailing campaigns, resulting in DHS receiving identical or nearly identical electronic filings during the comment period. Other comments included multiple-signature petition drives that presented a specific point of view. Many comments expressed opinions on immigration policy generally but provided little substantive information or supporting documentation that DHS could use to refine its judgment on the efficacy of the rulemaking or that was pertinent to the issues raised by the supplemental proposed rulemaking.

DHS viewed every comment received from a different source as a separate comment, notwithstanding similarities in wording. When multiple comments were received from the same source but via different media (e.g. electronic and mail), DHS attempted to identify and correlate the comments. DHS reviewed the substance of every comment and considered the substance of the comments in formulating this final rule. We summarize the substance of the comments received below.

During the public comment period, DHS received requests that the comment period be extended. DHS reviewed these requests and concluded that they presented no novel or difficult issues justifying an extension of the comment period, particularly in light of the rulemaking's extensive history, as well as the limited number of issues raised by the district court and addressed in the supplemental proposed rule. Accordingly, DHS declines to extend the comment period.

In developing this supplemental final rule, DHS has considered the entire administrative record of the August 2007 Final Rule, as well as the record of proceedings in the pending litigation, including arguments made in the various motions and briefs, and orders of the district court, that were relevant to the issues addressed in this action. *AFL–CIO* v. *Chertoff,* D.E. 129 (N.D. Cal. Oct. 1, 2007) (certified administrative record); D.E. 146–2 (N.D. Cal. Dec. 4, 2007 (*errata*)) (hereinafter ''Administrative Record''). The docket of the United States District Court for the Northern District of California is a public record and the documents contained therein are available from the court clerk's office.

After considering the full record, including the comments received in response to the supplemental notice of proposed rulemaking, DHS has made adjustments to the cost calculations in the Initial Regulatory Flexibility Analysis (IRFA) and prepared a Final Regulatory Flexibility Analysis (FRFA), finalized the additional legal analysis set out in the supplemental notice of proposed rulemaking, and determined that the rule should issue without change. Therefore this final rule reaffirms the text of the August 2007 Final Rule without substantive change and makes one typographical correction.

B. Purpose of the Rulemaking

The Federal Government has been aware for many years that employment in the United States is a magnet for illegal immigration, and that a comparison of names and social security numbers submitted by employers against SSA's data provides an indicator of possible illegal employment. In 1997, the U.S. Commission on Immigration Reform found the following:

> Reducing the employment magnet is the linchpin of a comprehensive strategy to deter unlawful immigration. Economic opportunity and the prospect of employment remain the most important draw[s] for illegal migration to this country. Strategies to deter unlawful entries and visa overstays require both a reliable process for verifying authorization to work and an enforcement capacity to ensure that employers adhere to all immigration-related labor standards.
>
> * * * * *
>
> The Commission concluded that the most promising option for verifying work authorization is a computerized registry based on the social security number; it unanimously recommended that such a system be tested not only for its effectiveness in deterring the employment of illegal aliens, but also for its protections against discrimination and infringements on civil liberties and privacy.
>
> * * * * *
>
> The federal government does not have the capacity to match social security numbers with [Immigration and Naturalization Service (INS)] work authorization data without some of the information captured on the I–9. Congress should provide sufficient time, resources, and authorities to permit development of this capability.
>
> U.S. Comm'n on Immigration Reform, *Becoming an American: Immigration*

and Immigrant Policy 113–14, 117 (1997) (emphasis in original); Administrative Record at 139–140, 143.

Similarly, the Federal Government has been long aware of the potential for abuse of social security numbers by aliens who are not authorized to work in the United States. Such abuse has been the subject of numerous public reports by the Government Accountability Office and the SSA's Inspector General, as well as congressional hearings. *See, e.g.*, Administrative Record, at 35–661; Government Accountability Office, Report to the Subcommittee on Terrorism, Technology and Homeland Security, Committee on the Judiciary, U.S. Senate, *Estimating the Undocumented Population: A ''Grouped Answers'' Approach to Surveying Foreign-Born Respondents* (GAO Rept. No. GAO–06–775, Sept. 2006) (describes alternative means of gathering interview data from undocumented aliens to reduce the ''question threat'' to some respondents because they fear that a truthful answer could result in negative consequences); Subcommittee on Oversight and Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, *Social Security Number and Individual Taxpayers Identification Number Mismatches and Misuse,* 108th Cong., 2nd Sess., No. 108–53 (March 10, 2004).

The illegal alien population in the United States and the number of unauthorized workers employed in the United States are both substantial. *See, e.g.*, J. Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (March 2006), found at *http://pewhispanic.org/files/factsheets/17.pdf* (estimating approximately 11.2 million illegal aliens in the United States; approximately 7.2 million illegal aliens in the workforce); M. Hoefer, N. Rytina & C. Campbell, Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006* (August 2007) found at *http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf* (estimating unauthorized population of 11,550,000 as of January 2006).

The scale of the problem that this rule seeks to address—that is, the unlawful employment of aliens not authorized to work in the United States—has become more well-defined through the rulemaking and related litigation. The comments submitted in response to the initial proposed rule in 2006 by organizations such as Western Growers, and the public statements by representatives of such organizations, have been bracingly frank:

> In the midst of the combustive debate over immigration reform, we in agriculture have been forthright about the elephant in America's living room: Much of our workforce is in the country illegally—as much as 70%.

T. Nassif, ''Food for Thought,'' *The Wall Street Journal,* Nov. 20, 2007, at A19. *See also* Docket ICEB–2006–0004–0145 (August 14, 2006), Administrative Record at 1306 (comments of the National Council of Agricultural Employers, suggesting over 76% of agricultural workers are not authorized to work in the United States). DHS recognizes this critical fact—that many employers are aware that a substantial portion of their workforce is unauthorized—and has therefore taken steps within the Department's existing authorities to assist employers in complying with the law.

Public and private studies in the administrative record of this rulemaking make clear that social security no-match letters identify some portion of unauthorized aliens who are illegally employed in the United States. One private study concluded that ''most workers with unmatched SSNs are undocumented immigrants.'' C. Mehta, N. Theodore & M. Hincapie, *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (2003) at *i*; Administrative Record at 309, 313.

Based on the rulemaking record and the Department's law enforcement expertise, DHS finds that there is a substantial connection between social security no-match letters and the lack of work authorization by some employees whose SSNs are listed in those letters. While social security no-match letters do not, by themselves, conclusively establish that an employee is unauthorized, DHS's (and legacy INS's) interactions with employers that receive no-match letters have consistently shown that employers are also aware that an employee's appearance on a no-match letter may indicate the employee lacks work authorization. Nevertheless, as Mehta, Theodore & Hincapie found, SSA's no-match letters currently ''do[] not substantially deter employers from retaining or hiring undocumented immigrants. Twenty-three percent of employers retained workers with unmatched SSNs who failed to correct their information with the SSA.'' C. Mehta, N. Theodore & M. Hincapie, *supra* at *ii;* Administrative Record at 314.

Some employers may fail to respond to no-match letters because they have consciously made the illegal employment of unauthorized aliens a key part of their business model or because they conclude that the risk of an immigration enforcement action is outweighed by the cost of complying with the immigration laws by hiring only legal workers. *See* C. Mehta, N. Theodore & M. Hincapie, *supra* at 2, 20–30; Administrative Record at 314, 316, 334–44 (noting employer ''complaints'' over loss of illegal workforce when employees are asked to correct their SSN mismatches, as well as the practice by some employers of encouraging workers to procure new fraudulent documents to provide cover for their continued employment). DHS's interactions with employers have also shown that many law-abiding employers are unsure of their obligations under current immigration law after they receive a no-match letter, and that some employers fear allegations of anti-discrimination law violations if they react inappropriately to no-match letters.

In light of these facts, DHS has concluded that additional employer guidance on how to respond to SSA no-match letters will help law-abiding employers to comply with the immigration laws. Accordingly, in this final rule, DHS outlines specific steps that reasonable employers may take in response to SSA no-match letters, and offers employers that follow those steps a safe harbor from ICE's use of SSA no-match letters in any future enforcement action to demonstrate that an employer has knowingly employed unauthorized aliens in violation of section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. 1324a.

C. Supplemental Final Rule

1. Authority to Promulgate the Rule

Congress has delegated to the Secretary of Homeland Security the authority to promulgate regulations that implement, interpret and fill in the administrative details of the immigration laws. INA section 103(a), 8 U.S.C. 1103(a); Homeland Security Act of 2002, Public Law 107–296, sections 102(a)(3), (b)(1), and (e), 110 Stat. 2135 (Nov. 25, 2002) (HSA), as amended, 6 U.S.C. 112(a)(3), (b)(1), and (e). Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–45 (1983), the courts afford due deference to agency interpretations of these laws as reflected in DHS's rules. The Executive Branch may, as appropriate, announce or change its policies and statutory

interpretations through rulemaking actions, so long as the agency's decisions rest on a ''rational connection between the facts found and the choice made.'' *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins.,* 463 U.S. 29, 43 (1983).

DHS is authorized by the HSA and the INA to investigate and pursue sanctions against employers that knowingly hire or continue to employ unauthorized aliens or do not properly verify their employees' employment eligibility. HSA sections 102(a)(3), 202(3), 441, 442, 6 U.S.C. 112(a)(3), 251, 252; INA section 274A(e), 8 U.S.C. 1324a(e). All persons or entities that hire, recruit or refer persons for a fee for employment in the United States must verify the identity and employment eligibility of all employees hired to work in the United States. INA section 274A(a)(1)(B), (b)(1), (b)(2) 8 U.S.C. 1324a(a)(1)(B), (b)(1), (b)(2). Under the INA, this verification is performed by completing an Employment Eligibility Verification form (Form I–9) for all employees, including United States citizens. INA section 274A(b)(1), (b)(2), 8 U.S.C. 1324a (b)(1), (b)(2); 8 CFR 274a.2. An employer, or a recruiter or referrer for a fee, must retain the completed Form I–9 for three years after hiring, recruiting or referral, or, where the employment extends longer, for the life of the individual's employment and for one year following the employee's departure. INA section 274A(b)(3), 8 U.S.C. 1324a(b)(3). These forms are not routinely filed with any government agency; employers are responsible for maintaining these records, and they may be requested and reviewed by DHS Immigration and Customs Enforcement (ICE). *See* 71 FR 34510 (June 15, 2006).

DHS's authority to investigate and pursue sanctions against employers that knowingly hire or continue to employ unauthorized aliens necessarily includes the authority to decide the evidence on which it will rely in such enforcement efforts. It also includes the authority to decide the probative value of the available evidence, and the conditions under which DHS will commit not to rely on certain evidence. Under the prior regulations, an employer who had received an SSA no-match letter or DHS letter and was charged with knowing employment of unauthorized aliens could defend against an inference that the employer had constructive knowledge of the workers' illegal status by showing that the employer had concluded, after exercising reasonable care in response to the SSA no-match letter or DHS letter, that the workers were in fact work-authorized. 8 CFR 274a.1(*l*)(1) (2007). Those regulations, however, provided no detailed guidance on what would constitute ''reasonable care.'' In the August 2007 Final Rule—as supplemented by this final rule—DHS announces its interpretation of INA section 274A and limits its law enforcement discretion by committing not to use an employer's receipt of and response to an SSA no-match letter or DHS letter as evidence of constructive knowledge, if the employer follows the procedures outlined in the rule. This limitation on DHS's enforcement discretion—this safe harbor—is well within the rulemaking powers of the Secretary of Homeland Security. *See, e.g., Lopez* v. *Davis,* 531 U.S. 230, 240–41 (2001) (upholding categorical limitation of agency discretion through rulemaking). This rule does not affect the authority of SSA to issue no-match letters, or the authority of the Internal Revenue Service (IRS) to impose and collect taxes, or the authority of DOJ to enforce the anti-discrimination provisions of the INA or adjudicate notices of intent to fine employers.

The ongoing litigation involving the August 2007 Final Rule does not constrain DHS's authority to amend and reissue the rule. The Executive Branch's amendment of regulations in litigation is a natural evolution in the process of governance. As the United States Court of Appeals for the District of Columbia has noted:

> It is both logical and precedented that an agency can engage in new rulemaking to correct a prior rule which a court has found defective. *See Center for Science in the Public Interest* v. *Regan,* 727 F.2d 1161, 1164–65 (D.C. Cir. 1984); *Action on Smoking and Health* v. *CAB,* 713 F.2d 795, 802 (D.C. Cir. 1983). Where an injunction is based on an interpretation of a prior regulation, the agency need not seek modification of that injunction before it initiates new rulemaking to change the regulation.

NAACP, Jefferson County Branch v. *Donovan,* 737 F.2d 67, 72 (D.C. Cir. 1984). *See generally Thorpe* v. *Housing Auth. of Durham,* 393 U.S. 268, 281–82 (1969).

As noted in the supplemental notice of proposed rulemaking, the district court enjoined implementation of the August 2007 Final Rule and the issuance of SSA no-match letters containing an insert drafted by DHS. *AFL–CIO* v. *Chertoff,* D.E. 137 (N.D. Cal. 2007) (preliminary injunction); 73 FR at 15947. The preliminary injunction did not prohibit further rulemaking by DHS. The district court subsequently stayed proceedings in the litigation to allow for further rulemaking. *AFL–CIO* v. *Chertoff,* D.E. 142 (stay motion); 144 (statement of non-opposition); 149 (minute order staying proceedings pending new rulemaking) (N.D. Cal. 2007). Accordingly, not only does DHS continue to have the authority to revise and finalize this rulemaking but the orders of the district court contemplate such rulemaking action.

2. ''Reasoned Analysis'' Supporting Perceived Change in Policy Reflected in the Final Rule

An agency action is arbitrary and capricious if the agency fails to examine relevant data and articulate a satisfactory explanation for its action including a ''rational connection between the facts found and the choice made.'' *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins.,* 463 U.S. 29, 43 (1983). In its order granting the preliminary injunction, the district court found that ''DHS has sufficiently articulated a rational connection between the facts found and the choice made.'' 552 F.Supp.2d at 1010. The district court expressed concerns, however, that DHS had not sufficiently articulated a rationale for what the court saw as DHS's ''change'' in position on the significance of SSA no-match letters when promulgating that August 2007 Final Rule. While the district court acknowledged that the preamble to the August 2007 Final Rule remained consistent with DHS's and legacy INS's prior informal guidance by ''assur[ing] employers that 'an SSA no-match letter by itself does not impart knowledge that the identified employees are unauthorized aliens,' '' 559 F.Supp.2d at 1009 (quoting 72 FR 45616), the court concluded that ''DHS decided to change course'' in the text of the August 2007 Final Rule by ''provid[ing] that constructive knowledge may be inferred if an employer fails to take reasonable steps after receiving nothing more than a no-match letter.'' *Id.* Having identified what it believed to be a change in DHS's position, the court concluded that ''DHS may well have the authority to change its position, but because DHS did so without a reasoned analysis, there is at least a serious question whether the agency has 'casually ignored' prior precedent in violation of the APA.'' 552 F.Supp.2d at 1010.

DHS provided in the supplemental proposed rule an extensive review of the non-precedential correspondence and public reports relating to the value of SSA no-match letters as an indicator that individuals listed in a letter may not be authorized to work in the United States and the obligations of employers to respond to such letters. 73 FR at 15947–48. That review showed that neither the former INS nor DHS had issued a formal or precedential

statement of agency policy regarding the significance of SSA no-match letters, and that, therefore, there was no agency precedent that had been ''casually ignored'' in DHS's promulgation of the August 2007 Final Rule. It also showed that DHS's consistent, if informal, view of SSA no-match letters has been that (1) SSA no-match letters do not, by themselves, establish that an employee is unauthorized, (2) there are both innocent and non-innocent reasons for no-match letters, but (3) an employer may not safely ignore SSA no-match letters, and (4) an employer must be aware of and comply with the anti-discrimination provisions of the INA. The position reflected in the August 2007 Final Rule—that a no-match letter, and an employer's response to such a letter could, in the totality of the circumstances, constitute proof of an employer's constructive knowledge that an employee is not authorized to work in the United States—was consistent with the informal agency interpretations offered to employers over the past decade.

Nevertheless, in light of the court's concerns that DHS had changed its position on these issues in the August 2007 Final Rule, the supplemental notice of proposed rulemaking set forth the ''reasoned analysis'' sought by the court and identified four significant reasons for the issuance of this rule: (1) The need to resolve ambiguity and confusion among employers regarding their obligations under the INA following receipt of an SSA no-match letter; (2) the growing evidence and consensus within and outside government that SSA no-match letters are a legitimate indicator of possible illegal work by unauthorized aliens; (3) DHS's view that SSA's criteria for sending employee no-match letters helps to focus those letters on employers that have potentially significant problems with their employees' work authorization; and (4) the established legal principle that employers may be found to have knowingly employed unauthorized alien workers in violation of INA section 274A based on a constructive knowledge theory. 73 F.R. 15949–50.

a. Need for Clear Guidance Regarding No-Match Letters

As was noted in the supplemental notice of proposed rulemaking, one key justification for issuance of this rule is to eliminate ambiguity regarding an employer's responsibilities under the INA upon receipt of a no-match letter. As one business organization with nationwide membership commented in response to the initial publication of the proposed rule in 2006:

> Disagreement and confusion [of an employer's obligations upon receipt of a no-match letter] are rampant and well-intended employers are left without a clear understanding of their compliance responsibilities. [Organization] members have had substantial concerns regarding whether mismatch letters put them on notice that they may be in violation of the employment authorization provisions of the immigration law, since the Social Security card is one of the most commonly used employment authorization documents.

Administrative Record at 1295 (comment from National Council of Agricultural Employers, Aug. 14, 2006). *See also id.* at 849 (comment by the National Federation of Independent Business: ''Clarification of the employer's obligation on receiving a no-match letter and the safe harbor provided for in the proposed rule is critical.'').

As noted above, all previous agency guidance was in letters responding to individual queries from employers, members of Congress, or other interested parties—neither the INS nor DHS had ever released any formal statement of agency policy on the issue. In addition, agency correspondence over the years was heavily caveated, at times even equivocal, and although more recent letters from DHS had articulated more clearly employers' obligations upon receiving a no-match letter, those letters did not purport to supplant prior statements by legacy INS. In the absence of a clear, authoritative agency position on the significance of no-match letters, employers and labor organizations were left free to stake out positions that best served their parochial interests, by in some cases misconstruing language in the no-match letter aimed at preventing summary firings or discriminatory practices as instead commanding employers to turn a blind eye to the widely-known fact that unauthorized alien workers would often be listed in those letters. In the face of this ambiguity, well-meaning employers' responses to SSA no-match letters were also affected by concern about running afoul of the INA's antidiscrimination provisions. Thus, employers concluded that the risks of inaction in the face of no-match letters—with the possibility of being found to have knowingly employed unauthorized workers in violation of INA 274A—was outweighed by the risks of embarking on an investigation after receiving a no-match letter only to face charges of discrimination.

The August 2007 Final Rule was designed to remedy this confused situation by reminding employers of their obligation under the INA to conduct due diligence upon receipt of SSA no-match letters, and by formally announcing DHS's view that employers that fail to perform reasonable due diligence upon receipt of SSA no-match letters or DHS suspect document notices risk being found to have constructive knowledge of the illegal work status of employees whose names or SSNs are listed. Further, because the constructive knowledge standard applies a ''totality of the circumstances'' test to the facts of a particular case, and is therefore not reducible to bright-line rules, the August 2007 Final Rule sought to provide greater predictability through a clear set of recommended actions for employers to take, and assured employers that they would not face charges of constructive knowledge based on SSA no-match letters or DHS letters that had been handled according to DHS's guidelines.

b. No-Match Letters Are Legitimate Indicators of Possible Illegal Work by Unauthorized Aliens

DHS's reasoned analysis on the evidentiary value of SSA no-match letters in the August 2007 Final Rule, and in this supplemental rulemaking, also includes the growing evidence and consensus within and outside government that SSN no-matches are a legitimate indicator of possible illegal work by unauthorized aliens. The SSA Office of the Inspector General (SSA IG) has reported, after reviewing earnings suspense file data for tax years 1999–2001, that fraudulent use of SSNs [1] was widespread in the service, restaurant, and agriculture industries and that such fraud was a significant cause of SSA no-matches:

> [OIG] identified various types of reporting irregularities, such as invalid, unassigned and duplicate SSNs and SSNs belonging to young children and deceased individuals. While we recognize there are legitimate reasons why a worker's name and SSN may not match SSA files, such as a legal name change, we believe the magnitude of incorrect wage reporting is indicative of SSN misuse. Employees and industry association representatives acknowledged that unauthorized noncitizens contribute to SSN misuse.

Office of the Inspector General, Social Security Administration, *Social Security Number Misuse in the Service, Restaurant, and Agriculture Industries,* Report A–08–05–25023, at 2 (April 2005), Administrative Record at 456. *See generally* Administrative Record at 35–661.

[1] *See* INA Section 274C, 8 U.S.C. 1324c.

SSA no-match letters have also formed a basis for multiple criminal investigations by ICE and prosecutions on charges of harboring or knowingly hiring unauthorized aliens.[2]

DHS's view—that no-match letters regularly identify unauthorized alien workers—was also overwhelmingly affirmed by those who submitted comments on the proposed rule in 2006. *See, e.g.*, Administrative Record at 866 (comment by U.S. Chamber of Commerce: ''It is estimated that annually 500,000 essential workers enter the U.S. to perform much needed labor without work authorization. * * * The proposed regulation will strip needed workers from employers without providing employers with an alternative legal channel by which to recruit to fill the gaps. * * *''); *id.* at 874 (comment by Essential Workers Immigration Coalition including same statement); *id.* at 850 (comment by National Federation of Independent Business: ''a substantial number of workers identified by no-match letters are undocumented immigrants who are unable to provide legitimate social security numbers''); *id.* at 858 (comment by Western Growers opposing the rule on grounds that ''it would have a most devastating effect on California and Arizona agriculture, where an estimated 50 to 80 percent of the workers who harvest fruit, vegetables and other crops are illegal immigrants''); *id.* at 887 (comment by American Immigration Lawyers Association: ''[T]he proposed regulation admittedly will 'smoke out' many unauthorized workers.''); *id.* at 1306 (comment by National Council of Agricultural Employers suggesting that, as a conservative estimate, 76% of agricultural workers are not authorized to work in the United States, that ''employers would likely lose a significant part of their workforces,'' and that ''a substantial number of workers would not return to work'' when faced with the requirement to verify work authorization ''because they would be unable to do so''). *See also AFL-CIO* v. *Chertoff,* 552 F.Supp.2d at 1008 (''th[e] Court cannot agree with plaintiffs'' fundamental premise that a no-match letter can never trigger constructive knowledge, regardless of the circumstances'').

c. SSA's Procedures Better Target No-Match Letters to Employers With Potential Workforce Problems

SSA's criteria for sending employer no-match letters also inform DHS's position in the August 2007 Final Rule and in this supplementary rulemaking. SSA does not send employer no-match letters to every employer with a no-match. Instead, SSA sends letters only when an employer submits a wage report reflecting at least 11 workers with no-matches, and when the total number of no-matches in a given wage report represents more than 0.5% of the employer's total Forms W–2 in the report.

In addition, SSA has continued to refine the wage reporting process in ways that help to reduce administrative error resulting in a no-match letter. Employers filing more than 250 Forms W–2 are required to file electronically (*see* 42 U.S.C. 405(c)(2)(A); 20 CFR 422.114; 26 CFR 301.6011–2), and electronic filing of Forms W–2 has risen from 53% of all employee reports in FY2003 to over 80% in FY2007—a 51% increase.[3] This direct electronic filing substantially reduces the likelihood that SSA errors—such as during data entry of the information submitted on a paper Form W–2—would result in discrepancies in the wage reports. Employers also have access to SSA's system for identifying name-SSN mismatches at the time they file the wage reports. That system can only be used to verify current or former employees and only for wage reporting (Form W–2) purposes. Employers who use SSA's system are able to eliminate most no-matches in their reports and thereby significantly reduce their likelihood of receiving a no-match letter.

DHS is also aware that SSA has developed a series of computerized error-checking routines to resolve certain common errors that result in unmatched name and SSN. These routines resolve name discrepancies caused by misspellings, typographical errors, first name and last name transpositions, and female surname changes (e.g. marriage or divorce). They can also resolve discrepancies from the use of a derivative nickname instead of a proper name or from scrambling compound or hyphenated surnames. The routines can also resolve SSN discrepancies such as numerical transpositions.

GAO has reported that approximately 60 percent of no-matches in recent tax years' wage reports are corrected by SSA's algorithms. *See* Government Accountability Office, *Social Security: Better Coordination among Federal Agencies Could Reduce Unidentified Earnings Reports* (GAO Report 05–154, 2005), Administrative Record at 400. *See also* Office of the Inspector General, Social Security Administration, *Effectiveness of the Single Select Edit Routine* (Audit Report A–03–07–17065, Sept. 2007). While these routines cannot resolve all discrepancies, they reduce the number of inadvertent no-matches that are reported to employers.

DHS believes that, taken together, these efforts better direct no-match letters to employers that have potentially significant problems with their employees' work authorization. Employers with stray mistakes or *de minimis* inaccuracies are much less likely to receive no-match letters.

d. The Longstanding Principle That Employers May Be Liable for INA Violations Based on Constructive Knowledge

Both pre-existing regulations and consistent case law demonstrate that an employer can be found to have violated INA section 274A(a)(2), 8 U.S.C. 1324a(a)(2), by having constructive rather than actual knowledge that an employee is unauthorized to work. The concept of constructive knowledge appeared in the first regulation that defined ''knowing'' for purposes of INA section 274a, 8 CFR 274A.1(*l*)(1) (1990); 55 FR 25928 (June 25, 1990). As noted in the preamble to the original regulation, that definition of knowledge is consistent with the Ninth Circuit's decision in *Mester Mfg. Co.* v. *INS,* 879 F.2d 561, 567 (9th Cir. 1989) (holding that, after receiving information that employees were suspected of having presented false documents to show work authorization, the employer had constructive knowledge of unauthorized status because the employer failed to make inquiries or take appropriate corrective action). *See also New El Rey Sausage Co.* v. *INS,* 925 F.2d 1153, 1158 (9th Cir. 1991).

The rulemaking record demonstrates that employers have continued to

[2] *See, e.g., United States* v. *Gonzales,* 2008 WL 160636 (N.D. Miss. No. 4:07-CR–140, Jan. 18, 2008) (finding no-match letters admissible at trial, and upholding a search warrant obtained on the basis of information, including copies of social security no-match letters, received from a confidential informant, treating no-match letters as ''documentary evidence supporting the allegation'' of the confidential informant); *United States* v. *Fenceworks, Inc.,* No. 3:06–CR–2604 (S.D. Cal.), D.E. 16 (judgment of probation and forfeiture of $4,700,000 in case involving multiple Social Security no-match letters) (related cases Nos. 3:06–CR–2605 (probation and fine of $100,000); 3:06–CR–2606 (probation and fine of $200,000)); *United States* v. *Insolia,* No. 1:07–CR–10251 (D. Mass), D.E. 1 (complaint; attachment, ¶¶ 25–32, February 2007 probable cause affidavit detailing history of employer's no-match letters from 2002 through 2005 and other investigative methods and facts); 34 (indictment); *United States* v. *Rice,* No. 1:07–CR–109 (N.D.N.Y), D.E. 1 (complaint; attached probable cause affidavit) (¶¶ 64–66, detailing results of matching analysis and SSA letters received by defendant's employer), D.E. 17 (plea agreement).

[3] Social Security Administration, *Performance and Accountability Report, Fiscal Year 2007* at 67–8.

demand clear guidance on appropriately responding to SSA no-match letters, consistent with their obligations under the INA. It also demonstrates a well-established consensus that the appearance of employees' SSNs on an SSA no-match letter may indicate lack of work authorization. The record also shows that SSA's practices in generating no-match letters helps to focus those letters on employers that, in DHS's view, have non-trivial levels of employees with SSN mismatches in their workforce, and existing law clearly establishes that employers may be charged with constructive knowledge when they fail to conduct further inquiries in the face of information that would lead a person exercising reasonable care to learn of an employee's unauthorized status.

This reasoned analysis supports DHS's position in the August 2007 Final Rule—that an employer's failure to conduct reasonable due diligence upon receipt of an SSA no-match letter can, in the totality of the circumstances, establish constructive knowledge of an employee's unauthorized status. Assuming, as did the district court, that this position constituted a change from prior statements in informal agency correspondence, DHS has now provided additional—and sufficient—reasoned analysis to support that change.

3. Anti-Discrimination Provisions of the INA

The preamble to the August 2007 Final Rule said that employers that adopt the rule's safe harbor procedures to verify employees' identity and work authorization must apply them uniformly to all employees who appear on employer no-match letters. Failure to do so, the preamble warned, may violate the INA's anti-discrimination provisions. The preamble further noted that employers that follow the safe harbor procedures uniformly and without regard to perceived national origin or citizenship status will not be found to have engaged in unlawful discrimination. 72 FR 45613–14. The DHS insert prepared to accompany the no-match letter had similar language. *AFL–CIO* v. *Chertoff,* D.E. 7, Exh. C. (N.D. Cal. Aug. 29, 2007).

The district court questioned DHS's authority to offer what the court viewed as interpretations, rather than mere restatements, of settled anti-discrimination law, noting that DOJ, not DHS, has authority for interpretation and enforcement of the INA's anti-discrimination provisions. The court concluded that DHS appeared to have exceeded its authority. 552 F.Supp.2d at 1011.

DHS recognizes the jurisdiction of DOJ over enforcement of the anti-discrimination provisions in section 274B of the INA (8 U.S.C. 1324b). As stated in the preamble to the August 2007 Final Rule, ''DOJ—through its Office of Special Counsel for Immigration-Related Unfair Employment Practices—is responsible for enforcing the anti-discrimination provisions of section 274B of the INA, 8 U.S.C. 1324b.'' 72 FR 45,614. The August 2007 Final Rule also stated that DHS's rule ''does not affect * * * the authority of DOJ to enforce the anti-discrimination provisions of the INA or adjudicate notices of intent to fine employers.'' *Id.* DHS does not have the authority to obligate the DOJ or the Office of Special Counsel, and the August 2007 Final Rule did not purport to make any such obligation. Whether an employer has engaged in unlawful discrimination in violation of INA 274B is a determination that is made by DOJ through the Office of Special Counsel. A statement by one agency about the authority of another agency does not, in and of itself, encroach on the authority of that other agency, and DHS's statements in the August 2007 Final Rule were reviewed through an interagency process that was created to improve the internal management of the Executive Branch. Executive Order 12866, 58 FR 51735 (Oct. 4, 1993), as amended by Executive Order 13258, 67 FR 9385 (Feb. 28, 2002), as amended by Executive Order 13422, 72 FR 2763 (Jan. 23, 2007).

Nevertheless, in light of the district court's concerns, DHS rescinds the statements in the preamble of the August 2007 Final Rule discussing the potential for anti-discrimination liability faced by employers that follow the safe harbor procedures set forth in the August 2007 Final Rule.[4] DHS has also revised the language in its insert letter that will accompany the SSA no-match letters. These changes do not alter existing law or require any change to the rule text.

DHS recognizes the concerns raised by commenters that discrimination litigation may be brought against them. As expressed by one commenter:

> One of the greatest potential costs faced by employers as a result of this rulemaking is the increased likelihood of discrimination lawsuits brought about by the required termination of employees who cannot resolve ''mismatches.'' DHS' retraction of the assurances it attempted to provide in the proposed rule only increases the uncertainty that employers face. Moreover, even meritless claims brought by terminated employees will require significant expenses in legal fees and related costs to defend, and unless DHS can remove jurisdiction in all courts in which such actions might be brought, it cannot prevent these expenses. *Our reality is that we will be ''attacked'' by numerous organizations * * * as we have been in the past.*

ICEB–2006–0004–0498.1 at 1–2 (emphasis in original); *see also* ICEB–2006–0004–0571.1 at 2; ICEB–2006–0004–0679.1 at 2.

While DHS lacks the authority to announce interpretations of the anti-discrimination provisions of the INA, DOJ possesses such authority, and persons seeking guidance regarding employers' anti-discrimination obligations in following the safe harbor procedures in the August 2007 Final Rule, as modified by this supplemental rulemaking, should follow the direction provided by DOJ published in today's edition of the **Federal Register**, and available on the Web site of the Office of Special Counsel for Immigration-Related Unfair Employment Practices, at *http://www.usdoj.gov/crt/osc/htm/Nomatch032008.htm.* Employers may also seek advice on a case-by-case basis through OSC's toll-free employer hotline: 1–800–255-8155. The Department continues to urge employers to apply the safe harbor procedures in this rule to all employees referenced in an SSA no-match letter or a DHS notice uniformly and without regard to perceived national origin or citizenship status.

4. Regulatory Flexibility Analysis

In its decision enjoining implementation of the August 2007 Final Rule, the district court construed the safe harbor in the rule as effectively creating compliance obligations for employers that received no-match letters. Doubting the voluntary nature of the safe harbor rule, the court found it likely that small businesses would incur significant costs to enter the safe harbor:

> Because failure to comply subjects' employers to the threat of civil and criminal liability, the regulation is the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures. The rule as good as mandates costly compliance with a new 90-day timeframe for resolving mismatches. Accordingly, there are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis.

552 F.Supp.2d at 1013 (internal quotations and citations omitted). In light of the district court's conclusion

[4] For example, DHS rescinds conclusive statements from the preamble of the August 2007 Final Rule such as ''employers who follow the safe harbor procedures * * * will not be found to have engaged in unlawful discrimination.'' 73 FR at 15950, citing 72 FR 45613–14.

that a regulatory flexibility analysis would likely be required, DHS published an initial regulatory flexibility analysis (IRFA) in the supplemental proposed rule, 73 FR at 15952–54, and placed on the docket for public comment the *Small Entity Impact Analysis, Supplemental Proposed Rule: Safe Harbor Procedures for Employers Who Receive a No-Match Letter,* ICEB–2006–0004–0233 (hereinafter, the ''SEIA'').

DHS continues to view the August 2007 Final Rule and this supplemental rule as interpretive, and does not believe that these rulemakings bear any of the hallmarks of a legislative rule. *See Hemp Industries Ass'n* v. *Drug Enforcement Admin.,* 333 F.3d 1082, 1087 (9th Cir. 2003) (identifying three circumstances in which a rule is legislative); *Syncore Int'l Corp.* v. *Shalala,* 127 F.3d 90, 94 (D.C. Cir. 1997) (interpretive rule ''typically reflects an agency's construction of a statute that has been entrusted to the agency to administer'' and a statement of policy ''represents an agency position with respect to how it will treat—typically enforce—the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach.''). DHS is not invoking its legislative rulemaking authority to mandate a specific action upon a certain event. Instead, this rulemaking informs the public of DHS's interpretation of Section 274A of the INA and describes how DHS will exercise its discretion in enforcing the INA's prohibition on knowing employment of unauthorized aliens. Although the district court questioned whether DHS has changed its position on the evidentiary force of no-match letters in enforcement proceedings against employers, neither the August 2007 Final Rule nor this supplemental rulemaking departs from any prior legislative rule. *See Oregon* v. *Ashcroft,* 368 F.3d 1118, 1134 (9th Cir. 2004). As noted above, the only record of the agency's previous position lies in correspondence between the agency and individuals and employers seeking advice on specific questions.

Thus, although DHS continues to believe that the Regulatory Flexibility Act does not mandate the analysis that has been undertaken here, see *Central Texas Tel. Coop.* v. *FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005), the Department provided an IRFA and supporting economic analysis, and has now prepared a Final Regulatory Flexibility Analysis (FRFA) in response to the district court's concerns.

As the United States Court of Appeals for the Ninth Circuit has noted, the Regulatory Flexibility Act (RFA) ''imposes no substantive requirements on an agency; rather, its requirements are 'purely procedural' in nature. * * * To satisfy the RFA, an agency must only demonstrate a 'reasonable, good-faith effort' to fulfill its requirements.'' *Ranchers Cattlemen Action Legal Fund* v. *USDA,* 415 F.3d 1078, 1101 (9th Cir. 2005). *See also Envtl. Def. Ctr.* v. *EPA,* 344 F.3d 832, 879 (9th Cir. 2003) (''Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit.'').

The RFA, by definition, does not apply to individuals. Where it applies, the RFA requires agencies to analyze the impact of rulemaking on ''small entities.'' Small entities include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3), (5)–(6). Small businesses are defined in regulations promulgated by the Small Business Administration. 13 CFR 121.201.

The RFA provides that an initial regulatory flexibility analysis (IRFA) shall contain:

(1) A description of the reasons why action by the agency is being considered;

(2) A succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

5 U.S.C. 603(b). Furthermore, an IRFA must also contain:

a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) The use of performance rather than design standards; and

(4) An exemption from coverage of the rule, or any part thereof, for such small entities.

5 U.S.C. 603(c). The RFA does not require that these elements be considered in a specific manner, following a prescribed formula or content. Given the nature of rulemaking, and its diversity, agencies develop IRFAs in a manner consistent with the statute and the rulemaking itself.[5]

The IRFA provided with the supplemental notice of proposed rulemaking contained the elements listed in 5 U.S.C. 603(b) as well as the discussion of significant regulatory alternatives required by 5 U.S.C. 603(c). The supplemental proposed rule explicitly requested comments on the economic aspects of the analysis and on the discussion of regulatory alternatives. Publication of the supplemental proposed rule received significant media coverage. The U.S. Small Business Administration Office of Advocacy (Advocacy) hosted a small business roundtable shortly after publication of the supplemental proposed rule to collect comments from interested small businesses and submitted a public comment letter based on this input. The comments provided by Advocacy are addressed in the analysis below. As noted above, the supplemental proposed rule and accompanying IRFA received nearly 3,000 comments from the public, including a significant number of comments specifically addressing the IRFA and the underlying SEIA.

DHS has reviewed the comments received on the IRFA and has concluded that the IRFA complied with the statutory standards for such an analysis and provided the public sufficient information to submit informed comments regarding the possible impact of this rule.

[5] The Small Business Administration had provided additional guidance. See Office of Advocacy, Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (2003). It states, in pertinent part:

The RFA requires agencies to conduct sufficient analyses to measure and consider the regulatory impacts of the rule to determine whether there will be a significant economic impact on a substantial number of small entities. No single definition can apply to all rules, given the dynamics of the economy and changes that are constantly occurring in the structure of small-entity sectors.

Every rule is different. The level, scope, and complexity of analysis may vary significantly depending on the characteristics and composition of the industry or small entity sectors to be regulated.

Id. at 14.

In light of comments that identified plausible regulatory alternatives or areas needing further clarification or adjustments in the economic model underlying the SEIA, DHS has revised the analysis and assembled a FRFA. The RFA requires that a FRFA contain:

(1) A succinct statement of the need for, and objectives of, the rule;

(2) A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, 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;

(3) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. 604(a). The discussion below and in the final SEIA on the docket addresses specific comments received on the IRFA and, together with the FRFA summarized in this supplemental final rule, provides the statutorily required agency assessment of comments received, projections of the number of affected small entities, description of the anticipated reporting and compliance burdens, and discussion of steps taken to limit any impact of the rule on small entities. In this way, DHS has ''demonstrated a 'reasonable, good-faith effort' to fulfill'' the procedural and substantive requirements of the RFA.

III. Public Comments and Responses

A. Authority To Promulgate the Rule

A number of commenters challenged DHS's authority to promulgate this rule. DHS has reanalyzed its jurisdiction and authority in light of these comments, and concludes that it has the necessary authority to promulgate this final rule.

Several commenters suggested that the rule imposes an affirmative due diligence obligation on employers that does not exist in the INA once employers complete the Form I–9 process. As is explained in section II.C, *supra*, the INA's prohibition on ''knowing'' hiring or continued employment of unauthorized workers extends to employers that have constructive knowledge that an employee is unauthorized to work. The concept of constructive knowledge appeared in the first regulation that defined ''knowing'' for purposes of INA section 274a, 8 CFR 274A.1(*l*)(1) (1990); 55 FR 25,928. As noted in the preamble to that original regulation, that definition of knowledge is consistent with the Ninth Circuit's decision in *Mester Mfg. Co.* v. *INS*, 879 F.2d 561, 567 (9th Cir. 1989) (holding that when an employer who received information that some employees were suspected of having presented a false document to show work authorization, such employer had constructive knowledge of their unauthorized status when the employer failed to make any inquiries or take appropriate corrective action). See also *New El Rey Sausage Co.* v. *INS*, 925 F.2d 1153, 1158 (9th Cir. 1991). Contrary to the apparent view of some commenters, the INA does not absolve employers of any further responsibility once they have completed the initial Form I–9 verification process. The concept of constructive knowledge—and employers' responsibility to conduct reasonable due diligence in response to information that could lead to knowledge of their employees' illegal status—flows from the INA as interpreted in long-standing case law and federal regulations; it is not an invention of this rulemaking.

One commenter argued that the rule would undercut the good faith compliance defense available to employers that complete the Form I–9 employment eligibility verification process, and is therefore contrary to the INA. DHS disagrees. The affirmative defense the INA provides to employers that comply with the Form I–9 process in good faith remains available as protection against a charge of knowingly hiring unauthorized employees in violation of INA section 274A(a)(1)(A), but it has no force, by the statute's plain language, as a defense against an allegation of knowingly continuing to employ an unauthorized alien in violation of INA section 274A(a)(2). This rulemaking explains the evidentiary weight DHS may place on SSA no-match letters and DHS suspect document notices in identifying, investigating, and prosecuting employers suspected of continuing to employ unauthorized aliens in violation of section 274A(a)(2). The commenter's concern over the continuing viability of the good faith I–9 compliance defense is misplaced.

One comment also suggested that DHS could not promulgate this rule because it violates the congressional notification and review requirements of INA section 274A(d)(3), 8 U.S.C. 1324a(d)(3). That section provides that the President must notify Congress before he may make any ''changes in (including additions to) the *requirements* of subsection (b)'' of INA section 274A, which established the I–9 employment verification system. INA section 274A(d)(1)(B), 8 U.S.C. 1324a(d)(1)(B) (*emphasis added*).

The August 2007 Final Rule instructs employers that elect to follow the safe harbor procedures set out in the rule to confirm identity and work eligibility by filling out a new Form I–9 for any employees unable to resolve their mismatch through the 90-day process. This does not, however, constitute a change to ''the requirements of subsection (b)'' of INA section 274A. The procedures of the safe harbor rule are not a ''requirement''; employers are encouraged to follow these procedures to limit their legal risk, but they are not compelled to do so. Moreover, while the I–9 reverification option in the safe harbor procedures is based on the I–9 process used at the time of hire, it is neither part of, nor an addendum to, the I–9 process that all employers must follow at the time of hire. Rather, the safe harbor rule helps employers to avoid violating the prohibition against knowingly continuing to employ unauthorized workers. INA section 274A(a)(2), 8 U.S.C. 1324a(a)(2).

B. ''Reasoned Analysis'' Supporting Perceived Change in Policy Reflected in the Final Rule

Many commenters argued that DHS had not provided an adequate ''reasoned analysis'' the district court suggested was necessary to support the perceived change in agency position. Several comments suggested that DHS must establish with certainty, or with some degree of confidence beyond a rational basis, that a Social Security no-match letter establishes that the indicated employee was an alien not authorized to work in the United States. Some argued that the rule would be arbitrary and capricious unless DHS could refute the claim ''that the SSA database is not a certain indicator of one's right to work'' in the United States. ICEB 2006–0004–0732.1 at 3.

The comments suggesting that DHS must base the rule on evidence that an SSA no-match is near-conclusive proof of a listed person's illegal status misunderstand the nature of this rulemaking action. DHS has consistently stated that an SSA no-match letter,

standing alone, does not conclusively establish that any employee identified in the letter is an unauthorized alien. Nor does an employer's receipt of, and response to, an SSA no-match letter always prove that the employer had constructive knowledge that any listed employees were unauthorized to work in the United States. Rather, this rulemaking announces DHS's view that a no-match letter, and an employer's response to it, may be used as evidence, evaluated in light of ''the totality of the circumstances,'' of an employer's constructive knowledge. This rulemaking also announces DHS's commitment that an employer that follows the safe harbor procedures set forth in the rule will always be found to have responded reasonably to the no-match letter.

As the district court noted in the pending litigation, DHS does not claim, and need not prove, that a no-match letter will always be sufficient evidence to demonstrate constructive knowledge:

> The flaw in plaintiffs' argument is their assumption that receipt of a no-match letter triggers a finding of constructive knowledge in every instance. In fact, the regulation is written such that whether an employer has constructive knowledge depends 'on the totality of relevant circumstances.' Depending on the circumstances, a court may agree with plaintiffs that receipt of a no-match letter has not put an employer on notice that his employee is likely to be unauthorized. But this Court cannot agree with plaintiffs' fundamental premise that a no-match letter can never trigger constructive knowledge, regardless of the circumstances.

552 F.Supp.2d at 1008.

This safe harbor rule is a rational response to DHS's regulatory finding that a no-match letter can be evidence of such knowledge—a finding amply supported in record of this rulemaking and fairly conceded even by the rule's opponents.

Some commenters argued that the SSA database was fraught with errors, and that even if SSA no-match letters were an indicator of possible illegal employment, they are too unreliable to support the evidentiary weight DHS seeks to place on them. DHS disagrees with the commenters' suggestion that SSA's records are so substantially incorrect that DHS can not rely on no-match letters generated from those records. When attempting to post wages to its Master Earnings File, SSA compares the employee names and SSNs provided by employers on Forms W–2 to the names and SSNs recorded in the Agency's NUMIDENT file. ''No-matches'' may result from the number holder's failure to provide SSA updated information, such as a legal name change resulting from marriage. Other ''errors'' result from typographical mistakes annotated on the W–2s by employers. These types of errors are being reduced by a variety of programmatic efforts, and, with direct electronic reporting of over 80% of wage data, the potential for errors resulting from the government's handling of the information is reduced.[6] As discussed in more detail below, the effective accuracy of the SSA data from which no-match letters are derived is estimated to be 99.5 percent. Moreover, as noted above, DHS views SSA's policy of limiting issuance of no-match letters to employers whose wage reports contain a certain level of mismatches as a useful means for separating employers whose reports contain a certain non-trivial number of errors that might reasonably indicate possible illegal employment or systematic problems in the employers' recordkeeping from employers with trivial errors in their wage reports.

Other commenters noted that the supplemental proposed rule did not explicitly limit the applicability of the safe harbor procedures to the SSA's ''Employer Correction Request'' or ''EDCOR'' letter. DHS is also aware that the rule text does not explicitly identify the ''EDCOR'' letter from SSA—addressed to employers and containing more than ten no-match social security numbers—as the notice from SSA to which the safe harbor procedures apply. The rule text is written in general terms to allow the safe harbor procedures to apply to notices that SSA may issue in the future. DHS has made it clear, however, that the SSA notice to which the safe harbor rule applies is the ''EDCOR'' letter listing multiple no-matches, rather than a ''Request for Employee Information'' or ''DECOR'' letter identifying a single employee with an SSN/name no-match. First, the text of the rule clearly states that the procedures may apply where an employer receives ''written notice to the employer from the Social Security Administration reporting earnings on a Form W–2 that employees' names and corresponding social security account numbers fail to match Social Security Administration records.'' The reference to plural no-matches and to W–2 reports distinguishes the ''EDCOR'' letters addressed to employers that list multiple no-matches from any notice unrelated to a W–2 report or from ''DECOR'' letters addressed to a single employee or to an employer regarding a single no-match. Second, DHS explained above and in the preamble to the supplemental proposed rule that the letter listing multiple employees with SSN and name no-matches is the notice to which the rule's safe harbor applies.

[6] Social Security Administration, *Performance and Accountability Report, supra* n.2, at 190.

C. Anti-Discrimination Provisions of the INA

A significant number of commenters repeated concerns, previously summarized and addressed in the August 2007 Final Rule, that employers would engage in illegal discrimination in reaction to this rulemaking. Such comments regarding the consistency of this regulation with existing anti-discrimination law and regarding employers' continued anti-discrimination obligations were addressed in detail in the August 2007 Final Rule, 72 FR at 45620–21, and DHS declines to revisit those issues in this supplementary rulemaking.

Other commenters objected to DHS's rescission of the statements in the preamble to the August 2007 Final Rule explaining that employers will not be engaged in unlawful discrimination under the anti-discrimination provisions of the INA if they follow the safe harbor procedures uniformly for all employees, without regard to perceived national origin or citizenship. In their view, the removal of those assurances greatly reduced the value of the safe harbor being offered in this rule, and left employers exposed to potential litigation accusing them of illegal discrimination as a result of their efforts to follow the safe harbor procedures set forth in this rulemaking.

DHS agrees that guidance on anti-discrimination compliance is important to the successful implementation of the safe harbor procedures. As DHS noted in the August 2007 Final Rule, the Department of Justice is responsible for enforcing the anti-discrimination provisions of the INA. DHS believes that the commenters' concerns are addressed in the anti-discrimination guidance from the DOJ Office of Special Counsel published in today's edition of the **Federal Register**.

D. Regulatory Flexibility Analysis

Commenters were divided on whether an initial regulatory flexibility analysis, and by implication a final regulatory flexibility analysis, was required. In light of the district court's conclusion that a regulatory flexibility analysis would likely be required, DHS has conducted such an analysis, supported by the small entity impact analysis (SEIA) accompanying this rulemaking. Both are summarized in greater detail in Section V.B.

The bulk of the comments regarding the RFA argued that the analysis in the

IRFA and in the SEIA was flawed. Commenters argued that the scope of the analysis conducted by DHS was too narrow, that the analysis incorrectly omitted certain costs from the equation, or that the analysis was based on inaccurate assumptions about the behavior of employers and employees that might be impacted by the rule. These comments regarding the SEIA and IRFA are addressed below.

1. Scope of Regulatory Flexibility Act Review

A number of commenters conflated the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), with the requirements of other statutory and administrative reviews. For example, commenters suggested that the RFA analysis should include reviews called for by the Congressional Review Act, 5 U.S.C. 801, the federal data quality standards guidelines, Executive Order 12866, and other statutes and executive orders. No law requires that DHS combine all of the elements of these separate reviews, and DHS declines to do so.

One commenter conceded that these additional reviews are not required by the RFA:

> The DHS Safe-Harbor Rule IRFA presents estimates of costs to employers associated with following the safe-harbor procedures set forth in the proposed rule. It excludes certain costs that are not cognizable under the Regulatory Flexibility Act but are crucial for estimating the full social impact of the rule—most notably, costs borne by employees. These costs are not exempt from being counted under Executive Order 12,866 or the Congressional Review Act.

ICEB–2006–0004–0637.1 at 4. Notwithstanding this admission, the commenter repeatedly drew from standards outside the RFA to criticize the content of the IRFA. The law is clear that no other analysis is bootstrapped into the RFA. It is the case that the RFA permits agencies to prepare IRFAs in conjunction with, or as a part of, other analyses required by law, so long as the RFA's requirements are satisfied. 5 U.S.C. 605(a) (''Any Federal agency may perform the analyses required by [the RFA] in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.'') The fact that the RFA's requirements may be managed through other analyses, however, does not expand the requirements of the RFA or compel agencies to conduct such other analyses as part of an IRFA or a FRFA. These analyses are not required by the RFA, nor are they, for the reasons set forth below, mandated for this rule under any other provision of law.

a. Executive Order 12866 and OMB Circular A–4

Executive Order No. 12866, 58 FR 51735 (Oct. 4, 1993), as amended by Executive Order 13258, 67 FR 9385 (Feb. 28, 2002), as amended by Executive Order 13422, 72 FR 2763 (Jan. 23, 2007), directs agencies subordinate to the President to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, distributive impacts, and equity). In implementing Executive Order 12866, the Office of Management and Budget has provided further internal guidance to agencies through OMB Circular A–4 (Sept. 17, 2003), found at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*. OMB Circular A–4 states that it ''is designed to assist analysts in the regulatory agencies by defining good regulatory analysis * * * and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.'' OMB Circular A–4, at 3.

Executive Order 12866 is an exercise of the President's authority to manage the Executive Branch of the United States under Article II of the Constitution. The implementation of the Executive Orders and OMB Circulars, and other internal guidance, is a matter of Executive Branch consideration and discretion. The Executive Branch may utilize its standards under Executive Order 12866 in analyzing regulations under the RFA because the standards of the RFA and Executive Order 12866 do not conflict, but the RFA does not require use of those standards internal to the Executive Branch. The comments invoking Executive Order 12866 and OMB Circular A–4 standards to identify alleged deficiencies in the IRFA are therefore misplaced.

The fact that preparation of a regulatory impact analysis (RIA) under Executive Order 12866 is a matter of Executive Branch discretion is underscored by the terms of Executive Order 12866, section 11:

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is *intended only to improve the internal management of the Federal Government* and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(emphasis added). The internal, managerial nature of this and other similarly-worded Executive Orders has been recognized by the courts, and actions taken by an agency to comply with the Executive Order are not subject to judicial review. *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429, 445 (9th Cir. 1993) (citing *Michigan* v. *Thomas*, 805 F.2d 176, 187 (6th Cir. 1986)).

b. Congressional Review Act

Some comments argued that this rule is a ''major rule'' for purposes of the Congressional Review Act, 5 U.S.C. 801 (CRA). The CRA delays implementation, and provides a mechanism for congressional disapproval, of regulations designated as ''major rules'' by the Administrator of the Office of Management and Budget. Such a designation is made where OMB finds the rule has resulted in or is likely to result in (a) An annual effect on the economy of $100,000,000 or more; (b) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804(2). Determinations by OMB under the CRA are not subject to judicial review. 5 U.S.C. 805. OMB has not determined that this rule is a major rule and, therefore, the CRA does not apply.

2. Direct and Indirect Impact

A number of comments on the supplemental proposed rule objected that the cost estimates presented in the IRFA did not include estimates for costs other than for direct compliance with the rule. Examples of costs commenters urged DHS to take into account included potential lost wages for individuals who take time away from work to visit an SSA office or another government office to resolve the no-match, travel expenses for employees attempting to resolve a no-match, and other costs incurred by employers, such as legal fees associated with lawsuits that could be filed by work-authorized employees terminated in response to a no-match letter.

In addition, many commenters suggested that DHS's RFA analysis should include a number of other general indirect costs that allegedly could be borne by society in general—higher cost of food resulting from the

disruption of the agricultural labor force where illegal employment is common, depressed wages from employers shifting from direct employment to greater reliance on temporary employment agencies, social and economic cost of unauthorized workers becoming unemployed, general impact of the rule on the ''macro economy,'' economic impact of employers moving operations to Mexico or other foreign countries in search of reduced labor costs and less regulation, and possible growth in the underground economy and reduction in tax revenues.

DHS disagrees. All of these comments overstate the scope of the costs that are to be considered under the RFA. The RFA requires consideration only of the direct costs of a regulation on a small entity that is required to comply with the regulation. *Mid-Tex Electric Coop.* v. *FERC*, 773 F.2d 327, 340–343 (D.C. Cir. 1985) (holding indirect impact of a regulation on small entities that do business with or are otherwise dependent on the regulated entities not considered in RFA analyses). *See also Cement Kiln Recycling Coalition* v. *EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (In passing the RFA, ''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy * * * [T]o require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'').

No judicial precedent supports the commenters' view that indirect economic or social impacts must be considered under the RFA. These costs can be considered under other analyses and reviews that DHS and other agencies may conduct in reaching decisions on regulatory matters, but they fall outside the RFA. *See, e.g., Regulatory Flexibility Improvements Act*, Hearing before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, on H.R. 682, 109th Cong., 2nd Sess. (2006), at 13 (Statement of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration, criticizing the RFA by noting that ''the RFA * * * does not require agencies to analyze indirect impacts.'').

3. Baseline Costs, Unauthorized Alien Workers, and the Immigration Reform and Control Act of 1986

A number of commenters asserted that DHS should include in the IRFA and FRFA the cost of firing unauthorized alien workers and replacing those unauthorized alien workers who voluntarily resign or are terminated by employers when the workers are unable to confirm their identity and work authorization in accordance with the safe harbor procedures in this rule. In particular commenters criticized the exclusion from the IRFA of the costs of complying with section 274A(a)(2) of the INA. That section provides:

> It is unlawful for a person or other entity * * * to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

The commenters suggested that the cost of terminating and replacing workers who an employer learns are not authorized to work in the United States should be accounted for as a cost of the rule, since that knowledge (or constructive knowledge) results from the no-match letters, and the termination and replacement costs must be borne regardless of whether they are counted as a cost of the INA or of the rule. These comments fundamentally misunderstand the requirements of the RFA, as well as the INA's longstanding prohibition against employment of unauthorized aliens.

The RFA explicitly requires DHS to ''describe the impact *of the proposed rule* on small entities'' in an initial regulatory flexibility analysis. 5 U.S.C. 603(a) (emphasis added). The Act also states that a final regulatory flexibility analysis ''shall contain * * * a description of the projected reporting, recordkeeping and other compliance requirements *of the rule*.'' 5 U.S.C. 604(a)(4) (emphasis added). The RFA does not require that DHS analyze the impact of the underlying statutory provisions in either the initial or final regulatory flexibility analysis. And it would be particularly irrational to do so here, since termination and replacement costs are already being incurred by employers attempting to comply with the INA even before this safe harbor rule goes into effect. The comments themselves make this clear: such terminations have been documented since at least 2003—three years before this rule was first proposed. C. Mehta, N. Theodore & M. Hincapie, *supra*, at 13–14, Administrative Record at 327–8 (approximately 53.6 percent of surveyed employers terminated workers with listed no-matches). *See also* ICEB–2006–0004–0688.1 at 2 (''To date, the misuse of SSA's no-match letters by employers has already resulted in countless, unjust suspensions and/or firings of low-wage, immigrant workers''); ICEB–2006–0004–0652.1 at 8 (comment by NFIB, citing Mehta, Theodore & Hincapie, *supra*.).

As DHS explained in the supplemental notice of proposed rulemaking, the Immigration and Nationality Act expressly prohibits employers from knowingly hiring or knowingly continuing to employ an alien who is not authorized to work in the United States. INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2). Employers that have actual or constructive knowledge of their employees' illegal work status are statutorily obligated to cease their employment, and any costs that result are attributable to the INA, not to this safe harbor rule.

While the cost of terminating or replacing unauthorized workers cannot properly be considered a cost of this rule, some turnover involving legal workers that are unable or unwilling to resolve their mismatches through the procedures outlined in this rule could be counted as a cost of the rule for any employer that elects to follow the safe harbor procedures. Such turnover costs for legal workers were estimated in the IRFA, and are discussed in more detail below.

Several comments also suggested that employers may summarily discharge workers rather than giving them an opportunity to correct records, and argued that the impact on work-authorized employees who leave their jobs or are terminated by their employers should be included in the RFA analysis as a cost of the rule. As mentioned above, the RFA instructs agencies to examine costs and impacts to ''small entities''—defined by statute as ''hav[ing] the same meaning as the terms 'small business,' 'small organization' and 'small governmental jurisdiction' ''—and which does not include individuals. Therefore, the commenters misread the RFA. We also note that, if an employer were to summarily terminate legal workers, the impact on such workers would be caused not by the rule but by their employer's violation of the safe harbor procedures. Any legal workers who choose not to correct their records would effectively be voluntarily resigning, perhaps calculating that the opportunity cost of correcting their records was greater than the cost of finding alternate work.

4. Variability of SSA Criteria for Issuing No-Match Letters

A number of commenters suggested that the criteria used by SSA in determining whether to issue a no-match letter was subject to future change, and that increased costs could

be incurred if SSA issues more no-match letters. DHS recognizes that the impact on small entities could vary if SSA alters its matching processes or changes its criteria for issuing no-match letters. But the RFA does not require DHS to speculate about every contingency that could have some impact on small entities, such as the potential for another agency to exercise its discretion differently. Since DHS is unaware of any plans to change SSA's policies for issuing ''EDCOR'' no-match letters, any attempt in the IRFA or FRFA to analyze hypothetical changes in SSA policy would be mere speculation.

Some commenters also suggested that the IRFA and FRFA must cover historical data to account for the existing variability in the number of no-match letters issued from year to year, even absent any change to SSA's policies on issuing no-match letters. While such variability exists, it is largely irrelevant to the calculation under the FRA of the ''impact'' that may result to an average ''small entity'' that chooses to follow the safe harbor procedures in the rule. Changes in the number of no-match letters sent to employers in a given year may change the aggregate costs incurred by all employers that choose to follow the safe harbor procedures, but DHS has no data (and commenters have provided none) that would lead DHS to conclude that such variations would alter either the share of all no-match letters in a given year that would be received by small entities or the impact felt by a specific small entity that receives a no-match letter and decides to follow the safe harbor procedures. DHS's reliance on 2007 statistics regarding employers whose reports would have generated no-match letters for the analysis in the IRFA and SEIA was reasonable.

5. Base Assumptions Made in the IRFA and SEIA

A number of commenters disagreed with assumptions made in the IRFA and SEIA regarding the impact of the rule on small entities. DHS sought to catalog all of the assumptions underlying the analysis to make the methodology, calculations, and findings of the SEIA transparent, reproducible, and accessible for public review and comment. One commenter catalogued over thirty assumptions underlying the economic analysis provided by DHS, and noted that even this list was a subset of the analytical assumptions openly disclosed by DHS. *See* ICEB–2006–0004–07321.1 at 23–25. Notwithstanding DHS's transparency about the analytical underpinnings of its analysis, commenters who objected to the substance of DHS's assumptions provided little information to call into question the reasonableness of those assumptions or even to assist DHS to evaluate the strength of the commenters' objections.

The analysis required by the Regulatory Flexibility Act need not produce statistical certainty; the law requires that the DHS ''demonstrate a 'reasonable, good-faith effort' to fulfill [the RFA's] requirements.'' *Ranchers Cattlemen Action Legal Fund*, 415 F.3d at 1101. *See also Associated Fisheries of Maine* v. *Daley*, 127 F.3d 104, 114–15 (1st Cir. 1997). The IRFA and SEIA produced by DHS in this rulemaking meet that standard. The assumptions underlying the SEIA are reasonable, and DHS has utilized the best data available to produce the IRFA and the SEIA. Where data was unavailable, DHS consistently made analytically conservative assumptions regarding the cost to employers that choose to follow the safe harbor procedures in this rule. With one exception, the public comments did not provide better data or identify additional sources for empirical data within the scope of the RFA. In analyzing the comments received and in preparing the FRFA, DHS attempted once again to ensure that the best available data is used. Individual comments regarding specific assumptions in DHS's analysis are addressed in detail below.

a. Assumptions Regarding Impact on Legal Workers

i. Accuracy of SSA Records

A number of commenters suggested that the SSA data used to generate no-match letters (the Earnings Suspense File, or ''ESF'' database) is generated from an SSA database (the ''NUMIDENT'' database) that the commenters allege contains a large number of errors that will cause work-authorized employees to appear as no-matches, and to have to correct their discrepancies.[7] Many of these comments cited a report by the SSA Office of the Inspector General regarding errors in SSA's NUMIDENT database,[8] to argue that the data used for the no-match letters has an error rate of 4.1 percent. Some commenters suggested that DHS not use information derived from that database for immigration enforcement purposes until the database achieves a 99.5% accuracy level. Referring to the same SSA OIG report, another commenter alleged that SSA now maintains 17.8 million mismatched records that could result in no-match letters to employers.

DHS does not agree with the commenters' inference that the overall 4.1% data discrepancy rate estimated by SSA OIG is relevant to this rulemaking, or to SSA no-match letters generally, in the way suggested by the commenters. The SSA OIG's report reviewed the accuracy of four different data fields in SSA's system—''Name,'' ''Date of Birth,'' ''Death Indication,'' and ''Citizenship Status''—and the study's projected 4.1% data discrepancy rate was based on the cumulative data discrepancies in all four data fields sampled. But SSA no-match letters are generated only when an employee's name and SSN submitted by an employer cannot be matched to SSA records; discrepancies in the ''Date of Birth,'' ''Death Indication,'' and ''Citizenship Status'' fields do not cause an employee to be listed on a no-match letter because the Forms W–2 from which no-match letters are generated do not contain this information. The SSA OIG report showed that only 0.24% of native-born U.S. citizens had a name and number mismatch, while naturalized citizens and non-citizens had a 0.49% and 1.7% mismatch rate, respectively. This yields a projected overall name and SSN mismatch rate of 0.4% (weighted average) for all records in the NUMIDENT system. Based on the SSA OIG report cited by commenters, it appears that the database that generates no-match letters already exceeds the 99.5% accuracy level proposed in the comments.

ii. Turnover Rates

The SEIA assumed that employers that follow the safe harbor procedures may face increased turnover of employees authorized to work in the United States. To the extent that a work-authorized employee resigns or is terminated for failing to resolve the no-match, the employer could be reasonably expected to incur the cost of replacing that employee. For purposes of the SEIA, DHS estimated that 2% of authorized employees identified in no-match letters might resign or be terminated due to failure to resolve a no-match, and therefore the SEIA included those turnover costs as a cost of an employer's adoption of the safe harbor procedures in the rule.

It is important to note that this figure is not, as some commenters have incorrectly claimed, an estimate of the

[7] While the Earnings Suspense File is an electronic repository for wage items that cannot be matched to an individual worker's earnings record, the database that SSA uses to match a wage item to a worker is the Numident database.

[8] Social Security Administration, Office of the Inspector General, *Congressional Response Report: Accuracy of the Social Security Administration's Numident File* (No. A–08–06–26100, Dec. 2006).

number of legal workers that ''will be fired'' as a result of this rule. Nothing in the August 2007 Final Rule or in this supplemental rulemaking requires an employer to terminate an employee at the end of the 93-day no-match resolution and reverification schedule if a no-match remains unresolved. Should an employer learn in the course of that process that an employee lacks work authorization, the INA requires—as it has for over 20 years—that the employment relationship be terminated. While the regulatory safe harbor is only available if the rule's procedures are completed with 93 days, an employer may still be seen to have acted reasonably if an employee has taken longer than 93 days to resolve a no-match, depending upon the particular circumstances.

Moreover, the SEIA's estimate includes turnover caused by voluntary departures of employees who decide to seek employment elsewhere rather than resolve the no-match with SSA. Neither the government nor employers can compel employees to correct no-matches, and DHS does not have sufficient data to conclude that 100% of all legal employees will correct their no-matches within the 93-day schedule set out in the rule. DHS recognizes that it will cost employers something to replace workers if (1) some of their employees decided to leave employment after day 90, and/or (2) some employees (a) attempted but failed to complete the process of resolving their no-matches in 90 days; (b) those employees would not or could not produce alternative documents to complete a new Employee Verification Form I–9; and (c) an employer took a strict approach to terminate every person with unresolved no-matches after 93 days. DHS has, therefore, included these turnover costs in the SEIA.

Several commenters suggested that this projected turnover rate of 2% for legal workers is too low. DHS disagrees. As section III.J of the SEIA explains, there are significant economic incentives for both the employer and employee to resolve a no-match. A work-authorized employee has an incentive to both keep his or her current employment and to ensure that his or her name and SSN properly match SSA's records so that he or she will receive full credit for contributions made into Social Security and maximize the amount of Social Security benefits he or she will receive in retirement or in case of disability. At the same time, an employer has an incentive to ensure that employees resolve their no-match issues to avoid turnover in the workforce, and the SEIA assumed that employers would pay for human resources staff to assist employees to resolve a no-match, given the cost to the employer of replacing those employees. In light of these incentives, DHS's estimate of 2% was reasonable.

Although the commenters did not provide a basis for changing this assumption, DHS has added an alternative scenario in an appendix to the SEIA to examine how these turnover costs could change if the legal worker replacement rate were doubled from 2% to 4%. That additional analysis did not result in a material change in the SEIA's estimate of the rule's impact on small entities or in the reasonable regulatory alternatives that DHS could consider in this rulemaking.

iii. No-Match Resolution Process

Some commenters also suggested that DHS should reconsider the SEIA's assumption that 66% of authorized employees will be able to resolve no-matches without visiting an SSA office. DHS continues to believe that this assumption is reasonable for purposes of the analysis required by the RFA.

The SEIA made specific assumptions regarding how the employer and employee would resolve a no-match in order to estimate the costs on a per employer basis. DHS believes the cost that an employer would bear to correct a no-match typically depends on the reason for the no-match. For example, if an employer were able to determine that the no-match resulted from an internal clerical error by the employer, the employer would likely be able to correct this discrepancy quickly and inexpensively. If the employer determined that there was no clerical error, the SEIA assumed that the employer would meet with the employee to verify that the employer's records show the correct name and social security number. If the employee then determined that the employer had submitted the correct name and social security number, the employee would need to visit SSA to resolve the no-match. If the employee needs to visit SSA, the employer may incur a lost productivity cost for the time the employee was away from work.

The SEIA stated that no specific data was available to show what percentage of no-match issues were clerical errors, incorrect information submitted by the employee to the employer, or an issue that required a visit to SSA. Accordingly, the SEIA assumed one-third of the authorized employee no-matches would be clerical errors, one-third of the authorized employee no-matches would be resolved when the employer identified an error in an employer's records, and one-third of authorized employees would visit SSA to attempt to correct the no-match. None of the comments provided data that could improve on the SEIA's estimates.[9]

Even though DHS does not have hard data on how many mismatches may be resolved at each step of the safe harbor procedures, we can reasonably expect that a significant number of no-matches will be corrected internally by the employer without requiring the employee to visit SSA. For example, several comments suggested that work-authorized employees of Latin American and Asian descent appear on no-match letters because of compound naming conventions or inconsistent transliteration that sometimes results in inadvertent errors or discrepancies in employer records. Employers can easily resolve such inadvertent errors. In addition, electronic filing of W–2

[9] One commenter suggested that a DHS-funded study of the Basic Pilot or E-Verify program shows that a larger share of individuals listed in no-match letters will need to visit SSA, claiming that ''only in 30% of the time were tentative non-confirmations caused by either solely an error with the date of birth or the name.'' ICEB–2006–0004–07321.1 at 27 (citing to Westat, *Findings of the Web Basic Pilot Evaluation, supra* at 51). After re-reviewing the Westat report, DHS disagrees. The passage of the Westat report cited by the commenter examines the approximately 5% of individuals who receive a final non-confirmation from the E-Verify system and breaks that population down by the type of mismatch that caused the system to flag each person with an initial tentative non-confirmation. That analysis is graphically represented in Exhibit III–6 of the Westat report, which shows that 17% of those found unauthorized to work who claimed U.S. citizenship were flagged as ''DOB not matched'' and 13% of those found unauthorized to work who claimed U.S. citizenship were flagged as ''Name not matched.'' It appears that the commenter added 17% to 13% to arrive at the claim that ''30%'' of tentative non-confirmations are caused solely by errors in date of birth or name. The comment misses the mark for a number of reasons. First, the passage of the Westat report cited by the commenter looks at individuals who received a final non-confirmation stating that they were not authorized to work, and sorts individuals not by actual citizenship status but by citizenship status claimed by the individual. The population of unauthorized workers includes large numbers of individuals who falsely claim U.S. citizenship. By definition, the population relevant to the SEIA's calculation of no-match resolutions is entirely different, since it is limited to work-authorized persons. The comment also assumes, without explanation, that the workers with either a mismatched date of birth or a mismatched name correlate to the population that will be able to resolve the mismatch without visiting SSA. The passage of the Westat report cited by the commenter does not shed any light on the question of how many employees listed on a no-match letter will need to visit a Social Security office to resolve their mismatches. E-Verify and SSA's no-match letter program are distinct programs that rely on different input data sources and that examine different things. And the data summarized in Exhibit III–6 of the Westat report is simply not related to the subset of authorized employees that will choose to visit SSA.

reports limits SSA staff intervention in wage report data processing and increases the likelihood that mismatches originated with—and can be most readily resolved by—the employer.

Commenters did not provide information that would lead DHS to conclude its estimate was not reasonable. Nevertheless, as with the turnover rates discussed above, DHS has provided an alternative scenario in an appendix to the SEIA to model how the no-match resolution costs would change if the percentage of authorized employees that must visit a SSA office increases from 33% to 50%. We conclude that this alternative assumption does not materially change the SEIA's estimate of the impact on small entities or point to additional regulatory alternatives that DHS could consider in this rulemaking.

b. Percentage of No-Matches Relating to Unauthorized Aliens

One commenter suggested that the SEIA was inadequate because it assumed that the general employee turnover rate would be the same for authorized and unauthorized employees. The commenter believed that this is significant because the SEIA concludes that 57% of employees listed in no-match letters already have left their jobs by the time the employer receives the no-match letter. The commenter suggested that the turnover rate is likely to be much higher for unauthorized employees, meaning that authorized employees are more likely to be still employed when a no-match letter arrives and, thus, authorized employees are more likely to be impacted by the no-match letter and the safe harbor rule.

DHS is not aware of any Department of Labor, Bureau of Labor Statistics (BLS), or other data that presents separate turnover rates for authorized and unauthorized employees. Consequently, DHS is using the best data available for turnover rates. BLS provides turnover data for the non-farm sectors and is based on all employees on the payroll, without distinguishing between those authorized and unauthorized to work in the United States. Therefore, DHS believes the BLS industry turnover rates presented in the SEIA should be considered to be weighted averages of an authorized employee turnover rate and the unauthorized employee turnover rate.[10] DHS has clarified the SEIA to address this point. DHS has not found, and the commenters have not provided, any empirical evidence that supports a specific turnover rate or range other than the weighted average in the BLS composite rate.

Another commenter suggested that the errors in the NUMIDENT data relating to United States citizens would be less likely to appear in no-match letters, and that few U.S. citizens would be affected by no-match letters or face the possibility of termination. Another commenter noted that the SEIA assumed it is possible that only 10% of employees appearing on no-match letters are not work-authorized, and suggested that any particular no-match letter identifying 11 employees would likely list only lawful employees.

These comments highlight that DHS estimated costs based over a broad range: assuming that between 10% to 80% of employees on no-match letters were unauthorized. DHS cannot determine with certainty the rate at which authorized and unauthorized employees appear in no-match letters. Even if DHS could, the percent of unauthorized workers on any given no-match letter would likely vary by employer and by industry. Consequently, using a broad range, such as the one in the SEIA, remains the best way to present the potential economic impact of the rule on small entities.

c. Specific Wage and Occupational Assumptions

i. Replacement Costs

One commenter noted that all employment decisions in small businesses are made by the principals, who must take time to search for, interview, hire, and train new employees. According to this commenter, those same principals must process the employment paperwork and resolve any no-matches, resulting in distraction from other managerial duties. The comment suggests that the SEIA's replacement costs estimate does not account for the possible effect on the principals' ability to manage, and is therefore too low.

DHS disagrees. The SEIA estimated that replacing an authorized employee would cost approximately $5,000. In arriving at this estimate, we reviewed studies that quantified turnover costs for businesses large and small, and we found that $5,000 was a reasonable estimate of the cost incurred by the employer to replace each legal employee. Several of the economic studies on which this estimate relies are discussed in section III.J. of the SEIA. DHS believes this estimate includes reasonable estimations of the costs of hiring, training new employees, and processing paperwork.

ii. Occupational Categories

Another commenter suggested that mismatch resolution requires time and effort from more than the five occupational categories stated in the analysis, and that the SEIA underestimated the response level of companies that receive no-match letters. The commenter suggested that the more serious consequences articulated by the no-match rule would likely cause employers to involve additional occupations in the process, including the Chief Operating Officer, Chief Financial Officer, Chief Executive Officer, as well as Company Compliance Officers, senior human resources managers, paralegals, secretaries, and other clerical employees.

The SEIA does not attempt to capture every occupational title that possibly could be involved with a specific Social Security no-match letter or DHS notice of suspect document or the implementation of steps to adopt a safe harbor procedure. Rather, the intent of the SEIA is to capture levels of effort for different activities and wage levels. Each listed occupation is representative of multiple occupations at the equivalent wage. For example, the activities listed for the human resources assistant may actually be carried out by a payroll assistant.

Nevertheless, the comments correctly noted that the SEIA assumed that the most senior person that would participate in responding to no-match letters would be a senior human resources manager, and that more senior management with broad company-wide oversight responsibilities would not be involved. DHS agrees that employers that appreciate the seriousness of no-match letters may choose to include very senior managers in planning for the appropriate response, and so the final SEIA adds additional hours for a senior manager with broad company-wide oversight responsibilities.

One commenter also suggested that union representatives and union attorneys might be involved because provisions in many collective bargaining agreements prevent the termination of employees without following prescribed steps. The RFA requires DHS to consider the direct costs of the supplemental final rule. There are no requirements within the rule for the employer to follow any additional steps that may be contained within a collective bargaining agreement. Consequently, to the extent any additional costs are incurred due to the existence of collective bargaining

[10] *See* SEIA, Appendix C: Estimation of Weighted Average Turnover Rates.

agreements, such costs are indirect and outside of the scope of the FRFA.

One comment also pointed out that the BLS wage data was based upon surveys almost five years old—surveys conducted in November 2003, 2004, 2005 and May 2004, 2005 and 2006. Additionally, the commenter pointed out that the May 2006 Occupational Employment Statistics (OES) Estimates Technical Notes indicate that the data was collected as a result of mailing forms to 200,000 establishments, and questioned whether the BIA survey contained enough samples of the five occupations whose wages were included in the SEIA's cost calculations to provide a reliable estimate of the prevailing wage for each of those five occupations.

DHS is not persuaded by these challenges to the reliability and relevance of the BLS data. As specified in the OES Technical Notes, the OES survey consists of six panels that are surveyed over a three-year period. Each panel includes 200,000 establishments, for a total of 1.2 million establishments surveyed. In addition, the wage data obtained from the five earliest panels are all adjusted for inflation to the current period, so that the average wage computed from the 1.2 million establishments represents a wage for the latest period that was surveyed.[11] DHS continues to believe that the BLS data is the most reasonable data to use in the SEIA; the commenter did not suggest an alternative source of data for consideration.

d. Sources of Advice Other Than Legal Counsel

Some commenters, including an association of immigration attorneys, suggested DHS underestimated the share of employers that would seek legal services in implementing the safe harbor rule. DHS disagrees. DHS assumed that one-half of employers would seek professional legal advice in implementing the safe harbor rule, and that employers that did not seek legal counsel would rely on information available from trade associations or other advocacy groups. Trade associations, in particular, are a common source for small employers seeking guidance on best business practices, as an alternative to seeking formal legal advice. Even a cursory search of the Internet and review of trade publications unearths a number of professional human resource associations, publishers, law firms, and others providing advice on responding to no-match letters that is generally consistent with the steps outlined in the rule. Further, as the district court noted in the ongoing litigation involving this rule, business organizations ''such as the Chamber of Commerce of the United States of America, already have begun to develop costly programs and systems for ensuring compliance with the safe harbor framework,'' *AFL–CIO* v. *Chertoff,* 552 F.Supp.2d at 1014, and it is reasonable to assume that a significant number of small businesses will follow the advice available from such organizations instead of retaining legal counsel.

6. Opportunity and Productivity Costs

Several commenters suggested that DHS include the time away from work for hourly employees, most of whom may not be paid for time spent at a Social Security office or another agency's office. Similarly, some commenters suggested that travel costs to SSA offices should be included in the SEIA. As discussed above, the RFA requires federal agencies to consider the effects of regulatory action on small businesses and other ''small entities,'' and individual employees are not ''small entities'' as defined by the RFA. Costs to employees, such as lost wages from time away from work or travel expenses, are not properly included in the analysis for the purposes of the RFA.

A number of commenters suggested that DHS include lost productivity—both from the employee being away and from human resource personnel dealing with the no-match letter—as part of the SEIA. The SEIA did include an estimate of lost productivity due to the time an employee will spend meeting with human resource personnel to discuss the no-match. The SEIA also included an estimate of the lost productivity incurred by the employer when an employee visits SSA to resolve the no-match. And the SEIA included human resource labor costs as suggested by the commenter. See, e.g., sections III.C Wage Rates, III.G Cost of Employee Time, III.K Total Compliance Cost Estimates and Appendix I: Calculation of Human Resources Labor Cost.

Some commenters asserted that the rule will be costly to employees and the economy, suggesting that, because of the millions of inaccurate records in the SSA database, hundreds of thousands of employees will be required to take time off work to visit SSA field offices to correct the discrepancies. Commenters asserted that many of these employees will be required to make multiple visits, and specifically asserted that several lawful employees had contacted the SSA up to five times to correct no-matches.

As previously noted, employees are not small entities under the RFA and the RFA does not require agencies to measure indirect impact to the economy at large. Even so, some of the commenter's assertions warrant specific response. In analyzing potential lost productivity, the SEIA estimated the time an employee might be absent from work to travel to an SSA office to correct a no-match. The SEIA cited two publicly available Westat reports on which this time estimate was based.[12] These reports contain closely analogous data—that is, the time required to visit an SSA office to address a ''tentative non-confirmation'' received from the E-Verify electronic employment verification system (formerly known as Basic Pilot).[13] The reports suggested that on average, employees spend approximately five hours to visit SSA. For the purpose of the SEIA, DHS increased that estimate to a full eight hours of lost work time (a 60% increase over the reports' findings) to account for those employees that might need to make more than one visit to resolve their no-match.

The SEIA recognizes that there may be cases in which more than one trip to SSA is necessary, and consequently assumes that employees will spend an average of eight hours away from work to resolve the no-match with SSA. Because no supporting facts are provided, DHS cannot assess the validity of the assertion made by the commenter that some employees were required to contact SSA up to five times. Our consultations with SSA suggest that such an occurrence is highly unlikely.

Another commenter suggested that the SEIA estimates the opportunity cost to the employer of a no-match employee's time in visiting SSA is the equivalent of the average employee wage rate at $27.58. The commenter suggested that this estimate is wrong, since few employers pay an employee the full value of the labor provided, and the lost production of an individual employee may be several times greater than the employee's hourly wage. The commenter concluded that the SEIA underestimates the cost of lost production.

[11] See *Technical Notes for May 2006 OES Estimates,* ''Estimation methodology'' at *http://www.bls.gov/oes/2006/may/oes_tec.htm.*

[12] SEIA, at 30–31, citing Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation* (June 2002) at 170; Westat, *Interim Findings of the Web-Based Basic Pilot Evaluation* (Dec. 2006) at IV–17.

[13] A ''tentative non-confirmation'' can occur when an employee's name, date of birth, or social security number does not match SSA's records or if a death indicator is present in SSA's database.

The SEIA did not use average wages to compute opportunity costs. As explained in the SEIA, DHS used ''fully-loaded'' wages to estimate lost productivity. A fully-loaded wage includes such benefits as retirement and savings, paid leave (vacations, holidays, sick leave, and other leave), insurance benefits (life, health, and disability), legally required benefits such as Social Security and Medicare, and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). DHS used data from the Bureau of Labor Statistics, the government's source on such statistics, in order to estimate the fully-loaded wage.

DHS also assumed the employer would incur a lost productivity cost of 100% of the time an authorized employee needed to visit SSA to resolve the no-match. In practice, DHS believes that some employers frequently will incur no lost productivity or opportunity cost. If employees take paid leave time to visit SSA, they will have less leave time for other personal activities. The employer, however, incurs no additional productivity losses, because the employer had already counted on that employee taking that paid leave. Lost productivity would also be minimal in industries where workers' skills are largely interchangeable. For example, if a restaurant employee or retail clerk were away from work to resolve a no-match issue, the restaurant or store would normally attempt to schedule another employee to take that shift. Given the 90 days available under the safe harbor procedures to resolve the no-match, the employer has substantial flexibility to schedule around an employee's planned absence. Consequently, to the extent employers have the capability to plan around known absences and other employees are available, the productivity loss estimated in the SEIA is higher than what employers may see in practice.

DHS understands that some businesses cannot, through planning, mitigate productivity losses attributed to employee absences to resolve mismatches. No data is available that suggests how many businesses have the ability to schedule other employees to take the place of an absent employee, and therefore mitigate costs. For this reason, DHS estimated the highest possible impact, which is a 100% productivity loss.

In addition, DHS has attempted to estimate the cost of the rule on an ''average cost per firm'' basis. 73 FR at 15953. There may be cases in which the productivity loss to an employer of an employee's visit to SSA is greater than the ''average cost per firm'' estimate in the rule. However, given the fact that the SEIA estimated a lost productivity cost 100% of the time an authorized employee needed to visit SSA at the fully loaded wage rate for a full eight hour day, DHS does not believe that the ''average cost per firm'' estimate is unreasonable. In fact, DHS believes that, given the conservative assumptions underlying the analysis, the estimate of lost productivity due to an employee's trip to SSA likely overstates the impact to employers.

Other commenters took the view that DHS should consider the lost productivity or replacement costs resulting not only from the time employees spend resolving their mismatch, but also the lost productivity cost of employees terminated as a result of the employer following the no-match regulations. For instance, one commenter stated that when Swift & Co. was subject to a worksite enforcement action by ICE, the company lost 1,282 employees overnight, and Swift estimated that the lost production for one day was $20 million, or about $1,560 per employee per day.

The commenter did not detail how lost production costs of $1,560 per employee per day were calculated, other than it was Swift's estimate. Moreover, the workers lost by Swift were found to be unauthorized to work in the United States. These comments appear to be citing costs incurred by an employer that discovers—through the no-match letter or some other process—that large numbers of his workforce are unauthorized to work. But those costs are outside of the scope of the rulemaking and are attributable to the immigration laws of the United States.

7. Human Resources and Employee Tracking

a. Systems Costs

Some commenters suggested that if an employer does not possess a system that allows the employer to access an employee file based on a SSN, it could take substantial time to resolve large numbers of no-matches. The commenters were concerned that because the no-match letters only provide a list of SSNs without the corresponding employee names, the time and effort required of an employer to match the SSNs on the list with employees on the payroll. One commenter suggested that it would require a month to match 500+ SSNs to the correct employee names.

DHS disagrees with these estimates. The SEIA provided what DHS believes to be a reasonable estimate for the time and cost needed to match the SSNs listed on the no-match letter to current employees. The average number of mismatched SSNs per letter is approximately 65,[14] well under the ''500+'' number referenced by the commenter. Moreover, the scenario posed by the commenter—in which an employer would need to identify over 500 employees with mismatched SSNs—is a logical impossibility for many small businesses, who have fewer than 500 total employees. The SEIA's estimate, and the resulting analysis in the IRFA and FRFA of the potential impact on ''small entities,'' provided a reasonable estimate of this cost.

DHS also reasonably assumed that the majority of social security numbers would be stored electronically, allowing for relatively rapid screening. As discussed above, employers that file more than 250 W–2s in a given year are required to do so electronically—so that only smaller employers, with correspondingly shorter lists of mismatched SSNs, could conceivably need to conduct this matching process manually—and more than 80 percent of the FY 2007 W–2 reports were filed electronically. DHS permits storage of Employment Eligibility Verification Form I–9 under the same standards as applied by the IRS to tax accounting documentation, 8 CFR 274a.2(e)–(i), 71 FR 34510 (June 15, 2006), and an employer's process for checking the accuracy of their internal records will be especially rapid for those that keep both sets of records electronically. DHS believes, based on the evidence and commercial availability of computer systems to comply with wage and tax reporting requirements, that employers that do not store their wage, tax and employment information electronically would be relatively small and, therefore, would have fewer social security numbers to match with names. The system costs estimated in the SEIA are reasonable.

b. Reverification Costs

Several comments addressed the time and cost of the Employment Eligibility Verification Form I–9 re-verification process. For example, one commenter suggested that re-completing Forms I–9 for every employee on a no-match letter will take a significant amount of time for employers and could be a massive undertaking, depending on the number of employees on the no-match list that

[14] This average was calculated from the information DHS obtained from SSA by dividing the total number of mismatched SSNs listed in EDCOR letters by the total number of EDCOR letters.

are still current and will need to have Form I–9 reverified.

DHS disagrees and believes the commenters overstate the costs. The proposed rule, the August 2007 Final Rule, and the supplemental proposed rule provided a series of steps that DHS would find to be a reasonable response to the receipt of a no-match letter. As DHS explained in the original proposed rule, the steps are sequential and are designed to assist employers to confirm the work authorization of their employees while encouraging employees to correct their records with SSA. DHS's rule is designed to avoid interference with the basic purpose of SSA's No-Match Letter (EDCOR) program—which is to solicit corrections to SSA's records and reduce the Earnings Suspense File—and to provide employers and employees guidance on how DHS believes they can best comply with their existing obligations under the INA. Thus, the rule specifies that employers and employees should attempt to resolve the SSN mismatch with the SSA. Only when that process has not been completed within 90 days does the rule anticipate that an employer would choose to rely on the reverification process—i.e. completing parts of a new Form I–9 as set forth in the rule—to confirm the employee's work eligibility and obtain the safe harbor protection offered by the rule.

As noted above, *see* section 6.a.ii, the SEIA makes the reasonable assumption that only one-third of work-authorized employees still employed at the company and listed in a no-match letter would need to visit SSA to resolve the no-match.

DHS believes that only a small subset of these authorized employees will undergo the reverification process because most legal employees (citizens and aliens authorized to work) will resolve the no-match with SSA, in large part because it is in employees' personal financial interest to do so. Notwithstanding that financial incentive for employees to resolve their no-match and receive credit for retirement benefits, some employees that are referred to SSA to resolve their no-match may decide to complete a new Form I–9 instead of visiting the SSA. To the extent that employees might decline to visit an SSA office and instead choose to complete a new Form I–9, the SEIA overestimates the costs that would be incurred by employers. DHS estimates that completion of all sections of a new Form I–9 and preserving that form pursuant to the INA and regulations requires 12 minutes. 73 FR 18551 (April 4, 2008). The SEIA estimates an employee would be required to expend a full eight-hour day to visit SSA to resolve the no-match.

Given the assumption in the rule that the re-verification procedure will function as the last, fall-back step for employers to confirm an employee's work authorization, DHS assumed, for the purposes of the SEIA, that all employees who resort to the re-verification procedure will first have visited the SSA. DHS, therefore, will not lower the estimate of the number of employees expected to visit an SSA office. In order to allow for the possibility that a larger than anticipated number of legal employees may both visit SSA offices and use the I–9 reverification procedure, DHS will revise the SEIA to include additional re-verification costs for 3 percent of employees that might visit SSA and also complete a new Form I–9 reverification. Adding the reverification costs for this 3 percent without reducing the number of employees expected to visit SSA will likely result in a small overestimate of the actual costs, but due to limitations of available data, DHS believes that this approach is reasonable.

c. Outsourced Staffing Requirements

Several commenters suggested that many small businesses do not have an in-house human resources staff or payroll administrators and instead hire outside providers for this service. Some comments also criticized the wage rates used in the analysis because those rates do not take into account the difference between in-house wages and outsourced wages for the same services. A commenter pointed out, for example, that the wage rate of an in-house attorney cannot be equated with the cost charged to a client by outside counsel. These outsourced wage rates would include different and higher rates to recover overhead charges for rent, utilities, taxes, and other costs of doing business that might not be incurred by the employer. The commenter further suggested the cost of out-sourced wages are estimated to be two to three times the price of what an employer pays per hour in in-house wages.

DHS agrees that outsourced work may be more expensive than work conducted in-house as the commenter suggests. DHS also agrees to assume, for the purposes of the SEIA, that the cost of hiring services provided by an outside vendor or contractor is two to three times more expensive than the wages paid by the employer for that service produced by an in-house employee. The costs in the SEIA have been revised to take into account the higher costs that may be incurred when firms use outside service providers.

8. Other Costs

One commenter noted that while the SEIA included costs associated with replacing work-authorized employees who are terminated as a result of the rule, it did not include costs associated with payment of unemployment benefits to such employees. Unemployment benefit payments are a cost incurred by the federal and state governments, which are not ''small entities'' for purposes of the RFA. Moreover, such benefits are not paid by an employer as a result of that employer's adherence to the safe harbor procedures in this rule, and this cost is at best an indirect cost not covered by the RFA.

9. Rehiring Seasonal Employees

A number of commenters suggested that the employment of seasonal employees was not adequately considered in the IRFA. The two most common examples may be seasonal employment of farm employees and retailer seasonal employment of additional sales and support personnel during holiday seasons.

Some comments suggested that special systems would be needed to track seasonal employees no longer employed by the employer at the time the no-match letter is received. The rationale for such a tracking system would be to mitigate an employer's risk by ensuring that the employer can identify and appropriately examine the work authorization documents for returning job applicants who were previously listed on a no-match letter. The no-match rule does not address this scenario, and seasonal employers that hire returning employees could have had sufficient reason under INA section 274A, 8 U.S.C. 1324a, and the pre-existing regulations to compare past no-match letters against the identity information provided by all new and returning hires if employers believe such a comparison was needed. This rule provides a safe harbor after an employer has hired an employee, receives a no-match letter relating to that employee, and conducts due diligence to resolve the no-match letter. The rule does not address the initial hiring decision and employment eligibility verification. As with the costs that result from an employer's discovery of unauthorized workers on the payroll, the cost of any system that an employer may adopt to address knowledge acquired from previous no-match letters is attributable to the INA, not to this rule.

10. Conclusions

Several commenters noted that the thrust of the SEIA is that the proposed regulation will not affect a significant number of small entities and those small entities which are impacted will not incur significant expenses, and suggested that the IRFA and FRFA should contain an express statement to that effect.

The supplemental proposed rule did express the conclusion that ''DHS does not believe that the direct costs incurred by employers that choose to adopt the safe harbor procedures set forth in this rule would create a significant economic impact when considered on an average cost per firm basis.'' 73 FR at 15953. The SEIA, as revised in light of the comments received in the course of this rulemaking, continues to support the conclusion that the direct costs incurred by those small entities that avail themselves of the safe harbor are not expected to be significant on an average cost per small entity basis.

E. Further Interpretation of the August 2007 Final Rule

In this supplemental rulemaking DHS seeks to further clarify two aspects of the August 2007 Final Rule. First, the rule instructs employers seeking the safe harbor that they must ''promptly'' notify an affected employee after the employer has completed its internal records checks and has been unable to resolve the mismatch. After reviewing the history of the rulemaking, DHS believes that this obligation for prompt notice would ordinarily be satisfied if the employer contacts the employee within five business days after the employer has completed its internal records review. Some commenters suggested that this timeframe was inadequate, while others suggested that this guidance be made explicit in the text of the rule. DHS understands that too short a timeline for informing employees of their need to resolve a no-match may be unworkable for certain employers and employees, and so the Department declines to set a formal limit in the rule text on the time that an employer may take in providing ''prompt'' notice to affected employees. DHS emphasizes that an employer does not need to wait until after completing this internal review to advise affected employees that the employer has received the no-match letter and request that the employees seek to resolve the mismatch. Immediately notifying an employee of the mismatch upon receipt of the letter may be the most expeditious means of resolving the mismatch. Prompt notice to affected employees is important to enable them to take the steps necessary to resolve the mismatch, and an employer should not unreasonably delay such notice.

Second, plaintiffs in the litigation before the Northern District of California raised a question as to whether under the August 2007 Final Rule an employer could be found liable on a constructive knowledge theory for failing to conduct due diligence in response to the appearance of an employee hired before November 6, 1986 in an SSA no-match letter. When Congress enacted INA section 274A as part of the 1986 Immigration Reform and Control Act, it included a grandfather clause stating that employers' obligations created in that Act did not apply to the hiring, recruitment, or referral for employment for a fee, or to the continued employment, of workers hired before IRCA's date of enactment. *See* Public Law 99–603, section 101(a)(3), 100 Stat. 3359 (1986). Because those statutory bars against hiring or continuing to employ individuals without work authorization do not apply to workers within that grandfather clause, this rule does not apply to any such workers that may be listed in an SSA no-match letter. A number of commenters argued that this exclusion should be explicitly stated in the rule text. But employees hired before November 1986 are statutorily excluded from the operation of INA section 274A(a), and so no regulatory statement reiterating that effect is necessary.

F. Other Comments Received

The supplemental proposed rule made clear that DHS was addressing the three issues raised by the district court, 73 FR 15944, 45, and DHS did not reopen other aspects of the rulemaking. Several commenters understood the supplemental proposed rule as inviting comments generally, and they provided comments on a range of issues previously covered in the August 2007 Final Rule but not related to the three issues raised by the district court and addressed in the supplemental proposed rule. The August 2007 Final Rule addressed the substantive issues raised in these comments, and DHS declines to address those issues anew.

IV. Changes Made in Republishing the Final Rule

The final rule does not make any substantive changes from the August 2007 Final Rule or the Supplemental Proposed Rule. DHS has corrected a technical cross-reference in the text of the final rule and republishes the text of the regulation for the convenience of the reader.

V. Statutory and Regulatory Reviews

A. Administrative Procedure Act

DHS published the initial proposed rule and the supplemental proposed rule with requests for public comment in the **Federal Register** as a matter of agency discretion. This rule is not a legislative rule governed by the notice and comment provisions of 5 U.S.C. 553. DHS is publishing this supplemental final rule subject to the preliminary injunction entered by the district court. A delayed effective date is not required under the APA. 5 U.S.C. 553(d)(2).

B. Regulatory Flexibility Act

On the basis of the analysis in this preamble, DHS provides below its Final Regulatory Flexibility Analysis, as described under the Regulatory Flexibility Act, 5 U.S.C. 604. DHS published an initial regulatory flexibility analysis pursuant to 5 U.S.C. 603(b), (c), in response to the district court's injunction in the supplemental proposed rule. 73 FR at 15952–54. DHS published a small entity impact analysis in the docket of this rulemaking, ICEB–2006–0004–0233, and summarized that analysis in the supplemental proposed rule. DHS invited comments related to this Initial Regulatory Flexibility Analysis and the accompanying Small Entity Impact Analysis, including comments on the assumptions underlying that analysis.

1. Need for, Objectives of, and Reasons Why the Rule Is Being Considered

As discussed more fully in the supplemental proposed rule, DHS, as well as private employers in general, have become increasingly aware of the potential for abuse of social security numbers by aliens who are not authorized to work in the United States. DHS is responsible for the enforcement of the statutory prohibition against the hiring or continued employment of aliens who are not authorized to work in the United States. INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2); HSA section 101, 6 U.S.C. 111. Given employers' evident confusion regarding how to respond to SSA no-match letters, DHS has concluded that it needs to clarify employers' duties under the immigration laws, and has set forth guidance for employers that seek to fulfill their obligation not to hire or employ aliens who are not authorized to work in the United States.

The objective of the proposed rule, the August 2007 Final Rule, the supplemental proposed rule, and this final rule is to provide clear guidance for employers on how to comply with

the statutory bar against hiring or continuing employment of aliens who are not authorized to work in the United States. INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2). The objective of this statute is to eliminate the ''magnet'' effect of employment opportunities that induces aliens to enter or remain in the United States illegally. DHS exercises investigative and prosecutorial discretion in enforcing this statute, and this interpretive rule explains how DHS will exercise that discretion, and provides guidance to employers that wish to limit their risk of liability under the immigration laws.

2. Significant Issues Raised in Public Comments

Significant issues raised by the public comments relating to the initial regulatory flexibility analysis and the small entities impact analysis are discussed in section III.D of this preamble.

3. Description of and Estimate of the Numbers of Small Entities to Which the Rule Would Apply

To estimate the small entities affected, DHS uses the generally accepted Office of Management and Budget, Economic Classification Policy Committee, *North American Industrial Classification* (NAIC), pursuant to 44 U.S.C. 3504(e), and the size determinations by the Small Business Administration (SBA) for SBA and other programs. 13 CFR 121.101(a); 121.201; 121.902 (size standards promulgated for SBA programs and applicable to other agency programs). The definition of what constitutes a small business varies from industry to industry and generally depends on either the number of employees working for a business or the amount of annual revenue a business earns.

DHS requested information from SSA to assist in better identifying the number of small entities that could be expected to establish safe harbor procedures. Specifically, DHS requested that SSA provide the names and addresses of the companies already identified by SSA in its preparation to release no-match letters in September 2007. This raw data would have permitted DHS to conduct research to determine the North American Industry Classification System industry to which the specific companies belonged, to research the annual revenue and/or the number of employees of these companies through standard sources, and thus to apply the appropriate small business size standards. With these analyses, DHS anticipated that it would be able to provide a rough estimate of the number of employers expected to receive a no-match letter that met the SBA's definitions of small businesses.

However, SSA informed DHS that it was unable to provide DHS with the names and addresses of the employers expected to receive a no-match letter, citing the general legal restrictions on disclosure of taxpayer return information under section 6103 of the Internal Revenue Code of 1986, 26 U.S.C. 6103. DHS also approached the Government Accountability Office (GAO) and the Small Business Administration, Office of Advocacy, to seek any data that these agencies might be able to provide, and to consult about the analysis to be included in this IRFA. GAO supplied some additional data, but SBA informed DHS that it had no data-other than general small business census data-that was relevant to this rulemaking and that could assist in the analysis for purposes of this IRFA. Consequently, DHS does not have the data necessary to determine the precise number of small entities expected to receive a no-match letter.

Nevertheless, SSA was able to provide some general information. SSA provided a table showing a distribution of the number of employers that were slated to receive a no-match letter for Tax Year 2006, according to the number of Form W–2s filed by the employer. As this data did not exclude small entities, DHS believes that the universe of small entities that would have received a no-match letter for Tax Year 2006 is contained within the table that SSA provided. Even though this data did not provide the number of small entities, this data was useful to DHS while conducting the small entity impact analysis contained in the docket. *See* ICEB–2006–0004–0232, Exhibit A.5. DHS was not able to determine what share of the affected small entities would be small businesses, small non-profit organizations, or small governmental jurisdictions. Absent some reason to believe small non-profits or small governmental jurisdictions might implement the rule's safe harbor procedures differently from private employers, the cost structure for such entities would be no different from small firms. DHS is unaware of any data to suggest there would be a difference, and the public comments did not suggest there would be any difference.

4. Proposed Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule suggests, but does not require, that employers retain records of their efforts to resolve SSA no-match letters. This suggestion is based on the possible need of an employer to demonstrate the actions taken to respond to a no-match letter if and when ICE agents audit or investigate that employer's compliance with INA section 274A, 8 U.S.C. 1324a. While the rule encourages employers to document their eligibility for the safe harbor by keeping a record of their actions, the rule does not impose any requirement for an employer to make or retain any new documentation or records.

Companies that choose to adopt the safe harbor procedures in the rule would reasonably be expected to incur costs related to administering and implementing those procedures. Company-level costs could include the labor cost for human resources personnel, certain training costs, legal services, and lost productivity. A detailed analysis of safe harbor-related costs that companies may incur is contained in the Small Entity Impact Analysis available in the docket of this rulemaking. While several commenters have expressed concerns about the costs to businesses relating to the termination and replacement of unauthorized workers, DHS finds that those costs cannot properly be considered costs of this rule. The INA expressly prohibits employers from knowingly hiring or knowingly continuing to employ an alien who is not authorized to work in the United States. If an employer performs the due diligence described in the rule, and loses the services of unauthorized employees as a result, those costs of terminating and/or replacing illegal workers are attributable to the INA, not to this rule.

Table 1, below, summarizes the average cost per firm that DHS estimates will be incurred by businesses that receive a no-match letter and choose to adopt the safe harbor procedures set forth in this rule. Because DHS does not have adequate data to estimate the percentage of unauthorized employees whose SSNs are listed on no-match letters, for the purpose of this analysis, DHS estimated costs based on various ratios of authorized to unauthorized workers (i.e., 20% unauthorized—80% authorized). As Table 1 shows, the expected costs of adopting the safe harbor procedures in this rule are relatively small on an average cost per firm basis. In interpreting these costs, these estimates were based on a series of assumptions which are explained in detail in the small entity impact analysis included in the docket. Consequently, the costs a specific firm incurs may be higher or lower than the average firm costs estimated in Table 1.

TABLE 1—TOTAL COSTS PER FIRM BY EMPLOYMENT SIZE CLASS

Employment size class	Percentage of current no-match employees assumed to be unauthorized				
	10	20	40	60	80
5–9	$4,560	$4,454	$4,244	$4,033	$3,822
10–19	4,847	4,716	4,455	4,194	3,933
20–49	6,818	6,597	6,155	5,712	5,270
50–99	8,890	8,582	7,966	7,350	6,734
100–499	24,785	23,426	20,709	17,992	15,274
500+	36,624	34,496	30,239	25,983	21,726

Table 1 does not reflect the termination or replacement costs of unauthorized workers. The termination and replacement of unauthorized employees will impose a burden on employers, but INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2), expressly prohibits employers from knowingly hiring or knowingly continuing to employ an alien who is not authorized to work in the United States. Accordingly, costs that result from employers' knowledge of their workers' illegal status are attributable to the Immigration and Nationality Act, not to the August 2007 Final Rule or this supplemental proposed rule, and its provision of a safe harbor. Similarly, any costs incurred by seasonal employers that face difficulties in hiring new employees in the place of unauthorized workers whose SSNs were previously listed on SSA no-match letters are attributable to the Immigration and Nationality Act bar to knowingly hiring workers who are not authorized to work in the United States.

In summary, DHS does not believe that this safe harbor rule imposes any mandate that forces employers to incur ''compliance'' costs for purposes of the Regulatory Flexibility Act. Even assuming that the safe harbor rule requires certain action on the part of employers that receive no-match letters, DHS does not believe that the direct costs incurred by employers that choose to adopt the safe harbor procedures set forth in this rule would create a significant economic impact when considered on an average cost per firm basis. To the extent that some small entities incur direct costs that are substantially higher than the average estimated costs, however, those employers could reasonably be expected to face a significant economic impact. As discussed above, DHS does not consider the cost of complying with preexisting immigration statutes to be a direct cost of this rulemaking. Thus, while some employers may find the costs incurred in replacing employees that are not authorized to work in the United States to be economically significant, those costs of complying with the Immigration and Nationality Act are not direct costs attributable to this rule. DHS has not formally certified the rule as not having a ''significant economic impact on a substantial number of small entities'' as allowed under section 605(b) of the Regulatory Flexibility Act. Instead, DHS has prepared this Final Regulatory Flexibility Analysis as described in the Regulatory Flexibility Act, 5 U.S.C. 604.

5. Significant Alternatives Considered

DHS has considered several alternatives to the proposed rule. For the most part, however, the alternatives would not provide employers with necessary guidance and assurances against liability under the INA, nor would the alternatives improve employers' compliance with INA section 274A, 8 U.S.C. 1324a.

a. No action. Taking no action to clarify employers' responsibilities under INA section 274A, 8 U.S.C. 1324a, was considered. Taking no action, however, would not resolve any of the problems identified and addressed by this proposed rule. Employers will remain confused and unsure how to act to resolve no-match letters in a manner consistent with their responsibilities under current immigration law, and will continue to face possible liability based in part on their failure to respond to no-match letters. Employers would continue to employ aliens unauthorized to work under federal immigration law.

b. Specific industry or sector limitations. DHS considered limiting the proposed rule to specific industries previously noted to be at high-risk of abuse of Social Security numbers in employment, including agriculture, services and construction. *See, e.g.*, Government Accountability Office, *Social Security: Better Coordination among Federal Agencies Could Reduce Unidentified Earnings Reports,* Administrative Record at 400 (GAO analysis of SSA data noting 17% of ESF filings by eating and drinking places; 10% by construction, and 7% by agriculture). DHS also considered promulgating a rule that applied only to critical infrastructure employers because of the increased need to prevent identity fraud by employees in high-risk facilities. None of these alternatives was acceptable because none addresses the larger population of aliens working without authorization or the need for clear guidance for employers in other sectors of the economy. These alternatives would also offer unfairly selective assurances to employers in certain sectors against liability under INA section 274A, while depriving other employers of the same protection.

Focusing on the three economic sectors with the most egregious violations of the immigration laws might have had an impact on a significant portion of the alien population that illegally enters the United States to work. As discussed more fully in the small entity impact analysis in the docket, the degree to which specific industry sectors violate the bar to employment of unauthorized aliens is, however, speculative. DHS does not have access to the data files indicating the number of employers by industry sector who would receive no-match letters under current SSA policies. DHS requested industry-sector-specific data from SSA but was informed that SSA does not possess this data. Non-empirical, anecdotal evidence, such as the admissions of the President of the Western Growers' Association, *supra*, that between 50 to 80% of their employees are unauthorized aliens, is a less reliable guide for agency action than empirical evidence. Even if such anecdotal evidence is sufficient to guide decisions about investigation and enforcement priorities, it is not an adequate basis for limiting the effect of formal agency guidance to a specific sector of the economy. Partial enforcement tends, moreover, as a matter of experience, to have the effect of redirecting unauthorized workers into areas where the law is unenforced or underenforced.

A critical-infrastructure approach provided other benefits, focusing on high-risk facilities and organizations. Critical infrastructure encompasses, however, segments of industries that are not entirely discrete. Focusing on critical infrastructure would have had salutary effects in certain areas, but the inefficiencies and inequities that result from other types of partial enforcement would remain unchanged. Moreover, DHS has already taken, and continues to take, other steps in working with critical infrastructure partners to improve employer compliance with the INA and reduce the employment of aliens not authorized to work in the United States.

Another variation suggested that DHS adopt special provisions for short-term, seasonal, or intermittent employees and employers that have high turnover rates. This variation applies, as the commenter pointed out and DHS has previously noted, to the agriculture, construction, and service sectors (such as restaurants or hotels). The commenter particularly noted that agricultural employers hire many employees for 60-day periods and, because SSA sends no-match letters on an annual W–2 wage reporting basis, most of these letters will arrive long after the term of employment has ended. The commenter further suggested that, because the employee no longer works for the employer, the employer's responsibilities should end there. The commenter requested that DHS clarify that employers are not required to track and contact past employees for whom they receive no-match letters.

DHS agrees with certain points made by the commenter, but disagrees with the commenter's suggested alternative. The commenter is correct that when an employee is terminated, the employer does not have any further responsibility for tracking down the employee and resolving the mismatch. DHS does not agree, however, that this scenario requires any special rule. The focus of this rulemaking is on reinforcing the INA's prohibition on continued employment of aliens not authorized to work in the United States. The issue of whether an employer acquires constructive knowledge from receipt of a no-match letter or possesses constructive knowledge at a later time when the employer hires the same employee for another cycle of work is not addressed by this rule. Employers' hiring practices must comply with the INA, and no safe harbor or specific guidance is offered by this rule.

Most significantly, none of the alternatives for limiting or tailoring the applicability of the rule to specific industries or sectors would mitigate the rule's impact on small business. Accordingly, DHS rejected the industry-specific approach as insufficient to accomplish the goal of improving overall employer compliance with immigration law and reducing the population of aliens illegally working in the United States, and as ineffective in limiting the impact on small employers.

c. Phased implementation for small employers. DHS considered phasing in the implementation of the rule by delaying its applicability to small entities. Comments suggested that by imposing the rule on large entities first, many of the errors thought to exist in the SSA database could be corrected over time and best practices for resolving no-matches could be developed. A commenter suggested that this experience could then be used to ease small entities into the process. The commenter suggested that large entities (including both private sector and governmental employers) that receive no-match letters have sophisticated human resources departments that are capable of handling no-match letters, but that small entities with limited human resources capacity do not have this capacity.

DHS has concluded, after further review, that such an approach would still harm, not help, small employers. All employers, including small entities, are already subject to the legal obligation not to knowingly employ unauthorized workers and the constructive knowledge standard for employer liability, both of which flow from the INA. DHS cannot exempt small entities from the INA, and so delaying the applicability of this rule for small entities would not excuse small employers from their existing legal obligations. Instead, limiting the guidance and the safe harbor protection offered in this rule to large employers would effectively leave small employers exposed to greater liability risk and would not address the illegal employment of unauthorized aliens by small employers.

d. Extended time allowance for small employers. DHS also considered further extending the time periods in the rule for small employers that wish to obtain the protection of the safe harbor to check their internal records to confirm the no-matches were not the result of some administrative error by the employer. Several commenters supported this alternative, with some suggesting that small employers in rural areas may find their employees have difficulty resolving their mismatches with SSA. Proposed alternatives included providing small entities with 180 days to complete the steps outlined in the rule, or establishing a tiered approach with different timeframes based on the size of the employer (with smaller employers receiving more time to comply), or based on the distance to the local SSA office. One commenter also suggested that DHS consider suspending the running of the timeframes when an employee is actively working with SSA to correct the discrepancy. DHS considered each of these variations, but does not believe that they would provide meaningful benefit to small employers or maintain the rule's effectiveness.

The timeframes set forth in the August 2007 Final Rule were extended significantly from those contained in the proposed rule published in 2006, in response to comments from large and small employers expressing concern that the timeframes initially proposed were too short. In particular, the time allotted for an employer to review its own records for errors was doubled from 14 days to 30 days. The commenters provided no evidence that small employers, with small payrolls, would need more time to review their records than would large organizations with thousands of employees. Several comments submitted during this supplemental rulemaking suggested DHS extend the timeframe for an employee to resolve a mismatch with SSA, citing distance to the nearest SSA office as a concern for workers in rural areas. But the comments provided no evidence or concrete support for the claim that the 90 days allotted under the rule would be insufficient. SSA has approximately 1,300 local offices nation-wide, and provides public assistance in locating the closest office both on-line and by telephone, along with advice on the documents required to resolve a mismatch.

Moreover, undue extension of the time period for an employee to resolve his or her mismatch would substantially weaken the effectiveness of the rule by frustrating employers' ability to be confident in the legal status of their workers. If the timeline in the rule were extended to 180 days, for example, unauthorized workers (possibly with encouragement from unscrupulous employers) would be more likely to simply go through the motions of contacting SSA in order to extend their time on the job for a full six months, while law-abiding employers that suspect, but lack conclusive proof, that some of their employees are illegally working without authorization would be forced to stand by and worry that the listed employees may leave without warning or that the employer might be subject to a worksite enforcement or

investigation effort by ICE. The suggestion to suspend the running of the timeframes while an employee is ''actively'' working to resolve his mismatch suffers from these same flaws and adds another: There would be no clear way for either the employer or DHS to determine whether an employee had in fact been actively working in good faith to resolve the mismatch, and an employer could not be confident that its conduct met the requirements for the safe harbor, effectively eviscerating the value of the rule for law-abiding employers.

e. Mandatory steps without assurances of safe harbor. DHS also considered requiring all employers to take specific actions whenever they received a no-match letter and their records indicated that a social security number was used in Form I–9 processing. Requiring employers to take affirmative steps to resolve social security no-match letters (as outlined as discretionary steps in the proposed rule) could result in fuller compliance with the prohibition against employment of aliens who are not authorized to work in the United States. But such a mandatory scheme implies that the steps set forth in the rule are the only reasonable response to a SSA no-match letter, a conclusion that cannot be supported by the evidence currently before DHS. Furthermore, the relative gains from a mandatory scheme, in the absence of additional statutory authority to impose sanctions for violations of that mandate, are likely to be very small. Employers that consciously or recklessly violate the INA will not alter their behavior under either a mandatory or voluntary safe harbor regime, while responsible employers that want to comply with the INA will benefit from the guidance provided in the proposed safe harbor rule and will improve their hiring and employment practices to ensure compliance with the INA.

f. Elimination of the time limit for resolving no-matches. One commenter suggested that DHS adopt what was described as a simpler, more straightforward rule for small entities that receive a no-match letter, in which the employer would: (1) Complete an internal investigation to determine whether the source of the discrepancy is the employer's own clerical error; (2) if not, inform the affected employee of the discrepancy; and, (3) if the employee challenges the discrepancy, require proof that the employee has been in contact with SSA to resolve the discrepancy. Under this scenario, the commenter suggested that a reasonable employer could assume that the employee was resolving the discrepancy with SSA and need not inquire further unless another no-match letter was received the following year (or some other adverse information arose). The commenter suggested that this approach would reduce the burden on small entities. The commenter also believed that this would eliminate what it perceived to be a presumption that receipt of a no-match letter puts the employer on notice that the employee may be unauthorized to work in the United States.

This alternative essentially eliminates the timeline for an employee to resolve the mismatch, and deprives the employer of any assurance that the questions raised by the no-match letter have been answered. The comment also mistakenly assumes that such a rule would negate the well-established fact-conceded in the record of this rulemaking even by this rule's opponents and endorsed by the district court in the ongoing litigation over this rule-that a no-match letter is a legitimate indicator of possible illegal work by unauthorized aliens. Such a rule would offer a *carte blanche* safe harbor to employers without requiring the employer to take any meaningful steps to answer the questions raised by the employees' appearance on a no-match letter. DHS cannot give the benefit of a safe harbor when there is no assurance that the mismatch has been resolved.

g. DHS resolution of no-matches. A commenter suggested that DHS, rather than employers and employees, resolve mismatches involving the employees of small entities. The commenter suggested that small entities could be sent to DHS for investigation of any mismatches that remained unresolved after the rule's timeframe expired. The commenter argued that such a system would give DHS notice of the existence of the no-match discrepancy, but not require that the employee be terminated until DHS has had an opportunity to investigate the matter. A variation on this alternative suggested that DHS create a special office or appoint an ''ombudsman'' to assist employees in resolving ''no-matches'' where the employee has been unable to resolve within the requisite timeframe. The commenter suggested that such an approach could lead to an intra-governmental correction process with direct lines of communication to investigate no-matches and correct the SSA database, relieving employers and protect authorized employees from automatic termination.

This alternative is not practically feasible. DHS does not have access to the information contained in no-match letters, nor does DHS have the personal information about individual employees that SSA needs to resolve mismatches. Taken to its logical end, this is a proposal to eliminate the SSA no-match letter program entirely-an undertaking that is far beyond DHS's regulatory competence.

6. Minimization of Impact

The RFA requires that an agency provide ''a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes * * *'' 5 U.S.C. 604(a)(5). This requirement presumes that the agency finds that the rule will have a significant economic impact on small entities and is normally treated in conjunction with the discussion of alternatives (see above) required by paragraph (a)(5). Although DHS, after reviewing the record, does not make a finding that the rule will have a significant economic impact on small entities, DHS believes that explaining the existing means by which a small entity may minimize any impact of the rule, and certain additional steps that DHS is taking to assist them, will be useful to small entities.

(1) DHS and its subsidiary components ICE and United States Citizenship and Immigration Services (USCIS), already provide substantial support for employers that wish to ensure the work eligibility of their workforce. The primary tool DHS makes available to employers is the E-Verify program, which is an Internet-based system for electronically verifying employment eligibility that is operated by U.S. Citizenship and Immigration Services (USCIS), in partnership with the SSA. The requirements for obtaining access to E-Verify and procedures for the use of E-Verify are established by DHS and USCIS. Before an employer can participate in the E-Verify program, the employer must enter into a Memorandum of Understanding (MOU) with DHS that sets out certain features of the program and enumerates specific responsibilities of DHS, SSA, and the employer. This MOU requires employers to agree to abide by current legal hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of the E-Verify program. Employers participating in E-Verify must still complete an Employment Eligibility Verification Form (Form I–9) for each newly hired employee, as required under current law. Following completion of the Form I–9, however, the employer enters the employee's information into the E-Verify Web site, and that information is then checked

against information contained in SSA and USCIS databases to confirm the employee's work eligibility with much greater rigor than is possible with the Form I–9 process alone.

E-Verify first sends the information to SSA for verification of the name, SSN, and date of birth, and SSA confirms these elements as well as U.S. citizenship based on the information in SSA records. USCIS also verifies through database checks that any non-United States citizen employee is in an employment-authorized immigration status. E-Verify will then confirm the employee is employment-eligible.

If the information provided by the employee matches the information in the SSA and USCIS records, no further action will generally be required, and the employee may continue employment. E-Verify procedures require only that the employer record on the Employment Eligibility Verification Form I–9 the verification ID number and result obtained from the E-Verify query, or print a copy of the transaction record and retain it with the Form I–9. Verification of the employee's name and SSN through E-Verify sharply reduces the likelihood that individuals checked through E-Verify will appear on an SSA no-match letter.[15]

(2) In addition, the ICE Mutual Agreement between Government and Employers (IMAGE) program permits companies to reduce unauthorized employment and the use of fraudulent identity documents, thereby reducing the likelihood of receiving a no-match letter. As part of the IMAGE program, ICE and USCIS provide education and training on proper hiring procedures, fraudulent document detection, use of the E-Verify employment verification program, and anti-discrimination procedures.

ICE provides employers in IMAGE with an ''I–9 audit.'' This free audit is similar to the services commercially provided by law firms and others for a fee.

IMAGE also provides employers with a catalogue of ''best practices'' including:

- Use of E-Verify for all hiring.
- Establish an internal training program, with annual updates, on how to manage completion of Form I–9 (Employee Eligibility Verification Form), how to detect fraudulent use of documents in the I–9 process, and how to use E-Verify.
- Permit the I–9 Employment Eligibility Verification and E-Verify process to be conducted only by individuals who have received this training—and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- Arrange for annual I–9 audits by an external auditing firm or a trained employee not otherwise involved in the I–9 and electronic verification process.
- Establish a self-reporting procedure for reporting to ICE any violations or discovered deficiencies.
- Establish a protocol for responding to no-match letters received from the Social Security Administration.
- Establish a Tip Line for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips.
- Establish and maintain safeguards against use of the verification process for unlawful discrimination.
- Establish a protocol for assessing the adherence to the ''best practices'' guidelines by the company's contractors/subcontractors.
- Submit an annual report to ICE to track results and assess the effect of participation in the IMAGE program.

To help ensure the accuracy of their wage reporting, ICE assists employers participating in the IMAGE program to verify the Social Security numbers of their existing labor force through SSA's Social Security Number Verification Service (SSNVS). IMAGE participants also verify work eligibility of their new hires through E-Verify. All of these steps reduce the potential for employer created errors in wage submittals to the IRS and SSA, reducing the potential for the employer to receive a no-match letter. *See http://www.ice.gov/partners/opaimage/index.htm.*

[15] E-Verify also provides a thorough procedure for contesting and correcting records. If SSA is unable to verify information presented by the employee, the employer will receive an ''SSA Tentative Nonconfirmation'' notice. Similarly, if USCIS is unable to verify information presented by the employee, the employer will receive a ''DHS Tentative Nonconfirmation'' notice. Tentative nonconfirmation notices issues are issued for a variety of reasons, including mismatches of name, date of birth, invalid SSNs, mismatches in citizenship status or alien work authorization status or if a death indicator is present in SSA's database. If the individual's information does not match the SSA or USCIS records, the employee may contest the tentative nonconfirmation. To contest the tentative nonconfirmation, the employee must contact SSA or USCIS within eight federal government work days to try to resolve the discrepancy. Under the E-Verify program requirements, the employer is prohibited from terminating or otherwise taking adverse action against an employee who has contested a tentative nonconfirmation while he or she awaits a final resolution from the federal government. If the employee fails to contest the tentative nonconfirmation, or if SSA or USCIS concludes that the individual is not work authorized, the employer will receive a notice of final nonconfirmation and the employee may be terminated.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in one year, and it would not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (1995), 2 U.S.C. 1501 *et seq.*

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104–121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). This rule has not been found to be likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or foreign markets.

E. Executive Order 12,866 (Regulatory Planning and Review)

Because this rule considers interests of a number of different agencies and provides guidance to the public as a statement of policy or interpretive rule, the final rule was referred to the Office of Management and Budget pursuant to Executive Order 12866, as amended. Multiple agencies reviewed and considered the draft. This rule reflects that consultation. OMB has determined that this rule will not have an effect on the economy of more than $100 million.

F. Executive Order 13,132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order No. 13,132, 64 FR 43,255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12,988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order No.12,988, 61 FR 4729 (Feb. 5, 1996).

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. While employers seeking to establish eligibility for the safe harbor are encouraged to keep a record of their actions, this rule does not impose any additional information collection burden or affect information currently collected by ICE.

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons stated in the preamble to this supplemental final rule, the Department of Homeland Security reaffirms the text of the final rule issued on August 15, 2007, 72 FR 45611, and makes one typographical correction as set forth below:

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

§ 274a.1 [Amended]

■ 2. In § 274a.1(l)(2)(iii) remove the phrase ''(l)(2)(i)(B)'' and add in its place the phrase ''(l)(2)(i)(C)''.

Michael Chertoff,

Secretary.

[FR Doc. E8–25544 Filed 10–27–08; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 71, 83, and 93

[Docket No. APHIS–2007–0038]

RIN 0579–AC74

Viral Hemorrhagic Septicemia; Interstate Movement and Import Restrictions on Certain Live Fish

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule; delay of effective date.

SUMMARY: On September 9, 2008, we published an interim rule in the **Federal Register** (73 FR 52173–52189) to restrict the interstate movement and importation into the United States of live fish that are susceptible to viral hemorrhagic septicemia, a highly contagious disease of certain freshwater and saltwater fish. That interim rule was scheduled to become effective on November 10, 2008. We are delaying the effective date of the interim rule until January 9, 2009. This delay will provide APHIS with time to consider all comments and make some adjustments to the interim rule that may be necessary in order to successfully implement it.

DATES: The effective date for the interim rule amending 9 CFR parts 71, 83, and 93, published at 73 FR 52173–52189 on September 9, 2008, is delayed until January 9, 2009.

FOR FURTHER INFORMATION CONTACT: Dr. P. Gary Egrie, Senior Staff Veterinary Medical Officer, National Center for Animal Health Programs, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737–1231; (301) 734–0695; or Dr. Peter L. Merrill, Senior Staff Veterinarian, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 734–8364.

SUPPLEMENTARY INFORMATION:

Background

Viral hemorrhagic septicemia (VHS) is a highly contagious disease of certain freshwater and saltwater fish, caused by a rhabdovirus. It is listed as a notifiable disease by the World Organization for Animal Health. The pathogen produces variable clinical signs in fish including lethargy, skin darkening, exophthalmia, pale gills, a distended abdomen, and external and internal hemorrhaging. The development of the disease in infected fish can result in substantial mortality. Other infected fish may not show any clinical signs or die, but may be lifelong carriers and shed the virus.

On September 9, 2008, we published an interim rule in the **Federal Register** (73 FR 52173–52189, Docket No. APHIS–2007–0038) to amend 9 CFR parts 71, 83, and 93 by establishing regulations to restrict the interstate movement and the importation into the United States of certain live fish species that are susceptible to VHS. We announced that the provisions of the interim rule would become effective November 10, 2008, and that we would consider all comments on the interim rule received on or before November 10, 2008, and all comments on the environmental assessment for the interim rule received on or before October 9, 2008.

Delay of Effective Date

Since publication of the interim rule, we have received comments that address a variety of issues. These issues include the feasibility of the requirement in the interim rule for a visual inspection of regulated fish 72 hours prior to shipment, the provision that Interstate Certificates of Inspection allowing interstate movement of live fish will be valid for 30 days from the date of issuance, and the provision that laboratory testing is valid for 30 days from the date of sample collection for fish held in a water source that is not a secure water source.

Based on our review of the comments received to date, we consider it advisable to delay the effective date of the interim rule from November 10, 2008, until January 9, 2009, while retaining November 10, 2008, as the close of the comment period for the interim rule and October 9, 2008, as the close of the comment period for the environmental assessment. This additional time will allow APHIS to consider all comments and make some adjustments to the interim rule that may be necessary in order to successfully implement it.

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 22nd day of October 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–25663 Filed 10–27–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 25 and 121

[Docket No. FAA–2006–26722; Amendment Nos. 25–127, 121–341]

RIN 2120–AI66

Security Related Considerations in the Design and Operation of Transport Category Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The rule adopts several standards of the International Civil Aviation Organization (ICAO) and requires manufacturers to incorporate certain security features in the design of new transport category airplanes. Specifically, manufacturers of affected

airplanes must design flightdecks that are protected from penetration by projectiles and intrusion by unauthorized persons. The flightdeck, passenger cabin, and cargo compartments of these aircraft must be protected from the effects of detonation of an explosive or incendiary device. The rule also requires that manufacturers of new transport category airplanes design a ''least risk bomb location'' and that operators of certain existing airplanes designate such a location.

DATES: These amendments become effective November 28, 2008. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this rule as of the November 28, 2008 effective date of this rule.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule, contact: Jeff Gardlin, FAA Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98055; telephone (425) 227–2136; facsimile (425) 227–1149; e-mail: *jeff.gardlin@faa.gov*. For legal questions concerning this final rule, contact: Gary Michel, Regulations Division, AGC–200, FAA Office of the Chief Counsel, 800 Independence Avenue, SW., Washington DC, 20591; telephone (202) 267–3148; e-mail: *gary.michel@faa.gov*.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing minimum standards required in the interest of safety for the design and performance of aircraft. This regulation is within the scope of that authority because it prescribes new safety standards for the design of transport category airplanes.

I. Background

A. Summary of the NPRM

On January 5, 2007, the FAA published a notice of proposed rulemaking (NPRM) entitled ''Security Related Considerations in the Design and Operation of Transport Category Airplanes.'' [1] The FAA proposed to amend part 25 to specify design standards for new transport category airplanes in order to increase security for passengers and flightcrew.

For airplanes required by operating rules to have a flightdeck door, the FAA proposed standards to protect the flightdeck from forcible intrusion by unauthorized persons or penetration by small arms fire or fragmentation devices. The NPRM also proposed that airplanes with a certificated passenger seating capacity of more than 60 persons or a maximum certificated gross takeoff weight of over 100,000 pounds must be designed to limit the effects of an explosive or incendiary device by:

1. Providing means to protect the flightdeck and the passenger compartment from smoke, fumes, and noxious gases.

2. Requiring fire suppression systems for cargo compartments be designed to withstand certain impacts or loads—unless they are either redundant and separated from one another by a specified distance or installed remotely from the cargo compartment.

3. Designating a ''least risk bomb location'' (LRBL) where a bomb or other explosive device discovered in-flight could be placed, so if it were to detonate, flight-critical structures and systems would be protected from damage as much as possible.

4. Ensuring redundant airplane systems necessary for continued safe flight and landing are either physically separated by a certain distance or otherwise designed to permit continued safe flight and landing in the aftermath of some event.

5. Creating interior features of the cabin that make it more difficult to conceal weapons, explosives, or other such objects and easier to find such items by a simple search.

The FAA also proposed to amend part 121 to require operators of existing airplanes with a passenger seating capacity of more than 60 persons designate a least risk bomb location. The public comment period on the NPRM closed on April 5, 2007.

The NPRM noted the requirements of this rule are not intended to be applied to airplanes operated for private use. Though the FAA specifically sought input, we received no comments on this subject. Since publication of the NPRM, we have also published NPRM 07–13 [2], proposing certain alternative requirements for private use airplanes. We further intend to exclude § 25.795 from the final rule that results from the ''private use'' NPRM. This action is consistent with our previously stated intentions.

B. Summary of the Final Rule

This rule amends part 25 to require manufacturers design certain new transport category airplanes to increase security for passengers and the flightcrew. The rule specifies design standards to protect the flightdeck from forcible intrusion by persons or from penetration by small arms fire or fragmentation devices. It also requires the design provide means to limit the effects of detonation of an explosive or incendiary device by (1) limiting entry of smoke, fumes, and noxious gases into the flightdeck or the passenger cabin; (2) meeting specified standards for all components of fire suppression systems in cargo compartments; (3) establishing an LRBL; (4) physically separating certain redundant airplane systems or otherwise designing them to continue to function in the event of a detonation; and (5) providing interior features that make it harder to conceal weapons, explosives, or other objects and easier to detect such objects by a simple search of the airplane cabin.

This rule also amends part 121 to require operators of certain existing airplanes designate a least risk bomb location.

C. Summary of Comments

The FAA received 31 comments on the proposed rule. Commenters included airplane manufacturers, airlines, aviation associations, and individuals, including students and commercial pilots. Most of the comments supported the proposed rule; several commenters also had suggestions for change.

As provided in the original tasking statement to the Aviation Rulemaking Advisory Committee (ARAC), certain comments we received were referred to the Design for Security Harmonization Working Group. Those comments pertained to the following proposed sections in the NPRM:

1. In § 25.795(b)(3)(iii), delete the requirement to withstand ''a 6-inch displacement from a single point source applied anywhere along the distribution system because of support structure displacements or adjacent materials displacing against the distribution system.''

2. In § 25.795(b)(2), clarify those flight and dispatch regimes under which smoke protection is not required.

3. In § 25.795(c)(2), further explain the relation of system separation to several existing regulations.

[1] 72 FR 630.

[2] 72 FR 38732, (July 13, 2007).

4. In § 25.795(c)(2), explain how measurement of the separation distance is accomplished.

5. In § 25.795(c)(3), define an object size to facilitate interior searches.

Comments received on these and other sections of the NPRM are considered in detail in the following discussion of this final rule.

II. Discussion of Final Rule

A. Overview

For more than 50 years, terrorist acts—including hijackings and detonation of explosive devices—have targeted airplanes.

1. ICAO Design Standards To Increase Security

In response to a number of airplane bombings and hijackings that occurred in the 1960s, 1970s, and early 1980s, the International Federation of Airline Pilots Association developed proposals regarding design standards for increased security in airplanes. The association submitted the proposals to the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations charged with development of international standards for safety and security of civil aviation. ICAO airworthiness standards affecting airplane design are contained in Annex 8 of the Convention on International Civil Aviation. ICAO in turn, solicited comments on the proposals from its member countries and aviation organizations.

On December 21, 1988, a terrorist's bomb exploded in mid-air on Pan American World Airways Flight 103 from London to New York City. The explosion in the forward cargo hold of the Boeing Model 747 airplane occurred over Lockerbie, Scotland, killing all 259 people onboard and 11 people on the ground.

As a result of this catastrophic event, the effort to establish design standards for increased security gained impetus. Within several months of the explosion on Flight 103, ICAO formed a study group called Incorporation of Security into Aircraft Design (ISAD). The study group included representatives of the airworthiness authorities of the United States, the United Kingdom, France, Germany, Brazil, and Russia. Also included were representatives of the International Federation of Airline Pilots Association, the International Coordinating Council of Aerospace Industries Associations, and the International Air Transport Association.

The task of ISAD was to consider the existing proposals and recommend design standards that were to be incorporated into Annex 8. Ultimately, ISAD recommended design standards pertaining to the following:

1. Survivability of systems.
2. Suppression of fire in cargo compartments.
3. Protection from smoke and fumes in the flightdeck and the passenger cabin.
4. Design of an LRBL.
5. Protection of the flightdeck from penetration by small arms fire or shrapnel.
6. Design of interior features to deter concealment of weapons, explosives, or other objects and facilitate searching for them.

On March 12, 1997, ICAO adopted the recommended standards as Amendment 97 to Annex 8, and the member countries subsequently approved those standards. All but one of the standards became effective 3 years after their adoption. The exception was the standard requiring identification of an LRBL, which became effective immediately. The identification of an LRBL was already common practice in the aviation industry and had been applied as an operational standard rather than a design standard.

Generally, Annex 8 standards do not apply directly to the design of an airplane, but are implemented by adoption into the airworthiness regulations of ICAO's member countries. As a signatory to the Convention which established ICAO, the United States is required to implement the Annex 8 rules into our national airworthiness regulations to the extent practicable.[3]

2. ARAC's Recommendations Pertaining to Design for Security [4]

In addition to participating in the development of international standards through ICAO, a high priority for the FAA is maintaining harmonized standards between the United States and Europe. This harmonization is achieved through the Aviation Rulemaking Advisory Committee (ARAC) composed of 66 member organizations providing extensive knowledge and expertise on a wide range of aviation matters.

In 1999, the FAA tasked ARAC to propose regulations incorporating security measures into airplane design.[5] The proposed regulations were to be based on Amendment 97 to Annex 8. The task was assigned to the Design for Security Harmonization Working Group, incorporating members from the aviation industry and the governments of Europe, the United States, Brazil, and Canada.

In April 2001, after several airlines reported incidents of flightdeck intrusion by aggressive passengers, the FAA tasked ARAC to propose harmonized regulations to improve the intrusion resistance of the flightdeck.[6] This task was also assigned to the Design for Security Harmonization Working Group.

The working group proposed harmonized regulations for implementing security safeguards into the design of new transport category airplanes. The working group submitted its recommendations to ARAC which voted in favor of submitting the recommendations to the FAA.

3. Legislation and Rulemaking After the Terrorist Attacks of 9/11

Several months after the terrorist attacks on September 11, 2001, Congress passed the Aviation and Transportation Security Act. Among other provisions, the Act directed that—for airplanes required to have a door between the flightdeck and the passenger compartment—the FAA issue an order requiring strengthening of the door so that it could not be forced open from the passenger side.

On January 15, 2002, the FAA published Amendment No. 25–106.[7] The rule amended 14 CFR 25 to add new § 25.795, Security considerations. Paragraph (a) *Protection of flightdeck* specified that, if a flightdeck door were required by operating rules, the door installation must resist forcible intrusion by unauthorized persons and penetration by small arms and fragmentation devices. The rule also amended 14 CFR 121 to specify a date the required flightdeck door was to be installed. Thus, the amendment addressed only the ICAO standard regarding protection of the flightdeck.

B. Withdraw or Defer Rule

Two commenters, Boeing and the Air Transport Association of America (ATA), argued that this rulemaking was premature and recommended it be withdrawn or deferred for the reasons stated below. Because of the nature of the comments, the FAA consulted with

[3] Because we have not yet incorporated these ICAO standards into our regulations, the United States (like all other states of manufacture) has filed ''differences'' with ICAO regarding the design for security provisions of Annex 8. Adoption of this final rule removes these differences with the ICAO standards.

[4] The FAA formally established the Aviation Rulemaking Advisory Committee on January 22, 1991, to provide advice and recommendations about FAA's safety-related rulemaking (56 FR 2190).

[5] 64 FR 57921, (October 27, 1999).

[6] 66 FR 31273, (June 11, 2001).

[7] 67 FR 2118.

the Transportation Security Administration (TSA). The following discussion represents consensus of the FAA and TSA regarding recommendation to withdraw or defer the proposed rule.

1. Coordination With Other Agencies

Boeing and ATA contend the proposed rule was not properly coordinated with agencies that regulate aviation security issues. As was noted in the preamble to the NPRM, in October 1999 the FAA formed a Design for Security Harmonization Working Group under the auspices of ARAC. The task of the new working group was to propose harmonized regulations incorporating security measures into airplane design. The proposed regulations were to be based on ICAO's Amendment 97 to Annex 8. At that time, the TSA had not yet been formed. However, its predecessor organization within the FAA was a part of ARAC. Subsequently, when TSA was established as a separate agency, it continued to participate in ARAC.

After the FAA accepted ARAC's recommendations regarding harmonized regulations, we coordinated with TSA throughout the process of drafting the NPRM. This close coordination continued during the extensive governmental review prior to publication of the NPRM. In fact, Homeland Security Presidential Directives (HSPD), the Aviation Transportation System Security Plan (ATSS), and the National Strategy for Aviation Security all stress that aviation security measures should be fully coordinated among the relevant governmental agencies, and coordination of this rule was consistent with that approach.

2. Compliance With Certain HSPDs or With the National Strategy for Aviation Security

Boeing and ATA stated that another reason to withdraw or defer the rule is it does not comply with Homeland Security Presidential Directive 16 (Directive 16) or with the National Strategy for Aviation Security.

This is a more complex issue. Directive 16, issued in June 2006, mandates creation of a National Strategy for Aviation Security (the Strategy), which in turn is implemented through several security plans. The Strategy was issued on March 26, 2007, more than two months after publication of the FAA's proposed rule. Subsequently, the FAA and TSA reviewed the Strategy and its corresponding plans and concluded that this rule does not conflict with those documents. The ATSS notes:

The FAA also has specific responsibilities and authorities relating to safety and security of critical National Airspace System infrastructure, as well as responsibility for providing technical advice and regulatory certification for aircraft-based attack countermeasures.

The Strategy identifies terrorism and attacks directed at aircraft and their occupants as the number one threat to aviation security. This rule is consistent with the role of the FAA, as contemplated by the ATSS, because it regulates the design and manufacture of certain airplane countermeasures to protect the airplane and its occupants.

3. Risk Analysis of the Proposed Approach and Alternatives

In their comments, ATA and Boeing also recommended the NPRM be subject to a formal risk analysis to assess its merits compared to alternative aviation security measures. In particular, they urged that TSA's Risk Management Analysis Tool (RMAT), which is part of the Risk Management Analysis Process (RMAP), be used to assess the proposal. The commenters suggested that because the NPRM was not based on a risk assessment it may duplicate or needlessly overlap other security measures.

A formal risk analysis tool, such as RMAT, was not available when the NPRM was developed. The ARAC supported the measures proposed in the NPRM, based on a real threat to aviation, and concluded the proposed measures would reduce the risk associated with future attacks. The principles that underlie the proposed security measures have their origins in work done by the international aviation community dating back to the 1980s and are based on the concept of layered security. This is an integrated approach which relies on multiple layers of security measures, including pre-travel measures, checkpoint measures, and aircraft design measures to provide increased protection from terrorists and weapons.

Further, RMAT is a tool which is still under development and requires further testing. Given the continuing threat of attacks by terrorists, the FAA cannot justify delays in issuing this rule to analyze it with a tool that has not yet been validated. New tools for risk analysis are developed constantly, and if we wait for the next best tool, no regulatory improvements would occur. Based on discussion with TSA, we considered whether to use something other than the RMAT to address the comments from Boeing and ATA. FAA and TSA concluded that this wasn't feasible or necessary. First, there is really no other suitable risk model available to address this type of rule. Second, risk methodologies utilized by TSA and other agencies whose purview is security provided the outside intelligence on which FAA relied (beginning with ICAO standards) to determine that the threat of terrorist acts was significant and mitigation through airplane design was prudent and appropriate. All of the data available, including some that is classified, clearly show this rule would provide benefit. Regulatory decisions are based on the best information available at the time. Therefore, the FAA is amending parts 25 and 121, as proposed, with the modifications discussed below.

C. Applicability

As proposed, § 25.795(a) would apply to new transport category airplanes which are required by operating rules to have a flightdeck door. Sections 25.795 (b) and (c) would apply to new transport category airplanes with a maximum certificated passenger seating capacity of more than 60 persons or a maximum certificated takeoff gross weight of over 100,000 pounds. Section 121.295 would apply to existing transport category airplanes with a passenger seating capacity of more than 60 persons.

1. Rule Should Apply to All Transport Category Airplanes

Four commenters, including the Air Line Pilots Association, Coalition of Airline Pilots Associations, Passenger-Cargo Security Group, and an individual suggested the proposed rule apply to all transport category airplanes and not be limited, based on passenger capacity or maximum takeoff gross weight. The commenters cited the large number of airplanes in the fleet that are below the proposed thresholds, sizable passenger and cargo loads carried, threat the airplanes would present if commandeered and used as weapons, and the desire to apply aviation security measures uniformly.

As we discussed in the preamble to the NPRM, the intent of the proposed rule was to adopt security provisions in design that will be effective and at the same time practicable. Limiting the rule to the appropriate aircraft was a key task of the Design for Security Harmonization Working Group. In fact, as a result of the ARAC recommendation and the position of its member states, ICAO amended the applicability section of its standards to specify a similar applicability. We discussed this matter with the TSA and concluded that applying the proposed

rule to all transport category airplanes would add considerable complexity to the design and certification of smaller airplanes without measurably improving security.

In addition, if operating rules require an airplane to have a flightdeck door, then—regardless of that airplane's size—the requirements for the flightdeck bulkhead will apply. This aspect of the proposal most directly addresses use of the airplane as a weapon, which was presented as the major concern of the commenters.

The applicability of the majority of the provisions of § 25.795 is governed by passenger capacity and gross weight. In the NPRM, we stated both criteria are necessary to address airplanes of significant size that could carry both passengers and cargo, but be below the passenger threshold alone. Clearly, the intent was to capture airplane types of a certain size, whether or not they were carrying large numbers of passengers.

In reviewing the language in the rule, we noted the terminology used to define passenger capacity limits (''certificated passenger seating capacity'') might not be sufficiently clear. The word ''capacity'' suggests the limit of the airplane's capability. However, there could be some confusion whether this applies to each individual airplane or to the airplane type. As discussed above, we clearly intended to affect the airplane type. Therefore, to clarify the intent, the word ''maximum'' has been added to paragraphs (b) and (c) of § 25.795 as well as § 121.295. This is also consistent with the language used to characterize the gross weight limits.

2. Rule Should Also Apply to Airplanes Which Carry Only Cargo

Several commenters, including the Airline Professionals Association (APA), Air Line Pilots Association (ALPA), and Coalition of Airline Pilots Associations (CAPA) recommended the proposed requirements should also apply to all-cargo airplanes. The commenters specifically cited the physical protection of the flightdeck as something that should be required on all-cargo airplanes as well as on passenger airplanes. Their concern is cargo airplanes frequently operate from airports that do not have passenger screening facilities and can be used as weapons as effectively as airplanes which carry passengers.

Existing requirements for reinforced flightdeck doors address all transport category airplanes required by operating rules to have a flightdeck door. This rule extends those same requirements to the rest of the flightdeck bulkhead and other barriers, but does not change the applicability of those requirements from a security standpoint. The need to reinforce the flightdeck door or, in fact, the need to have a flightdeck door depends on restrictions on access to the airplane. We have discussed this issue with TSA and concluded that a suitable screening program to restrict access to the airplane is as effective as physical protection of the flightdeck without a rigorous screening program. This subject was discussed in detail in Amendments 121–287 and 129–37, Flightdeck Security on Large Cargo Airplanes,[8] and the rationale in those rules continues to be applicable.

3. Rule Should Apply to Existing As Well As New Airplanes

Several individual commenters recommended the proposed requirements be applied to existing airplane models, rather than only new type designs.

As discussed in the NPRM, existing airplanes are already equipped with reinforced flightdeck doors and LRBLs that were established voluntarily. The remainder of the proposed changes involve design changes that are significant for an existing airplane type. The costs of making these design changes would be very significant, and the benefits would not balance the cost. When developing the proposal, we considered various methods of implementation and concluded that introduction of these requirements on new type designs would be the only approach where benefits outweigh the costs. We have no plan to extend any of these requirements to the existing fleet or existing type designs. An airplane's certification basis is established in accordance with 14 CFR 21, and that will continue to apply in this case. With the exception of the change to § 121.295, only airplanes with this amendment in their certification basis will be covered by this final rule.

D. Secondary Barriers To Protect Flightdeck

Several commenters, including the CAPA, ALPA, Passenger-Cargo Security Group, and several individuals recommended the FAA require secondary barriers to provide enhanced security of the flightdeck. ALPA cited operational advantages of a secondary barrier when the flightdeck door must be opened during flight. The Passenger-Cargo Security Group argued that while the reinforced flightdeck door is an effective deterrent when it is closed and locked, its effectiveness is compromised with the number of times it is opened during flight. Therefore, the Group recommended that aircraft have a complementary security system and corresponding procedures.

Adding a requirement for secondary flightdeck barriers to this rule would be beyond the scope of the notice, since we did not propose or even discuss this issue in the NPRM. Therefore, if we were to conclude that secondary barriers should be required, we would have to issue another proposal and provide for public comment before adopting such a requirement. In any case, we would need the input of TSA and other agencies to determine whether security concerns warrant such a requirement. Presently, we do not anticipate any rulemaking that will require installation of secondary flightdeck barriers.

Finally, installation of secondary flightdeck barriers is currently permitted provided all airworthiness requirements are met and associated operational procedures are approved. As mentioned in the comment from ALPA, at least one major domestic carrier has developed, acquired approval for, and installed secondary barriers on a portion of its fleet. In addition, operators have established procedures to permit opening of the flightdeck door, and these are working well.

E. Protection of Flightcrew Compartment

As proposed, § 25.795(a) would specify standards for the design of the bulkhead, flightdeck door, and ''any other accessible barrier separating the flightcrew compartment from occupied areas.''

1. Use of terms ''Barrier'' and ''Boundary''

The International Coordinating Council of Aerospace Industries Associations (ICCAIA) pointed out that the proposed rule refers to ''the bulkhead, door, and any other accessible barrier separating the flightdeck compartment from occupied areas,'' whereas the proposed Advisory Circular uses the term ''boundary.'' In the context of the NPRM, we used the term ''barrier'' to indicate the function required. In the context of the Advisory Circular, we used the term ''boundary'' to help define those items that must serve as barriers. However, we agree the distinction is subtle and the term ''boundary'' is more general. Therefore, this final rule uses the term ''boundary'' rather than ''barrier'' to refer to structures which separate the flightdeck from the passenger compartment.

[8] 68 FR 42874.

2. Meaning of Term ''Accessible'' Barrier or Boundary

Boeing, Bombardier, and the ICCAIA requested clarification of the term ''accessible'' barrier (now accessible boundary).

In the context of resistance to intrusion into the flightdeck, a boundary is accessible if it could be exposed to loads from attempts at forcible intrusion. If the flightdeck bulkhead is either composed or installed forward of other interior structures, such as a galley or closet, the contribution of those interior structures to intrusion resistance may be included when assessing the acceptability of the boundary.

Boundaries on a multi-deck airplane could include the floor or ceiling, although the ceiling might not be accessible if it is high off the floor. Generally, physical intrusion through the cabin ceiling (from below the flightdeck) would not be feasible because of the flightdeck floor structural requirements that must already be met. When the cabin is above the flightdeck, the cabin floor is clearly accessible. However, it is also likely the existing structural requirements for the floor will not permit intrusion through the flightdeck ceiling.

In terms of the ballistic protection provided by a barrier, accessibility has a slightly different definition. Barriers are accessible, if they are on a hazardous trajectory (as defined in proposed AC 25.795–2) from a location accessible to a passenger. Interior structures installed aft of a bulkhead would probably not provide much ballistic protection. Floors and ceilings on multi-deck airplanes will very likely require protection.

When establishing a hazardous trajectory, an applicant for a new type certificate should consider trajectories originating in areas beyond the main cabin seating zones if a passenger has access to them. Such areas would include any compartment that is not locked. Crew rest compartments accessible from the cabin should be evaluated if they are not locked or do not have some other means of physically preventing unwanted access. This applies even though they are intended only for crew use.

3. Placards To Restrict Entry

An individual commented that placards on the compartment stating ''crew use only'' would be sufficient. We do not agree. While a placard might discourage inadvertent entry by a person, it would not prevent entry by a person deliberately trying to gain access. Therefore, an area of the cabin, including a compartment not on the main deck, is ''accessible'' unless there is a physical impediment, such as a lock, to entry.

F. Flightdeck Smoke Protection

As proposed, § 25.795(b)(1) would require that means be provided to limit entry of smoke, fumes, and noxious gases from any other area of the airplane into the flightdeck.

1. Applicability of §§ 25.831 and 25.855

Boeing commented that the preamble to the NPRM says that § 25.831 addresses removal of smoke from the flightdeck but does not directly address penetration of smoke into the flightdeck, other than smoke originating in a cargo compartment. According to the commenter, this statement incorrectly implies that § 25.831 contains a requirement pertaining to smoke penetration, and it does not.

We agree that the preamble was misleading on this point. Section 25.831 addresses removal of smoke from the flightdeck but does not address penetration of smoke from cargo compartments. It is § 25.857 that addresses excluding hazardous quantities of smoke from a fire in a cargo compartment from the flightdeck or passenger compartment. This matter is clearly addressed in the background section of proposed AC 25.795–3, therefore no change is needed to this final rule or the Advisory Circular.

2. Clarification of References to Advisory Circular 25–9A

Boeing and Transport Canada cited several places in the preamble of the NPRM where reference to AC 25–9A [9] could be misinterpreted and might not be sufficiently precise.

We agree that the preamble did not completely characterize the criteria provided in AC 25–9A and the relationship of that AC to these requirements. Advisory Circular 25–9A covers guidance for testing of smoke penetration and removal as well as recommended methods of compliance with §§ 25.854, 25.855, 25.857, 25.858, and 25.869. Clearly, AC 25–9A does not explicitly address the requirements of § 25.795, since they did not exist at the time the Advisory Circular was issued. Therefore, any use of the guidance in AC 25–9A in the context of § 25.795 will require adaptation appropriate for the specific requirements of this final rule. Nonetheless, some of the recommended procedures described in AC 25–9A are directly applicable to procedures that could be used to show compliance with § 25.795.

3. Airflow Settings and Dispatch Conditions

As discussed earlier, the FAA requested in the original tasking statement for ARAC that certain comments be addressed by the Design for Security Harmonization Working Group. Among them were comments regarding protection of the flightdeck from smoke penetration. In particular, Boeing and Transport Canada proposed opposite approaches to addressing the portions of a flight and the dispatch conditions when the capability to resist smoke penetration into the flightdeck should be required. Since both organizations were part of the working group, we referred the matter to the working group for a recommendation.

The intent of the requirement is that the airplane be capable of limiting smoke penetration into the flightdeck when an explosive or incendiary device has been discharged elsewhere on the airplane. We recognize that, at any given moment, the airplane may not be making use of that capability. However, once the crew becomes aware of the need to prevent smoke penetration, they should be able to take action in a fairly short time. This is discussed further in proposed AC 25.795–3. With regard to dispatch conditions, the conclusion of ARAC is that manufacturers should consider the systems that will be permitted to be inoperative for dispatch when showing compliance with this requirement. This also is noted in the Advisory Circular.

Transport Canada commented that the method of compliance discussed in the preamble and the Advisory Circular-providing small differential pressure between the flightdeck and other areas-might not be reliable without tests. The commenter concluded that analysis alone would not be acceptable to show compliance.

The FAA agrees that testing is necessary as part of the certification process, assuming that the differential pressures are very small. As noted in proposed AC 25.795–3, small differential pressures are difficult to predict analytically and often cannot be measured directly. Once an applicant for a new type certificate conducts tests, the FAA may agree that subsequent changes to the design could be substantiated by analysis alone if the prior test data remain valid. But we agree that in order to establish whether a small differential pressure actually exists, a simple test will most likely be

[9] Advisory Circular 25–9A, Smoke Detection, Penetration, and Evacuation Tests and Related Flight Manual Emergency Procedures; January 6, 1994.

needed. Proposed Advisory Circular 25.795–3 provides one method of compliance using testing.

4. Allowable Flightdeck Smoke

Boeing also proposed language that would state explicitly that the rule does not prohibit penetration of any smoke into the flightdeck in the immediate aftermath of an event.

The FAA does not believe that any further clarification is required outside this discussion. Both the NPRM and this final rule use the term ''limit'' rather than ''prevent'' when discussing penetration of smoke into the flightdeck. Additionally, proposed AC 25.795–3 clearly states that smoke resulting from detonation of an explosive or incendiary device ''may initially enter the flightdeck, until the flightcrew initiates action to prevent further entry of smoke.''

G. Passenger Cabin Smoke Protection

As proposed, § 25.795(b)(2) would require that means be provided to prevent incapacitation of persons in the passenger cabin resulting from smoke, fumes, and noxious gases.

1. Airflow Settings and Dispatch Conditions

Boeing and Transport Canada addressed the proposed requirements pertaining to protection of the passenger cabin from smoke. As with protection of the flightdeck from smoke, the comments addressed airflow settings and dispatch conditions related to passenger cabin smoke protection. These comments were also referred to ARAC for a recommendation.

The purpose of this requirement is that the airplane have the capability of coping with a quantity of smoke and other toxic gases in the passenger cabin, such that the passengers are not incapacitated. A straightforward method of compliance is to change cabin air rapidly with outside air. This rapid air change may not be possible in all configurations of the environmental control system or all flight regimes. In fact, the need to rapidly evacuate smoke from the passenger cabin is an emergency procedure for which a change in the ventilation rate may be required. Thus, the crew may need to initiate some procedures to enable the airplane to meet the required air change rate. This is discussed in more depth in proposed AC 25.795–4. No change is made to this final rule since the rule simply requires ''means'' to protect the passengers.

2. Use of Term ''Fresh Air''

The NPRM discusses rapid air change using fresh air as one way to comply with this requirement under § 25.795(b)(2). Boeing and Transport Canada questioned whether using the term ''fresh air'' was strictly accurate. Boeing suggested using the term ''outside air'' which is more descriptive of our intent.

The FAA agrees that the word ''fresh'' can have implications about air quality and that the quality of outside air is beyond the control of the applicant for a new type certificate. Using the term ''outside air,'' does not have the same implications about air quality. When showing compliance with this requirement by using rapid air changes, the key factor is that the air is not re-circulated and originates from the outside. Therefore, in the preamble of this final rule, the discussion of rapid air change refers to ''outside air.''

We also noted that the proposed rule language could be interpreted as requiring consideration of constant gas concentrations, rather than initial gas concentrations. While the preamble discussion of acceptable methods of compliance, as well as the characterization of the hazard, are clear that the initial concentrations of specific gases must be addressed, there is a potential for confusion. To make sure there is no misunderstanding, the word ''initial'' is added in paragraph b(2), as follows: ''Means must be provided to prevent passenger incapacitation in the cabin resulting from smoke, fumes, and noxious gases as represented by the initial combined volumetric concentrations of 0.59% carbon monoxide and 1.23% carbon dioxide.''

H. Cargo Compartment Fire Suppression

As proposed, § 25.795(b)(3) would require all components of fire suppression systems for cargo compartments be designed to withstand certain conditions, unless the systems are either redundant and separated in accordance with proposed § 25.795(c)(2) or installed remotely from the cargo compartment.

1. Protection From Chemical and Biological Hazards

The CAPA recommended that the requirements address chemical and biological hazards in addition to the effects of an explosive or incendiary device.

While there are no doubt valid security concerns associated with these potential hazards, they go beyond the scope and intent of this final rule. The rule, as proposed, addressed mitigating effects of explosive and incendiary devices from an engineering standpoint. Chemical or biological threats introduce entirely different issues and potential consequences. Should such threats warrant consideration in the airplane design, further rulemaking would be necessary. Accordingly, the FAA has made no change to this final rule.

2. Six-Inch Displacement of Components

Boeing and Bombardier questioned the requirement that all components of the cargo compartment's fire suppression system be able to withstand ''A 6-inch displacement in any direction from a single point force applied anywhere along the distribution system because of support structure displacements or adjacent materials displacing against the distribution system.'' Bombardier noted that this would seem to require a sphere with a diameter of 12-inches of space around each point along the distribution system. Boeing stated that certain parts of the airplane structure cannot displace 6 inches without failure or the distribution system would move with the structure, so that there would be no relative displacement.

These comments were referred to ARAC for consideration, and the committee's recommendations form the basis of this discussion. The 6-inch displacement criterion is not intended to require free space surrounding the distribution system. The intent of § 25.795(b)(3)(iii) is to provide sufficient flexibility that 6-inch displacements can be tolerated without failure.

The space available for displacement will obviously change in the event of an explosion. Similarly, the fact that certain structures cannot deform 6 inches without failure does not eliminate the potential for a relative displacement between the system and its supporting structure. Relative displacement can occur due to direct loading or secondary contact with adjacent materials or a combination of the two. This can occur irrespective of any structural failure and is a transient condition that is not readily analyzed. The intent of the criterion was to provide a straightforward standard that did not require extensive analysis or knowledge of a particular device.

Nonetheless, the FAA agrees that the proposed criterion could require consideration of unrealistic situations and would not contribute to safety. Therefore, this final rule addresses those situations as follows:

1. We considered the installation of systems near the fuselage contour, for example, in the crown of the airplane

for a main deck cargo compartment. In this area, a system could not be displaced beyond the contour of the fuselage, since the fuselage skin itself will not significantly deflect without failure. In those cases, the maximum displacement in the direction of the fuselage skin can be limited to that which would result in displacement outside the fuselage contour.

2. Similarly, the direction of potential displacement may be constrained somewhat since the explosive or incendiary device is assumed to be within the cargo compartment. The proposed criterion would have resulted in consideration of a displacement in any direction. However, considering the direction of loading that would result from an explosion within the compartment, there are some directions of displacement that are very unlikely.

Therefore, we have deleted the words ''any direction'' from this final rule, giving the applicant for a new type certificate the ability to propose how the system could be displaced. We expect the envelope of displacement to be no less than a hemispherical shape of a 6-inch radius in the direction away from the cargo compartment (except where limited by the fuselage contour, as noted above.)

3. Finally, there may be installations where the potential for relative displacement between the distribution system and the structure to which it is attached is eliminated. This would not apply to attachments involving standoffs or hanging brackets but could apply to more substantial structure. An example of such structure is a continuous attachment to a floor beam, such that the floor beam would have to fail in order to create a relative displacement with the distribution system. In that case, the locations where a relative displacement could occur would be more limited, and the necessary flexibility could be focused into those areas.

This approach does not address all possible scenarios but is in keeping with the intent of the requirement to enhance survivability of the system through reasonable and practicable measures. Advisory Circular 25.795–5 has also been updated to reflect the change in rule language and the discussion above.

3. All-Cargo Airplanes

The APA, ATA, and CAPA all questioned how the proposed requirement would apply to all-cargo airplanes that do not have an active fire suppression system installed. They expressed concern that the rule might eliminate the current approach to fire protection for all-cargo airplanes and require the installation of a fire suppression system. Such a system would have to be quite large and contain a large amount of extinguishing agent. ATA noted that the cost of certification, installation, and maintenance of a fire suppression system on all-cargo airplanes is not accounted for in the initial regulatory evaluation.

This final rule refers to ''an extinguishing agent'' but does not require installation of an active fire suppression system for all-cargo airplanes, assuming the existing method of fire suppression is available. In most cases, fire suppression on all-cargo airplanes involves oxygen starvation, rather than application of an extinguishing agent. Depressurization at altitude will reduce the available oxygen and cause the fire to be suppressed. Since this method should continue to be available if an explosive or incendiary device were to detonate, an additional fire suppression system would not be necessary.

This approach is in contrast to that used in Class B cargo compartments sometimes used on combination passenger-and-cargo airplanes that require a person to enter the compartment to combat the fire. After an explosion in the cargo compartment, having a person enter the compartment would be neither an acceptable nor a reliable method of fire suppression. The fire detection system in the cargo compartment of an all-cargo airplane is effectively the same as the fire detection system in the cargo compartment of a passenger airplane. Therefore, this rule should have little effect on most all-cargo airplanes.

4. Eliminate Class B Cargo Compartment on Affected Airplanes

With respect to Class B cargo compartments, Embraer suggested that it would be more clear and direct to simply eliminate them from airplanes covered by this proposal. This suggestion has merit; however, there is other rulemaking activity that specifically addresses standards for Class B cargo compartments. The FAA believes that the effects of this final rule and the results of that rulemaking need to be considered together. A future Class B cargo compartment might not require entry into the compartment to fight a fire. In that case, the regulations would have to be amended to permit the use of Class B compartments. Therefore, we have not changed the requirements or modified the cargo compartment classifications in this final rule.

5. Remove First Sentence of § 25.795(b)(3)

Embraer also commented that the first sentence of § 25.795(b)(3) (''An extinguishing agent must be capable of suppressing a fire.'') should be removed because it is redundant to requirements specified in § 25.857(c)(2). In addition, in proposed AC 25.795–5, there is a stated ''assumption'' that ''the system will extinguish the fire.''

We agree; however, the requirements of § 25.795(b) pertain specifically to the effects of explosive and incendiary devices which are not covered in § 25.857 and, in fact, are addressed only in § 25.795(b)(3). Since the assumption in proposed AC 25.795–5 is based on the regulatory requirement (§ 25.795(b)(3)), lacking the benefit of a supporting requirement in the rule, the assumption in the Advisory Circular may not be valid. Therefore, we have made no change to this final rule.

6. Protecting Pressure Vessels and Certain Other Equipment

The APA and CAPA questioned the impact criteria for protection of pressure vessels and other equipment vulnerable to fragment damage. They believe that the fragment velocities are much too low and should be on the order of the measured blast wave velocity of an explosive itself.

There may be some confusion as to what the requirements represent in terms of the threat. The purpose of the proposed requirement to protect against a half inch aluminum sphere traveling at 430 feet per second is to account for objects that fragment and are dispersed as a result of an explosive or incendiary device. While the fragment velocities of the explosive or incendiary device itself may reach very high levels, these are not a hazard to the airplane systems. Much of the work done to establish these criteria involves sensitive information and may not be released to the public. The impact criteria were discussed and agreed upon within ARAC, but security considerations preclude further detailed discussion in this rule. The FAA has considered the issues presented by the commenters and concluded that the criteria remain valid.

I. Least Risk Bomb Location

As proposed, § 25.795(c)(1) would require that an airplane be designed with a designated location where a bomb or other explosive device could be moved to protect flight-critical structures and systems as much as possible from damage in the case of detonation.

1. Language of § 25.795(c)(1)

Boeing suggested § 25.795(c)(1) be reworded to read, ''An airplane should be designed with a designated location or other mitigation for a bomb * * *.'' Boeing argued that the wording in the NPRM goes beyond the intent of the ARAC recommendation and that its own suggested wording provides more flexibility.

Section 25.795(c)(1) is consistent with the ARAC's recommendation. Additionally, the FAA believes that use of the word ''should'' is inappropriate in this context, as it conveys a recommendation rather than a requirement. Finally, the rule is flexible to the extent that a ''location'' is very general and permits a number of different approaches within the airplane. Approaches that do not fall under the definition of a ''location'' may be approvable, using the equivalent level of safety provisions of § 21.21(b)(1).

2. The Fuel System Is a Critical System

Transport Canada noted that one of the critical systems that should be kept away from the LRBL is the fuel system.

The FAA agrees that fuel systems are critical systems, as intended by this final rule. We will add fuel systems to the discussion in proposed AC 25.795–6.

J. Survivability of Systems

As proposed, § 25.795(c)(2) would require that redundant airplane systems necessary for continued safe flight and landing either be designed to maximize their ability to survive an event or be physically separated by a certain distance, except where that is impracticable. The NPRM proposed that redundant systems be separated by the diameter of a sphere and specified a formula for calculating that diameter.

1. Clarification of System Separation Requirement

Boeing and Airbus requested clarification on the portions of the airplane to which the system separation requirement applies: when must an applicant consider the entire spherical volume defined in the regulation and when is some lesser volume acceptable. In particular, Airbus proposed that the floor and ceiling of the passenger cabin be treated like the cargo compartment liner with only half the sphere applied to those areas.

The requirement applies to the entire fuselage, except where impracticable and where limited by the boundary of the bulkheads in the passenger and cargo compartments. As recommended by ARAC, the separation requirement is to be applied in full above the passenger ceiling, which is an area often used to route critical systems. Significant discussion of the rationale for this requirement in the final rule is contained in both the preamble to the NPRM and in proposed AC 25.795–7.

2. Purpose of System Separation

Boeing and Embraer addressed the purpose of system separation. Boeing suggested that the final rule explicitly state that the purpose of the requirement is to address an explosive or incendiary device. Conversely, Embraer suggested that the rule clarify that an explosive or incendiary device is only an example of something that system separation will help to mitigate.

While the impetus for the system separation requirement is related to security, the requirement will have benefits that extend beyond security. We do not believe a revision to regulatory language is needed; there is no implication that the requirement is contingent on a specific threat. The extent to which the requirement caters to security issues is addressed by the ''impracticable'' provisions and the limits on application of the sphere beyond the bulkheads in the passenger and cargo compartments.

3. Possible Conflict With Other Applicable Regulations

Boeing and Airbus commented that there are other regulations, such as §§ 25.729(f) and 25.903(d), that also require system separation, and promulgation of § 25.795(c)(2) could create conflict.

This is another subject addressed by the ARAC. The current requirements for system protection against high energy rotor failure or tire bursts are often met by system separation or shielding. In some cases, the traditional approach of system isolation to address a tire burst, for example, could result in both parts of a redundant system running within the required sphere size for compliance with § 25.795(c)(2).

However, after consultation with ARAC, we cannot envision a scenario in which compliance with either §§ 25.729(f) or 25.903(d) would preclude compliance with § 25.795(c)(2). Nonetheless, if such a situation were to arise, the provision in the regulation regarding impracticability would apply, and the applicant for a type certificate would show compliance with the regulation producing the conflict.

4. Combination of Systems Assumed To Be Inoperative

Boeing objected to the discussion of the combination of systems assumed to be inoperative within the sphere. The NPRM advised a manufacturer to consider the effect on continued safe flight and landing and whether primary and backup controls for particular systems should be separated relative to another system's primary and backup controls, essentially so that not only backup controls were available.

The intent of this discussion was to include an assessment of the effects of the system separation approach in addition to the literal geometric compliance of the system locations. That is, each system taken individually is sufficiently redundant to permit continued safe flight and landing, if there is a failure.

However, assuming a failure renders a combination of systems inoperative, with the proper separation, there should be sufficient control to permit continued safe flight and landing. Assuming entirely redundant systems, the separation alone will address the concern. Even if the systems are not 100% redundant, the capabilities of the backup system may be such that there is no concern with continued safe flight and landing. Nonetheless, the manufacturer should consider the ramifications of the inoperative systems and the capability of the systems that remain when complying with this requirement.

5. Other Mitigation Measures

Airbus commented that the rule should make it clear that other mitigation measures are required if system separation is impracticable. They note that the phrase ''or otherwise designed to maximize their survivability'' is intended to address this but believe that the wording could be more explicit. They suggested dividing paragraph (c)(2) into two paragraphs, to read as follows:

''i. Except where impracticable, redundant airplane systems necessary for continued safe flight and landing must be physically separated, at a minimum, by an amount equal to a sphere * * *. The sphere is applied everywhere within the fuselage limited by the forward bulkhead, the aft bulkhead, and the liner of the passenger cabin and cargo compartment, beyond which only one-half the sphere is applied.

''ii. Where compliance with paragraph (i) above is impracticable, other design precautions must be taken to maximize the survivability of those systems.''

We agree with the comment, inasmuch as it makes the requirement clearer. Accordingly, the language has been changed in this final rule.

6. Clarification Regarding Reliability and Redundancy

Airbus also commented that it would like the preamble to state more definitively that this requirement does not change the reliability requirements of any system or require systems that are not currently redundant to become redundant.

Both of these statements are correct, although there is no change needed to the rule language. This final rule adds a requirement to the system architecture (i.e., separation) but does not change the functional requirements of the systems affected. Proposed AC 25.795–7 will reflect this intent.

7. Clarification of How To Measure Separation of Systems

Boeing also asked for a more specific definition of how the separation distance was to be measured. Since the affected systems themselves have physical dimensions, the separation between them may not be a simple distance between points.

Due to the variety of possibilities and the number of different system types, we asked ARAC to address this comment as well. The ARAC concluded and we agree that the distance should be determined so that the sphere derived from the equation in § 25.795(c)(2) can pass between any part of the systems. Proposed AC 25.795–7 has been revised to reflect this same approach.

K. Clarification of § 25.795(c)(3)

As proposed, § 25.795(c)(3) would require that certain parts of the cabin be designed to make it more difficult to hide weapons, explosives, or other objects and easier to search for them. The specific parts of the cabin are the areas above the overhead bins, the toilets, and the life preservers or the areas where they are stored.

The ICCAIA, Bombardier, and Airbus all requested clarification on the degree to which the area above stowage compartments must prevent concealment of an object. In particular, they asked about the size of the object to be considered and how the acceptability of the design would be assessed. This is a subject that had initially been discussed in ARAC's Design for Security Harmonization Working Group but was not resolved. However, because of the evident need for a standard, we referred this comment to the working group for its recommendation.

The working group reached consensus on an approach for the interior design that should simplify the compliance findings. Although Boeing provided a dissenting opinion, the Transport Airplane and Engine Issues Group concurred with the working group and forwarded the recommendation to the FAA. In summary, the working group recommended an approach using objects of varying shapes that have a volume of 20 cubic inches or larger. A designer that elects to use this approach would have a straightforward way of showing compliance. This method is described more fully in AC 25.795–8. Nevertheless, since the commenters requested additional clarification, we have decided to add a provision defining a method of compliance that will always be found compliant, for designs that prevent concealment of 20 cubic inch objects. The rule also permits other methods acceptable to the Administrator. This would include other approaches using standard objects, as well as design features to eliminate the space above the overhead bins. Designs that prevent concealment of objects smaller than 20 cubic inches would, of course, also be acceptable.

The requirements of § 25.795(c)(3) are intended to facilitate searching and are a way to improve the design to that end. The actual search process and the types of things for which a search is conducted are not changed by this requirement. By improving the design and making it easier to search, the search is more effective and more efficient. This requirement should not affect operators when an airplane is searched, other than making the search more effective and efficient as noted above. It is simply a way to gauge the effectiveness of the design in improving the searchability of the airplane.

Qantas Airways and the ATA commented that improved interior design to facilitate searches was highly desirable and that any efforts in this area need to be coordinated with the Transportation Security Administration. Qantas commented that the regulatory requirements (that involve the design) imposed on the operator by TSA should be requirements on the airframe manufacturer as well.

We agree that good coordination with TSA is needed and have coordinated this rulemaking extensively with TSA. In terms of regulatory compliance, regulations are specific in their applicability. To the extent that these requirements apply only to persons subject to the rule, good cooperation between the regulators, manufacturers, and operators is the key to improving security.

L. Operational Requirement To Designate an LRBL

As proposed, § 121.295 would require that existing airplanes which seat more than 60 passengers have a location where a suspected explosive or incendiary device discovered in flight can be placed to minimize the risk to the airplane.

The ATA and AirTran Airways (AirTran) commented on the operational requirement to designate an LRBL and, in particular, how important it was for the airframe manufacturer to provide assistance to operators in identifying the LRBL. They noted that an operator does not have all the design information necessary to make this determination and would need the airframe manufacturer's help in complying with proposed § 121.295. AirTran also noted that the proposal does not address the procedures required to make proper use of the LRBL.

As discussed in the NPRM, operators have voluntarily designated an LRBL for many years. The FAA and later TSA have worked with airframe manufacturers and operators to implement identification and use of the LRBL without a regulatory requirement in place. This final rule requires the designation of an LRBL but does not require design changes for existing airplanes. Proposed Advisory Circular 25.795–6 addresses procedural issues and provides instruction for operators to obtain the information that the ATA and AirTran are seeking. We agree that close coordination between the operator and manufacturer is vital; however, at present the information needed to identify and carry out the necessary procedures for the LRBL is held by the TSA and is available to operators.

M. Other Measures To Increase Airplane Security

Section 107 (b) of the Aviation and Transportation Security Act states:

b. Implementation of other methods—As soon as possible after such date of enactment, the Administrator of the Federal Aviation Administration may develop and implement methods to—

1. Use video monitors or other devices to alert pilots in the flight deck to activity in the cabin, except that the use of such monitors or devices shall be subject to nondisclosure requirements applicable to cockpit video recordings under section 111.4(c);

2. Ensure continuous operation of an aircraft transponder in the event of an emergency; and

3. Revise the procedures by which cabin crews of aircraft can notify flight deck crews of security breaches and

other emergencies, including providing for the installation of switches or other devices or methods in an aircraft cabin to enable flight crews to discreetly notify the pilots in the case of a security breach occurring in the cabin.

Aerospace Services International proposed that closed circuit television be added to airplanes and submitted detailed suggestions for how these systems should operate.

The concept of video monitoring has been discussed at aviation safety and security forums for some years. However, there are numerous concerns (especially as to violation of privacy) associated with use of such systems, and at this point the potential benefits of requiring video monitoring do not outweigh the concerns. This subject was also discussed at some length in the rulemaking on Flightdeck Door Monitoring and Crew Discreet Alerting Systems.[10] Any requirements for use of closed circuit television are beyond the scope of the NPRM and thus would require separate rulemaking. Currently, we do not anticipate rulemaking in that area.

N. Existing Regulations Address Incendiary Devices

Boeing inferred that the FAA equates explosive devices and incendiary devices because of implications that they produce the same effects. Boeing does not agree that these two types of devices produce the same effect. Further, Boeing maintains that existing regulations and airplane design practice already address the effects of an incendiary device.

We agree that different devices may produce different effects and did not intend to equate them in the proposal. Most aircraft fires originating from, for example, mechanical or electrical faults are fairly slow-developing and localized, whereas an incendiary device can produce a fire that is widespread and formed very quickly. For the most part, Halon 1211 can be used to suppress the extensive fire that an incendiary device can cause. However, as discussed in the NPRM, Halon will not be available indefinitely.

In addition, no explicit requirement in the current regulations addresses fire caused by an incendiary device. Therefore, this final rule specifically requires that new airplanes be designed to protect against detonation of such devices. Proposed AC 25.795–5 discusses the subject more fully.

[10] Amendment 121–334, 72 FR 45629.

O. Destructive Capability of Explosive or Incendiary Devices

Boeing and Bombardier commented that the NPRM does not specify the destructive capability of the devices that the proposed regulations are intended to mitigate.

The commenters are correct. In fact, with this rule we intend to improve an airplane's survivability from security threats, including explosive and incendiary devices, regardless of the energy of the device. The degree of improvement will vary, depending on the airplane design and the specific device. However, when coupled with other security measures, the effect will be a significant improvement in safety for the public.

Since this final rule and the associated advisory circulars taken together provide clear performance measures, design objectives, and guidance, there is no need to discuss specific device capabilities. In addition, this is sensitive security information and cannot be publicly disclosed. We can be more specific with an applicant for a new type certificate should a particular proposed method of compliance require it. Accordingly, we have made no change to the rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there is no current or new requirement for information collection associated with this amendment.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

III. Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995).

In conducting these analyses, FAA has determined this rule has benefits that justify its costs, and is a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 because it raises novel policy issues contemplated under that executive order. The rule is also ''significant'' as defined in DOT's Regulatory Policies and Procedures. Accordingly, OMB has reviewed this final rule.

The rule will not have a significant economic impact on a substantial number of small entities, will not create unnecessary obstacles to international trade, and will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector. These analyses, are discussed below.

Summary of Costs and Benefits

The cost of a fatal aircraft accident involving terrorist bombing and hijacking can exceed one billion dollars. In addition to the direct costs of such an accident are associated costs of Congressional hearings, bankruptcy proceedings, and other litigation following such an accident. Finally, the psychological costs of such an accident are incalculable.

The total estimated costs of this rule are $1.4 billion ($360.0 million present value). This total includes the costs of certification and manufacturing as well as the incremental fuel burn. We estimate larger transport category aircraft costs at $1.3 billion ($326.7 million present value). Smaller transport category airplane costs are $88.8 million ($33.2 million present value).

We estimate the total benefits of this rule at $2.7 billion ($587.7 million present value). The operational benefits alone justify the costs of the rule.

Who Is Potentially Affected by This Rulemaking

Manufacturers and operators of new part 25 transport category airplanes.

Assumptions and Sources of Information

- Period of analysis: 2008 through 2061—While the period of analysis is driven by the estimated number of certifications and corresponding production period, this final rule would still be cost beneficial if analyzed over a 20-year period.
- Discount rate: 7%
- Terrorist Acts: Transportation Security Administration
- Civil Aviation Crimes: 2000 Crime Acts Report, Federal Aviation Administration
- Terrorist Acts: 9–11 Commission Report, July 22, 2004
- Costs of Terrorist Acts: ''September 11, 2001: Then and Now,'' John R. Jameson
- Costs of Terrorist Acts: ''The Economic Cost of Terrorism,'' Brian S. Wesbury, September 2002
- BACK Aviation Solutions: Fleet PC™
- Wong, Jinn-Tsai and Yeh, Wen-Chien ''Impact of Flight Accident on Passenger Traffic Volume of the Airlines in Taiwan,'' Journal of the Eastern Asia Society for Transportation Studies, vol. 5, October, 2003
- NASA 2004 Cost Estimating Handbook

Alternatives We Considered

The FAA considered reducing the size of transport category airplanes that would be subject to the requirements contained in this proposal because we believe that smaller airplanes—whether carrying passengers or cargo—are less likely to be the target of terrorists. However, given the importance of maintaining cabin security, this final rule will require protection of the flightcrew compartment for all transport category airplanes required by operating rules to have a flightdeck door.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify, and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

In the Initial Regulatory Flexibility Determination, we found that there would not be a significant economic impact on a substantial number of small entities. Entities potentially affected by this final rule include manufacturers and operators of part 25 transport category airplanes. We estimate direct cost and not secondary impacts or indirect cost, as measuring indirect costs is speculative and subject to double counting.

We received no comments regarding our initial determination, and our final regulatory flexibility determination is that this final rule will not have a significant economic impact on a substantial number of small entities.

In our classification, we use the size standards from the Small Business Administration. According to those standards, companies with fewer than 1,500 employees (in aircraft manufacturing) are small entities. All U.S. manufacturers of transport category airplanes have more than 1,500 employees; thus none are considered small entities.

A substantial number of operators which purchase larger affected aircraft might be classified as small entities and thus incur cost due to increased fuel consumption. Although a substantial number of small entities will be affected, operational cost savings alone are greater than the additional cost of fuel consumption. In addition, a substantial number of operators which purchase smaller affected aircraft will incur fuel cost due to the incremental weight increase. We estimate that the requirements contained in this final rule will add $2,600 in cost per smaller aircraft annually. This cost equates to roughly $200 per month per aircraft. We do not believe that this cost will be significant in the purchase and operation of a new airplane.

Therefore as the acting FAA Administrator, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–30) prohibits Federal agencies from engaging in any standards or engaging related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this rule and determined that it would promote international trade by standardizing security-related design features of part 25 airplanes and thereby comply with ICAO's international design standards.

In accordance with the Trade Agreements Act, the FAA used international aircraft safety standards as the basis for this rule and, therefore, is in compliance with the Act.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The value equivalent of $100 million in CY 1995, adjusted for inflation to CY 2007 levels by Consumer Price Index for all Urban Consumers (CPI–U) as published by the Bureau of Labor Statistics, is $136.1 million.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore would not have federalism implications.

Regulations Affecting Intrastate Aviation in Alaska

Section 1205 of the FAA Reauthorization Act of 1996 (110 Stat. 3213) requires the FAA, when modifying its regulations in a manner affecting intrastate aviation in Alaska, to consider the extent to which Alaska is not served by transportation modes other than aviation, and to establish appropriate regulatory distinctions. In the NPRM, we requested comments on whether the proposed rule should apply differently to intrastate operations in Alaska. We did not receive any comments, and we have determined, based on the administrative record of this rulemaking, that there is no need to make any regulatory distinctions applicable to intrastate aviation in Alaska.

Environmental Analysis

Order 1050.1E defines FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 3f and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this rulemaking under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is a ''significant regulatory action'' as defined in both Executive Order 12866, and DOT's Regulatory Policies and Procedures, the final rule is not a ''Significant Energy Action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Availability of Rulemaking Documents

You may obtain an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

2. Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/*; or

3. Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html*.

You may also obtain a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

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

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. You can find out more about SBREFA on the Internet at *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

List of Subjects

14 CFR Part 25

Aircraft, Aviation safety, Incorporation by reference

14 CFR Part 121

Aircraft, Aviation safety, Safety, Transportation.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration (FAA) amends parts 25 and 121 of Title 14, Code of Federal Regulations, as follows:

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 4794.

■ 2. Revise § 25.795 to read as follows:

§ 25.795 Security considerations.

(a) *Protection of flightcrew compartment.* If a flightdeck door is required by operating rules:

(1) The bulkhead, door, and any other accessible boundary separating the flightcrew compartment from occupied areas must be designed to resist forcible intrusion by unauthorized persons and be capable of withstanding impacts of 300 joules (221.3 foot pounds).

(2) The bulkhead, door, and any other accessible boundary separating the flightcrew compartment from occupied areas must be designed to resist a constant 250 pound (1,113 Newtons) tensile load on accessible handholds, including the doorknob or handle.

(3) The bulkhead, door, and any other boundary separating the flightcrew compartment from any occupied areas must be designed to resist penetration by small arms fire and fragmentation devices to a level equivalent to level IIIa of the National Institute of Justice (NIJ) Standard 0101.04.

(b) Airplanes with a maximum certificated passenger seating capacity of more than 60 persons or a maximum certificated takeoff gross weight of over 100,000 pounds (45,359 Kilograms) must be designed to limit the effects of an explosive or incendiary device as follows:

(1) *Flightdeck smoke protection.* Means must be provided to limit entry of smoke, fumes, and noxious gases into the flightdeck.

(2) *Passenger cabin smoke protection.* Means must be provided to prevent passenger incapacitation in the cabin resulting from smoke, fumes, and noxious gases as represented by the initial combined volumetric concentrations of 0.59% carbon monoxide and 1.23% carbon dioxide.

(3) *Cargo compartment fire suppression.* An extinguishing agent must be capable of suppressing a fire. All cargo-compartment fire suppression systems must be designed to withstand the following effects, including support structure displacements or adjacent materials displacing against the distribution system:

(i) Impact or damage from a 0.5-inch diameter aluminum sphere traveling at 430 feet per second (131.1 meters per second);

(ii) A 15-pound per square-inch (103.4 kPa) pressure load if the projected surface area of the component is greater than 4 square feet. Any single dimension greater than 4 feet (1.22 meters) may be assumed to be 4 feet (1.22 meters) in length; and

(iii) A 6-inch (0.152 meters) displacement, except where limited by the fuselage contour, from a single point force applied anywhere along the distribution system where relative movement between the system and its attachment can occur.

(iv) Paragraphs (b)(3)(i) through (iii) of this section do not apply to components that are redundant and separated in

accordance with paragraph (c)(2) of this section or are installed remotely from the cargo compartment.

(c) An airplane with a maximum certificated passenger seating capacity of more than 60 persons or a maximum certificated takeoff gross weight of over 100,000 pounds (45,359 Kilograms) must comply with the following:

(1) *Least risk bomb location.* An airplane must be designed with a designated location where a bomb or other explosive device could be placed to best protect flight-critical structures and systems from damage in the case of detonation.

(2) *Survivability of systems.*

(i) Except where impracticable, redundant airplane systems necessary for continued safe flight and landing must be physically separated, at a minimum, by an amount equal to a sphere of diameter

$$D = 2\sqrt{(H_0/\pi)}$$

(where H_0 is defined under § 25.365(e)(2) of this part and D need not exceed 5.05 feet (1.54 meters)). The sphere is applied everywhere within the fuselage—limited by the forward bulkhead and the aft bulkhead of the passenger cabin and cargo compartment beyond which only one-half the sphere is applied.

(ii) Where compliance with paragraph (c)(2)(i) of this section is impracticable, other design precautions must be taken to maximize the survivability of those systems.

(3) *Interior design to facilitate searches.* Design features must be incorporated that will deter concealment or promote discovery of weapons, explosives, or other objects from a simple inspection in the following areas of the airplane cabin:

(i) Areas above the overhead bins must be designed to prevent objects from being hidden from view in a simple search from the aisle. Designs that prevent concealment of objects with volumes 20 cubic inches and greater satisfy this requirement.

(ii) Toilets must be designed to prevent the passage of solid objects greater than 2.0 inches in diameter.

(iii) Life preservers or their storage locations must be designed so that tampering is evident.

(d) *Exceptions.* Airplanes used solely to transport cargo only need to meet the requirements of paragraphs (b)(1), (b)(3), and (c)(2) of this section.

(e) *Material Incorporated by Reference.* You must use National Institute of Justice (NIJ) Standard 0101.04, Ballistic Resistance of Personal Body Armor, June 2001, Revision A, to establish ballistic resistance as required by paragraph (b)(3) of this section.

(1) The Director of the Federal Register approved the incorporation by reference of this document under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You may review copies of NIJ Standard 0101.04 at the:

(i) FAA Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055;

(ii) National Institute of Justice (NIJ), *http://www.ojp.usdoj.gov/nij,* telephone (202) 307–2942; or

(iii) National Archives and Records Administration (NARA). For information on the availability of this material at NARA go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* or call (202) 741–6030.

(3) You may obtain copies of NIJ Standard 0101.04 from the National Criminal Justice Reference Service, P.O. Box 6000, Rockville, MD 20849–6000, telephone (800) 851–3420.

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 3. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

■ 4. Add § 121.295 to read as follows:

§ 121.295 Location for a suspect device.

After November 28, 2009, all airplanes with a maximum certificated passenger seating capacity of more than 60 persons must have a location where a suspected explosive or incendiary device found in flight can be placed to minimize the risk to the airplane.

Issued in Washington, DC on October 17, 2008.

Robert A. Sturgell,

Acting Administrator.

[FR Doc. E8–25476 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2006–25250; Amdt. No. 91–303]

RIN 2120–AI63

Special Awareness Training for the Washington, DC Metropolitan Area; OMB Approval of Information Collection

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; Notice of Office of Management and Budget approval for information collection.

SUMMARY: This notice announces the Office of Management and Budget's (OMB's) approval of the information collection requirement contained in the FAA's final rule, ''Special Awareness Training for the Washington, DC Metropolitan Area,'' which was published on August 12, 2008.

DATES: The FAA received OMB approval for the information collection requirements in § 91.161 on October 2, 2008. The rule will become effective on February 9, 2009.

FOR FURTHER INFORMATION CONTACT: John D. Lynch, Certification and General Aviation Operations Branch, AFS–810, General Aviation and Commercial Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3844.

SUPPLEMENTARY INFORMATION: On August 12, 2008, the FAA published the final rule, ''Special Awareness Training for the Washington, DC Metropolitan Area'' (73 FR 46797). The rule requires ''special awareness'' training for any pilot who flies under visual flight rules (VFR) within a 60-nautical-mile (NM) radius of the Washington, DC VHF omni-directional range/distance measuring equipment (DCA VOR/DME). The rule contains information collection requirements that had not yet been approved by the Office of Management and Budget at the time of publication. In the **DATES** section of the rule, the FAA noted that affected parties did not need to comply with the information collection requirements until OMB approved the FAA's request to collect the information.

In accordance with the Paperwork Reduction Act, OMB approved that request on October 2, 2008, and assigned the information collection OMB Control Number 2120–0734. The FAA request was approved by OMB

without change and expires on October 31, 2011. This notice is being published to inform affected parties of the approval and to announce that the information collection requirements of § 91.161 will become effective when the final rule becomes effective on February 9, 2009.

Issued in Washington, DC, on October 22, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E8–25608 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30635; Amdt. No. 477]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (ANCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR

Part 95 Airspace, Navigation (air).

Issued in Washington, DC on October 20, 2008.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, November 20, 2008.

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES AND CHANGEOVER POINTS

[Amendment 477 effective date November 20, 2008]

From	To	MEA	MAA
§ 95.4000 High Altitude RNAV Routes			
§ 95.4276 RNAV Route T276 Is Added To Read			
COUGA, WA FIX	CARBY, WA FIX	6500	17500

From	To	MEA
§ 95.6001 VICTOR AIRWAY V2 Is Amended To Read in Part		
LANSING, MI VORTAC	SALEM, MI VORTAC	#*5000

From	To	MEA
*3000–MOCA *3000–GNSS MEA #R–115 UNUSABLE BELOW 5000		
§ 95.6008 VOR FEDERAL AIRWAY V8 Is Amended To Read in Part		
HAYES CENTER, NE VORTAC	GRAND ISLAND, NE VORTAC	*5500
§ 95.6033 VOR FEDERAL AIRWAY V33 Is Amended To Read in Part		
BRADFORD, PA VOR/DME *5000–GNSS MEA #BFD R–006 UNUSABLE USE BUF R–187	BUFFALO, NY VOR/DME	#*11000
§ 95.6044 VOR FEDERAL AIRWAY V44 Is Amended To Read in Part		
FALMOUTH, KY VOR/DME	YORK, KY VORTAC	3300
YORK, KY VORTAC	PARKERBURG, WV VORTAC	3300
*KARRS, NJ FIX *7000–MRA **6000–MRA ***1300–MOCA ****2000–GNSS MEA	**GAMBY, NJ FIX	***7000
§ 95.6066 VOR FEDERAL AIRWAY V66 Is Amended to Read in Part		
ABILENE, TX VORTAC	TRUSS, TX FIX	3500
TRUSS, TX FIX	MILLSAP, TX VORTAC	3700
§ 95.6086 VOR FEDERAL AIRWAY V86 Is Amended To Read in Part		
SHERIDAN, WY VORTAC *7000–MOCA *7000–GNSS MEA	WETON, WY FIX	*10900
WETON, WY FIX *15000–MRA **7000–MOCA ***7000–GNSS MEA	*KOCYE, WY FIX	**13000
*KOCYE, WY FIX *15000–MRA **8600–MOCA **9000–GNSS MEA	KARAS, WY FIX	**13000
KARAS, WY FIX *9700–MRA **9400–MOCA **10000–GNSS MEA	*PACTO, SD FIX	**11100
*PACTO, DS FIX *9700–MRA **5500–MCA RAPID CITY, SD VORTAC, W BND **7100–MOCA	**RAPID CITY, SD VORTAC E BND W BND	.....
§ 95.6088 VOR FEDERAL AIRWAY V88 Is Amended To Read in Part		
VINTA, OK FIX *2300–MOCA *4000–GNSS MEA	NARCI, OK FIX	*4500
NARCI, OK FIX *3100–MOCA *4000–GNSS MEA	WACCO, MO FIX	*6500
§ 95.6115 VOR FEDERAL AIRWAY V115 Is Amended To Read in Part		
JAMESTOWN, NY VOR/DME	LANGS, NY FIX	3900
LANGS, NY FIX *3500–MOCA *5000–GNSS MEA	BUFFALO, NY VOR/DME	*11000
§ 95.6117 VOR FEDERAL AIRWAY V117 Is Amended To Read in Part		
BELLAIRE, OH VOR/DME	WISKE, WV FIX	3100
§ 95.6119 VOR FEDERAL AIRWAY V119 Is Amended To Read in Part		
WELLSVILLE, NY VORTAC	BURST, NY FIX	4500
BURST, NY FIX	GENESEO, NY VOR/DME	4000

From	To	MEA
§ 95.6128 VOR FEDERAL AIRWAY V128 Is Amended To Read in Part		
YORK, NY VORTAC	CROUP, OH FIX	3300
§ 95.6143 VOR FEDERAL AIRWAY V143 Is Amended To Read in Part		
POTTSTOWN, PA VORTAC	YARDLEY, PA VOR/DME	*6900
§ 95.6157 VOR FEDERAL VIRWAY V157 Is Amended To Read in Part		
ALLENDALE, SC VOR *2000–GNSS MEA	VANCE, SC VORTAC	*6000
§ 95.6159 VOR FEDERAL AIRWAY V159 Is Amended To Read in Part		
ORLANDO, FL VORTAC *3000–MRA	*SHIMM, FL FIX	2000
*SHIMM, FL FIX *3000–MRA	OCALA, FL VORTAC	2000
§ 95.6164 VOR FEDERAL AIRWAY V164 Is Amended To Read in Part		
BUFFALO, NY VOR/DME *11000–MRA **4400–MOCA **5000–GNSS MEA	*BENEE, NY FIX	**11000
*BENEE, NY FIX *11000–MRA **4500–MOCA **5000–GNSS MEA	WELLSVILLE, NY VORTAC	**6000
§ 95.6187 VOR FEDERAL AIRWAY V187 Is Amended To Read in Part		
RATTLESNAKE, NM VORTAC	RIZAL, CO FIX	9100
RIZAL, CO FIX	MANCA, CO FIX	10900
MANCO, CO FIX *1200–MOCA	HERRM, CO FIX	*15000
HERRM, CO FIX *10700–MCA GRAND JUNCTION, CO VORTAC, S BND	*GRAND JUNCTION, CO VORTAC	12100
§ 95.6198 VOR FEDERAL AIRWAY V198 Is Amended To Read in Part		
PEARL, LA FIX *1300–MOCA	DOGMA, MS FIX	*2300
DOGMA, MS FIX *4000–MRA **1300–MOCA	*ROMMY, MS FIX	**2800
§ 95.6221 VOR FEDERAL AIRWAY V221 Is Amended To Read in Part		
HOOSIER, IN VORTAC *3100–MOCA *4000–GNSS MEA #R–053 UNUSABLE.	SHELBYVILLE, IN VORTAC	#*6000
§ 95.6240 VOR FEDERAL AIRWAY V240 Is Amended To Read in Part		
PEARL, LA FIX *1300–MOCA	DOGMA, MS FIX	*2300
DOGMA, MS FIX *4000–MRA **1300–MOCA	*ROMMY, MS FIX	**2800
§ 95.6245 VOR FEDERAL AIRWAY V245 Is Amended To Read in Part		
JACKSON, MS VORTAC *3000–GNSS MEA	BIGBEE, MS VORTAC	*5000
§ 95.6278 VOR FEDERAL AIRWAY V278 Is Amended To Read in Part		
GUTHRIE, TX VORTAC *6500–MRA **3300–MOCA	*NIFDE, TX FIX	**4500
*NIFDE, TX FIX	BOWIE, TX VORTAC	**3300

From	To	MEA
*6500–MRA **2600–MOCA		
§ 95.6288 VOR FEDERAL AIRWAY V288 Is Amended To Read in Part		
LUCIN, UT VORTAC *13000–MRA *16000–MCA CORIN, UTA FIX, E BND **9400–MOCA	*CORIN, UTA FIX	**13000
*CORIN, UTA FIX *13000–MRA **11400–MOCA	FORT BRIDGER, WY VOR/DME	**16000
§ 95.6295 VOR FEDERAL AIRWAY V295 Is Amended To Read in Part		
ORLANDO, FL VORTAC *3000–MRA	*SHIMM, FL FIX	2000
*SHIMM, FL FIX *3000–MRA	OCALA, FL VORTAC	2000
§ 95.6305 VOR FEDERAL AIRWAY V305 Is Amended To Read in Part		
HOOSIER, IN VORTAC *2700–FNSS MEA #R–027 UNUSABLE.	BRICKYARD, IN VORTAC	#*2700
§ 95.6391 VOR FEDERAL AIRWAY V391 Is Amended To Read in Part		
DOVE CREEK, CO VORTAC *10500–MOCO	PAROX, CO FIX	*12000
PAROX, CO FIX *10700–MCA GRAND JUNCTION, CO VORTAC, S BND	*GRAND JUNCTION, CO VORTAC	12000
§ 95.6441 VOR FEDERAL AIRWAY V441 Is Amended To Read in Part		
GATORS, FL VORTAC	BRUNSWICK, GA VORTAC	3000
§ 95.6455 VOR FEDERAL AIRWAY V455 Is Amended To Read in Part		
PICAYUNE, MS VOR/DME *5000–MRA	*PLUGG, MS FIX	2000
*PLUGG, MS FIX	EATON, MS VORTAC	2000
§ 95.6493 VOR FEDERAL AIRWAY V493 Is Amended To Read in Part		
LEXINGTON, JY VORTAC	BEAER, KY FIX	3000
BEAER, KY FIX	YORK, KY VORTAC	3300
YORK, KY VORTAC	TARTO, OH FIX	3300
§ 95.6521 VOR FEDERAL AIRWAY V521 Is Amended To Read in Part		
*ORATE, FL FIX *3000–MRA **5000–MCA CROSS CITY, FL VORTAC, W BND **1400–MOCA	**CROSS CITY, FL VORTAC	***2000
CROSS CITY, FL VORTAC *7000–MCA HEVVN, FL FIX, W BND **1400–MOCA	*HEVVN, FL FIX	**5000
§ 95.6542 VOR FEDERAL AIRWAY V542 Is Amended To Read in Part		
BRADFORD, PA VOR/DME	EXALL, PA FIX	4500
EXALL, PA FIX	ELMIRA, NY VOR/DME	4000
§ 95.6552 VOR FEDERAL AIRWAY V552 Is Amended To Read in Part		
PICAYUNE, MS VOR/DME *6000–MRA	*MINDO, MS FIX	2000
*MINDO, MS FIX *6000–MRA	SEMMES, AL VORTAC	2000
§ 95.6578 VOR FEDERAL AIRWAY V578 Is Amended To Read in Part		
ALMA, GA VORTAC	SAVANNAH, GA VORTAC	*10000

From	To	MEA
*2000–MOCA *3000–GNSS MEA		
§ 95.6456 ALASKA VOR FEDERAL AIRWAY V456 Is Amended To Read in Part		
TUCKS, AK FIX *3300–MOCA	KENAI, AK VOR/DME	*5000
KING SALMON, AK VORTAC	STREW, AK FIX SW BND NE BND	
*2300–MOCA		
BITOP, AK FIX *5200–MOCA *8000–GNSS MEA, NE BND *6000–OPPOSITE GNSS MEA, SW BND	NOSKY, AK FIX	*9000
NOSKY, AK FIX *10300–MCA TUCKS, AK FIX, SW BND **12300–MOCA	*TUCKS, AK FIX	**13000
STREW, AK FIX	BITOP, AK FIX NE BND SW BND	
*5000–GNSS MEA		

From	To	MEA	MAA
§ 95.7001 Jet Routes			
§ 95.7225 JET ROUTE J225 Is Amended To Read in Part			
CEDAR LAKE, NJ VORTAC	KENNEDY, NY VOR/DME	18000	33000

[FR Doc. E8–25508 Filed 10–27–08; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

Instrument Flight Rule Altitudes in Designated Mountainous Areas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: The FAA is amending its regulations concerning the use of instrument flight rule (IFR) altitudes. Specifically, a duplicate coordinate in the description of the Eastern United States Mountainous Area is being removed.

DATES: This amendment becomes effective October 28, 2008.

FOR FURTHER INFORMATION CONTACT: Ellen Crum, Air Traffic Systems Operations, Airspace and Rules Group, ATO–R, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–8783, facsimile (202) 267–9328.

SUPPLEMENTARY INFORMATION:

Background

On April 28, 1956, FAA published a final rule revising the regulations concerning minimum en route IFR altitudes (21 FR 2750). Section 610.8 concerned the designation of mountainous areas. This section was later redesignated as § 95.13 (28 FR 6718, June 29, 1963).

When the section was originally written, one set of coordinates for the Eastern United States Mountainous Region (latitude 42°13′ N, longitude 72° 44′ W) was inadvertently repeated. This final rule removes the repeated coordinates to avoid confusion.

Technical Amendment

This technical amendment merely removes duplicate coordinates. There are no other changes to the list of coordinates.

Justification for Immediate Adoption

Because this action removes duplicated information, the FAA finds that notice and public comment under 5 U.S.C. section 553(b) is unnecessary. For the same reason, the FAA finds that good cause exists under 5 U.S.C. section 553(d) for making this rule effective upon publication.

List of Subjects in 14 CFR Part 95

Air traffic control, Airspace, Navigation (air).

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations, as follows:

PART 95—IFR ALTITUDES

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, and 14 CFR 11.49(b)(2).

■ 2. Amend § 95.13 by revising the text of paragraph (a) following the map to read as follows:

§ 95.13 Eastern United States Mountainous Area.

* * * * *

(a) * * *

Beginning at latitude 47°10′ N., longitude 67°55′ W.; thence west and south along the Canadian Border to latitude 45°00′ N., longitude 74°15′ W.; thence to latitude 44°20′ N., longitude 75°30′ W.; thence to latitude 43°05′ N., longitude 75°30′ W.; thence to latitude 42°57′ N., longitude 77°30′ W.; thence to latitude 42°52′ N., longitude 78°42′ W.; thence to latitude 42°26′ N., longitude 79°13′ W.; thence to latitude 42°05′ N., longitude 80°00′ W.; thence to latitude 40°50′ N., longitude 80°00′ W.; thence to latitude 40°26′ N., longitude 79°54′ W.; thence to latitude 38°25′ N., longitude 81°46′ W.; thence to latitude 36°00′ N., longitude 86°00′ W.; thence to latitude

33°37′ N., longitude 86°45′ W.; thence to latitude 32°30′ N., longitude 86°25′ W.; thence to latitude 33°22′ N., longitude 85°00′ W.; thence to latitude 36°35′ N., longitude 79°20′ W.; thence to latitude 40°11′ N., longitude 76°24′ W.; thence to latitude 41°24′ N., longitude 74°30′ W.; thence to latitude 41°43′ N., longitude 72°40′ W.; thence to latitude 42°13′ N., longitude 72°44′ W.; thence to latitude 43°12′ N., longitude 71°30′ W.; thence to latitude 43°45′ N., longitude 70°30′ W.; thence to latitude 45°00′ N., longitude 69°30′ W.; thence to latitude 47°10′ N., longitude 67°55′ W., point of beginning.

* * * * *

Issued in Washington, DC, on October 23, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E8–25692 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM01–5–000, Order No. 714]

Electronic Tariff Filings

October 22, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Energy Regulatory Commission published a document in the **Federal Register** on October 3, 2008 (73 FR 57515), revising Commission rules. That document inadvertently included two non-substantive errors in the instructions for the amendatory language. This document corrects those instructions.

DATES: *Effective Date:* Effective on November 3, 2008.

FOR FURTHER INFORMATION CONTACT: Andre Goodson, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8560, *Andre.Goodson@ferc.gov.*

SUPPLEMENTARY INFORMATION: In FR Doc. E8–22500 appearing on page 57515 in the **Federal Register** of Friday, October 3, 2008, the following corrections are made:

§ 35.13 [Corrected]

■ 1. On page 57532, in the second column, in § 35.13, instruction 14g is revised to read as follows: In paragraph (b)(3), the word ''schedule'' is removed; and the word ''mailed'' is removed, and the word ''posted'' is added in its place.

§ 35.14 [Corrected]

■ 2. On page 57532, in the third column, in § 35.14, instruction 15a is revised to read as follows: In paragraph (a), introductory text, the phrase ''(fuel clause)'' is added after the phrase ''Fuel adjustment clauses'', and the phrase '', tariffs or service agreements'' is added after the phrase ''rate schedules'' anywhere it appears in the paragraph's introductory text.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25611 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201, 208, and 209

[Docket No. FDA–2003–N–0313] (formerly Docket No. 2003N–0342)

RIN 0910–AC35

Toll-Free Number for Reporting Adverse Events on Labeling for Human Drug Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule that confirms the interim final rule entitled ''Toll-Free Number for Reporting Adverse Events on Labeling for Human Drug Products'' (73 FR 402, January 3, 2008) (interim final rule) and responds to comments submitted in response to the request for comments in the proposed rule of the same title (69 FR 21778, April 22, 2004) (proposed rule). This final rule affirms the interim final rule's requirement for the addition of a statement to the labeling for certain human drug products for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act (the act). The statement includes a toll-free number and advises that the number is to be used only for reporting side effects and is not intended for medical advice (the side effects statement). This final rule also affirms the interim final rule's addition of new part 209 to the regulations requiring distribution of the side effects statement. This final rule implements provisions of the Best Pharmaceuticals for Children Act (the BPCA) and the Food and Drug Administration Amendments Act of 2007 (FDAAA).

DATES: *Effective Date*: This final rule is effective November 28, 2008.

Compliance Date: The compliance date for this final rule is July 1, 2009. For more information on the compliance date see section II of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Carol Drew, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6306, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION:

I. Background

A. BPCA and Proposed Rule

The BPCA (Public Law 107–109) directed FDA to issue a final rule requiring the labeling of each human drug product for which an application is approved under section 505 of the act (21 U.S.C. 355) to include: (1) A toll-free number maintained by FDA for the purpose of receiving reports of adverse events regarding drugs and (2) a statement that the number is to be used for reporting purposes only, not to receive medical advice. Collectively, we refer to the toll-free number and reporting statement as the ''side effects statement.'' The BPCA stated that the final rule must implement the labeling requirement to reach the broadest consumer audience and minimize the cost to the pharmacy profession.

On April 22, 2004 (69 FR 21778), FDA published a proposed rule entitled ''Toll-Free Number for Reporting Adverse Events on Labeling for Human Drug Products.'' FDA received 22 comments on the proposed rule.

B. FDAAA Requirements and Interim Final Rule

On September 27, 2007, the President signed into law FDAAA (Public Law 110–85). Among other things, FDAAA reauthorized the BPCA. Section 502(f) of FDAAA stated that ''the proposed rule * * * 'Toll-Free Number for Reporting Adverse Events on Labeling for Human Drug Products' * * * shall take effect on January 1, 2008,'' unless FDA issues a final rule before that date. FDA was in the process of analyzing the comments on the proposed rule and conducting research on consumer comprehension of the proposed side effects statements when FDAAA was enacted. FDA did not issue a final rule prior to January 1, 2008. Therefore, by operation of law, the proposed rule took effect on January 1, 2008.

FDAAA mandated one change to the proposed rule. Section 502(f)(2) of

FDAAA states that the proposed rule shall not apply to over-the-counter (OTC) drugs marketed with an application approved under section 505 of the act (application OTC drug products) if these application OTC drug products meet certain labeling requirements.

On January 3, 2008 (73 FR 402), FDA published an interim final rule to: (1) Codify the modifications made by FDAAA to the proposed rule, (2) notify the public that the agency planned to complete the ongoing research testing the proposed side effects statements for consumer comprehension, and (3) establish a compliance date of January 1, 2009. The interim final rule stated that the agency did not intend to take enforcement action prior to January 1, 2009, and that the agency would complete the research on the side effects statements and either finalize the interim final rule as published or publish a final rule that amends the interim final rule.

II. Highlights of the Final Rule

The preamble to the proposed rule described the provisions of this rule in detail. In the preamble to the interim final rule we described the changes to the proposed rule required by FDAAA. In this final rule we respond to comments received on the proposed rule and finalize the regulations. No comments were received on the interim final rule.

As described in the interim final rule, one substantive change has been made to the regulatory provisions published in the proposed rule: Section 201.66(c)(5)(vii) (21 CFR 201.66(c)(5)(vii)) has been modified to require that only approved application OTC drug products whose packaging does not include a toll-free number through which consumers can report complaints to the manufacturer or distributor of the drug product are required to include the side effects statement in labeling. As discussed previously in this document, this modification was mandated by FDAAA.

In the interim final rule, FDA established a compliance date of January 1, 2009, and notified the public that we intended to exercise enforcement discretion and not take enforcement actions with regard to the effective regulations until January 1, 2009. In the interim final rule we stated that the effective date and implementation schedule for the final rule would be designed to minimize the burden of any additional regulatory changes for affected entities who must comply with the final rule. Since the publication of the interim final rule, we have received several inquiries about specific provisions of the interim final rule. Given the short time interval between the publication date of this final rule and the original compliance date of January 1, 2009, we are delaying the compliance date by six months to July 1, 2009. We believe this brief delay is appropriate because we have made no changes to the codified. All affected entities are required to be in compliance by July 1, 2009.

III. Comments and Agency Response

The agency received 22 comments on the proposed rule. Comments were received from prescription and nonprescription drug manufacturers; trade organizations representing drug manufacturers; pharmacists, pharmacies, and pharmacy-related interests; consumer organizations; professional associations and organizations; one member of Congress; one agency of a foreign government; and others.

To make it easier to identify comments and our responses, the word ''Comment,'' in parentheses, appears before the comment's description, and the word ''Response,'' in parentheses, appears before our response. We have numbered each comment to help distinguish between different comments. Similar comments are grouped together under the same number. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which it was received. A summary of the comments received and our responses follow.

A. Scope of the Rule

(Comment 1) The agency received 7 comments opposing the proposed requirement that the labeling for application OTC drug products contain the toll-free number and statement mandated by the BPCA. These comments argued that Congress did not intend the BPCA requirements to apply to application OTC drug products.

(Comment 2) Two comments suggested that FDA limit the applicability of the regulatory provisions to new drugs that have been approved for marketing within 5 years of the date of the final rule, and that the regulation's requirements attach for only 5 years following a new drug's approval. These comments requested that FDA limit the regulatory provisions to the approximately 30 new molecular entities (NMEs) that are approved each year for the 5-year period after they are approved and suggested that reporting should be targeted to encourage consumer reporting of adverse reactions from newer drugs.

(Response) Section 17 of the BPCA required that the labeling of each drug for which an application is approved under section 505 of the act include the toll-free number and statement. Because OTC drug products may be approved under section 505 of the act, we proposed that the labeling for all application OTC drug products contain the BPCA mandated requirements. However, in section 502(f)(2) of FDAAA, Congress stated that the proposed rule shall not apply to OTC drugs marketed with an application approved under section 505 of the act if these application OTC drug products meet certain labeling requirements. Specifically, section 505(f)(2) of the act states that the proposed rule shall not apply to a drug: (1) For which an application is approved under section 505 of the act; (2) that is not described under section 503(b)(1) of the act (21 U.S.C. 353(b)(1)); and (3) the packaging of which includes a toll-free number through which consumers can report complaints to the manufacturer or distributor of the drug. In the interim final rule, we stated that this provision means that the proposed provisions do not apply to application OTC drug products if the product's packaging includes a manufacturer's or distributor's toll-free number for reporting complaints. Accordingly, this final rule includes a modified § 201.66(c)(5)(vii) reflecting the changes to the proposed rule required by FDAAA.

As to the comments suggesting that we limit the scope of the rule to a specific subset of NMEs or for a specific number of years for specific products, we note that neither the BPCA nor FDAAA gives FDA the legal authority to limit the scope of the rule in this way. The BPCA requires that the labeling of each drug product approved under section 505 of the act, regardless of the date on which approved, include the side effects statement.

B. Wording of the Side Effects Statement

As stated in the preamble to the proposed rule, section 17 of the BPCA requires that the labeling for each drug approved under section 505 of the act include: (1) A toll-free number maintained by FDA for the purpose of receiving reports of adverse events regarding drug products and (2) a statement that the number is to be used for reporting purposes only, not to seek medical advice. FDA considered these requirements and proposed a conforming statement for prescription drug products: ''Call your doctor for

medical advice about side effects. You may report side effects to FDA at 1–800–FDA–1088.''

As stated in the preamble to the proposed rule, the drug facts labeling format for OTC drug products required us to modify the side effects statement to correspond to the drug facts format (§ 201.66). The OTC requirement was included in the specific subheadings for presenting warnings in the drug facts format (§ 201.66(c)(5)(vii)). In combination with the requirements of § 201.66(c)(5)(vii), the labeling provision for the application OTC drug products was proposed to read: ''Stop use and ask a doctor if • side effects occur. You may report side effects to FDA at 1–800–FDA–1088.''

We solicited comments on the proposed wording of the side effects statements and on whether the term ''side effects'' should be further qualified.

(Comment 3) We received several comments suggesting that we test on consumers the proposed language for the side effects statements, as well as alternatives, to evaluate consumer comprehension and determine the best and most precise terminology for the statement.

(Comment 4) Among the comments we received on the proposed wording of the side effects statement, one comment asserted that the proposed statement is concise and makes it clear that the number is not for medical advice. Several comments suggested specific additions to the wording of the statements, including: Using the term ''health care professional'' instead of, or in addition to, the term ''doctor''; adding the term ''pharmacist'' to the statement to suggest that consumers call either their doctor or pharmacist for medical advice about side effects; adding wording to clarify that FDA does not give medical advice and is not offering medical consultation; and/or adding wording to clarify that FDA should not be called in case of medical emergency and that FDA should only be called once any medical emergency is resolved.

(Comment 5) Of the six comments we received on whether to use the term ''side effects'' or ''adverse event,'' five supported use of the term ''side effects'' as more consumer friendly. Of those comments, two suggested qualifying the term with ''serious'' and one opposed adding any qualifications to the term. Those suggesting qualifying the term were concerned about FDA receiving numerous unnecessary reports about side effects that are well-known and expected, not serious; the comment opposed to qualifying the term was concerned that qualifying the statement would limit the types of events reported, discourage consumers from reporting, and hinder the agency's ability to identify trends from reporting. One comment suggested that use of the term ''side effects'' would have a negative effect on drug marketing.

(Comment 6) Among the comments we received on the wording of the side effects statement for application OTC drug products were comments opposing the inclusion of the statement in the ''warnings'' section of the drug facts format and the specific ''stop use'' language that section requires. One comment suggested placing the side effects statement under the ''when using this product'' subheading as the last bullet, so that the labeled adverse events precede the side effects statement. Comments opposed the ''stop use'' language on the grounds that stopping use of an OTC drug product may be inappropriate. Comments also stated that the ''stop use'' language has a greater impact on OTC drug products than it does on prescription drug products, i.e., there is no corresponding requirement telling consumers using prescription drug products to stop using the product if they experience a side effect. Several comments also stated that because the drug facts format requires a telephone number for consumers to call to get answers to questions, there would be confusion caused by having more than one phone number in the labeling for consumers to call.

(Response) After reviewing the comments received on the proposed rule, FDA initiated a two-part study to test consumer comprehension of the wording of the proposed side effects statements. Part one of the study consisted of focus groups held to narrow the field of potential statement alternatives. When describing the side effects statement for prescription drug products, participants in the focus groups were asked whether they preferred the use of ''doctor'' or ''health care provider,'' ''doctor'' or ''doctor or pharmacist,'' ''serious side effects'' or ''side effects,'' and ''adverse events'' or ''side effects,'' in the statement, as well as other language variations. The focus groups were completed in 2006 (OMB Control No. 0910–0497).

The second part of this research was a labeling comprehension experimental study conducted over the Internet (OMB Control No. 0910–0603). Nine statements were tested as informed by the prior focus group testing. A total of 1,674 men and women ranging in age from 21 to 95 with varying levels of education completed the study. Five different versions of the side effects statement for prescription drug products and four different versions of the side effects statement proposed for application OTC drug products were tested. Approximately 40 percent of the sample of consumers saw one of the four OTC side effects statements and the other 60 percent of the sample saw one of the five prescription drug side effects statements. FDA's final report on the study was completed in 2008 and is available in the docket for this rule.

In answer to questions about the best wording for the side effects statement, only one of the statements tested was significantly less clear than the others. We eliminated this statement from consideration. All other statements were rated very similarly by participants. Participants who responded to the side effects statements for prescription drugs responded nearly identically to participants who responded to the side effects statements for OTC drug products. Given these results, FDA concluded that in choosing among the statements, considerations such as length, readability, and other factors could be used to select among the remaining side effects statements. Taking into account the results from the labeling comprehension study and other factors, we have chosen to finalize the side effects statements as originally proposed.

Additionally, to address comments received indicating concern that consumers would call FDA for medical advice and suggested language changes to prevent this, we queried participants in the study about whether they would choose to call FDA or their doctor in certain circumstances. Participants did not show an inclination to call FDA for medical advice. Among those that indicated a willingness to call FDA at all, the majority appropriately indicated that FDA was for reporting side effects and their doctors were for personal medical advice. Most individuals indicated that they would contact their doctor first regardless of the particular side effect they experienced. We conclude from this finding that the language proposed for the side effects statement is sufficient to convey the intention of the BPCA requirement that the statement is to be used for reporting purposes only, not to receive medical advice.

Similarly, with regard to concerns that we should qualify the type of side effect that should be reported to FDA by adding the word ''serious'' to ''side effect'' because FDA would receive numerous unnecessary reports, our research indicates that consumers are able to distinguish between serious and non-serious side effects and would

contact their doctor or hospital emergency room in the case of a ''serious side effect.'' A doctor who determines that a patient has had a serious side effect from a drug product may then report the side effect to FDA.

Regarding the comments we received on the specific language of the OTC side effects statement and its placement in the ''warnings'' section of the drug facts format, we disagree that placement in the ''warnings'' section is inappropriate or that the ''stop use'' language is inappropriate. The warnings section of the drug facts format label for OTC drug products may include several statements about possible side effects, telling consumers when to consult a doctor, pharmacist, or other health care professional in the use of the product. Consumers using OTC drug products most likely are not under the direct care of a health care practitioner, whereas consumers using prescription drug products are under the care of a health care practitioner. We believe it is appropriate for the side effects statement to instruct consumers using an OTC drug product who believe they are experiencing a side effect to stop using the drug product and consult their doctor before continuing use of the product.

We do not agree that having more than one phone number in the drug facts format labeling would be confusing to consumers. The agency's toll-free number clearly indicates it is an FDA phone number for reporting side effects. Our research indicates that the OTC side effects statement is understood by consumers. Moreover, section 502(f)(2) of FDAAA states that application OTC drug products that include a toll-free number through which consumers can report complaints to the manufacturer or distributor of the drug product are not required to include the side effects statement. In all likelihood this means that fewer application OTC drug products will have FDA's side effects statement in their labeling. Therefore, we anticipate that the majority of application OTC drug products will not have more than one phone number in their labeling for reporting side effects, reducing any potential for confusion.

C. Location of the Side Effects Statement in FDA-Approved Labeling

We proposed to require the side effects statement in two categories of drug product labeling: (1) FDA-approved Medication Guides for drugs approved under section 505 of the act, and (2) the labeling for application OTC drug products. We stated that manufacturers voluntarily may include the side effects statement in Medication Guides for products not approved under section 505 of the act or in patient package inserts (PPIs). For reasons stated in the proposed rule, we did not propose requiring the side effects statement in physician labeling or PPIs, but we solicited comments on those two issues. In addition, we proposed that the side effects statement be distributed with each prescription drug product, both new and refills, approved under section 505 of the act and dispensed to consumers by pharmacies and authorized dispensers in an outpatient setting.

(Comment 7) We received one comment stating that the side effects statement should be on all package labeling, including refills, to ensure maximum consumer exposure so that when consumers experience a side effect, they will find the side effects statement wherever they turn first for information.

(Comment 8) One comment suggested that instead of putting the side effects statement in drug product labeling, FDA's MedWatch telephone number appear in public telephone books next to the Poison Control phone number.

(Comment 9) Another comment suggested that consumers be given small magnets with FDA's MedWatch phone number obviating the need for repeated dispensing of this information each time a patient visits a pharmacy.

(Response) We believe that the requirements of this final rule will ensure that the side effects statement reaches a broad consumer audience while minimizing the burden on the pharmacy profession, as required by the BPCA. We require that the side effects statement appear in Medication Guides for drug products approved under section 505 of the act and in the labeling for certain application OTC drug products, and that pharmacies distribute the statement with all new prescriptions and refills for drug products approved under section 505 of the act. Under the BPCA, Congress required that FDA include the side effects statement in the labeling of each drug product approved under section 505 of the act. Placing the number in public telephone books or on magnets given to consumers would not satisfy the legal requirements of the BPCA.

(Comment 10) We received three comments supporting the inclusion of the side effects statement in approved Medication Guides. One comment suggested that this be the exclusive place for the labeling requirement. We do not agree that requiring the side effects statement exclusively in Medication Guides would satisfy the requirements of the BPCA. FDA-approved Medication Guides are prepared by manufacturers for a limited number of drug products that FDA determines pose a ''serious and significant public health concern'' (21 CFR 208.1). Given the limited number of drug products that have FDA-approved Medication Guides, only requiring the side effects statement in Medication Guides would not satisfy the BPCA requirement to reach the broadest consumer audience.

(Response) We did not propose including the side effects statement in physician labeling. In the proposed rule we stated that while consumers have access to physician labeling reprinted in the Physician Desk Reference (PDR), physician labeling is not written for the consumer audience. We solicited comments on this issue.

(Comment 11) We received one comment supporting our decision not to include the side effects statement in physician labeling. This comment agreed that physician labeling is not intended or written for a consumer audience and that it is not necessary to include both a manufacturer's name and telephone number and FDA's telephone number in physician labeling.

(Comment 12) We received three comments suggesting we require the side effect statement in physician labeling. These comments argued that some consumers may obtain physician labeling either over the Internet or upon request from their pharmacist and that FDA's toll-free number should be in all FDA-approved prescription labeling to ensure its widest exposure.

(Response) At the time the proposed rule was written, the agency's proposed rule to revise the physician labeling requirements in §§ 201.56 and 201.57 (21 CFR 201.56 and 201.57) was under review (the physician labeling rule). On January 24, 2006, the agency published the final physician labeling rule (71 FR 3922). Section 201.57 of the physician labeling rule requires that the following verbatim statement appear in the highlights section of the prescribing information under ''adverse reactions'' (§ 201.57(a)(11)(ii)): ''To report SUSPECTED ADVERSE REACTIONS, contact (insert name of manufacturer) at (insert manufacturer's phone number) or FDA at (insert current FDA phone number and Web address for voluntary reporting of adverse reactions).'' As physician labeling is written for the medical profession, the term ''adverse reactions'' was selected for this statement instead of the more consumer-friendly term ''side effects.'' While placing this newly required statement in the highlights section of physician labeling will alert consumers who

consult or refer to physician labeling that they can report adverse reactions directly to FDA at the MedWatch telephone number or Web site, the agency concludes that pharmacies' distribution of only the physician labeling containing this statement would not be sufficient to satisfy the requirement of the BPCA to reach the broadest consumer audience. In addition, the statement required under the physician labeling rule does not include the statement required by the BPCA that the phone number be used only for reporting side effects and not to obtain medical advice. Therefore, while the MedWatch phone number for reporting side effects has been added to physician labeling through the physician labeling rule, distributing physician labeling has not been added to this rule as a means for pharmacies to meet the requirements of distributing the side effects statement.

The proposed rule did not include the side effects statement in PPIs. PPIs are required by FDA for certain drug products, including oral contraceptives and estrogen drug products (21 CFR 310.501 and 310.515) and, in addition, some manufacturers also voluntarily produce PPIs for drug products. PPIs are based on physician labeling and are often distributed to consumers when the drug product is dispensed. In the preamble to the proposed rule, we stated that manufacturers may voluntarily include the side effects statement in PPIs. We solicited comments on this issue.

(Comment 13) We received five comments suggesting that we reconsider our decision not to include the side effects statement in PPIs. Of these four comments, one suggested that the PPI could be the first source of information consumers turn to when they experience a side effect; one suggested that it may be beneficial for consumers to see the statement more than once; one stated that including the statement in PPIs was a viable option; and two stated that requiring the side effects statement in PPIs would be a way to minimize the impact of the rule on pharmacies.

(Response) We have considered these comments and have concluded that, in consideration of the other requirements in this rule, requiring manufacturers to include the side effects statement in PPIs would have a minimal impact on meeting the goals of the BPCA. Furthermore, since drug products with FDA-approved PPIs are a subset of all prescription drug products, requiring the side effects statement in PPIs would most likely require pharmacies to maintain a tracking system to identify which drug products have a compliant PPI in order for pharmacies to know whether they had distributed the side effects statement through the PPI in compliance with this rule. Therefore we conclude that it is unlikely that adding the statement to PPIs would minimize the burden of this rule on pharmacies, and it is more likely that pharmacies would choose one of the other proposed five methods of distributing the side effects statement. As stated in the preamble to the proposed rule, manufacturers may voluntarily add the side effects statement to PPIs, however we are not adding the distribution of a PPI to the list of options available to authorized dispensers or pharmacies for compliance with this rule.

(Comment 14) We did not require manufacturers to provide the side effects statement on labeling for unit-of-use drug products. We received three comments stating that FDA could minimize the impact of the rule on pharmacies by requiring manufacturers of unit-of-use drug products to provide the side effects statement on the labeling of the exterior package.

(Response) We have considered these comments and have concluded that the proposed provisions are adequate to address the goals of the BPCA to reach a broad consumer audience; therefore we are not requiring that manufacturers add the side effects statement to unit-of-use labeling. In addition, requiring the side effects statement in the labeling for unit-of-use drug products is unlikely to decrease the burden of this rule on pharmacies, since pharmacies would most likely have to maintain a tracking system to know whether they had distributed the side effects statement through dispensing a unit-of-use drug product in compliance with this rule. We believe it is more likely that pharmacies would choose one of the other five proposed methods of distributing the side effects statement. Consumers will receive the side effects statement when the unit-of-use drug product is dispensed by an authorized dispenser or pharmacy using one of the five distribution methods proposed.

(Comment 15) We did not require health care practitioners who dispense drug samples in the course of their professional practice to distribute the side effects statement. The proposed rule stated that patients receiving drug products in these circumstances will rely on their health care practitioners to monitor and report adverse events. We received two comments asking us to require distribution of the side effects statement with drug samples.

(Response) Drug samples generally are given to consumers in conjunction with a new prescription. Patients who initially receive drug samples are under the care of their doctor or health care practitioner and generally use them in the short term and followup by filling a new prescription. For a drug product approved under section 505 of the act, consumers will receive the side effects statement upon filling the new prescription for the drug product for which they initially received a sample. We recognize that there may be situations in which health care practitioners provide drug samples to patients on an ongoing basis, such as in clinics for low-income patients. However such patients should be instructed by the health care practitioner providing the drug sample as to its directions for use and possible side effects. We do not believe that the benefit of requiring that the side effects statement be distributed with drug samples would be balanced by the burden such a requirement would impose on health care practitioners.

D. Distribution of Side Effects Statement by Pharmacies and Authorized Dispensers

We proposed that the side effects statement be distributed with each prescription drug product, both new and refills, approved under section 505 of the act and dispensed to consumers by pharmacies and authorized dispensers in an outpatient setting. We proposed five options through which pharmacies and authorized dispensers could distribute the side effects statement, including the following: (1) On a sticker attached to the package, vial, or container of the drug product; (2) on a preprinted pharmacy prescription vial cap; (3) on a separate sheet of paper; (4) in consumer medication information (CMI); or (5) by distributing the appropriate FDA-approved Medication Guide that contains the side effects statement. We solicited comments on other options pharmacies might use for distribution.

(Comment 16) We received one comment opposing a requirement to place the side effects statement directly on the label of the prescription vial or container. This comment stated that in many cases the vials or containers are already too crowded, and requiring another sticker on the container could crowd out more important labels and reduce the importance consumers ascribe to these labels both because of the number of stickers and because of the placement of secondary information in the stickers. We received one comment supporting the placement of the side effects statement on an auxiliary label. We received another comment stating that the most logical

place for the side effects statement to appear is in the CMI for the drug product. Another comment suggested that CMI not be the only means of communicating the toll-free number, as some pharmacies may not dispense CMI for refill prescriptions.

(Comment 17) We received several comments supporting our proposal to provide multiple options for pharmacies and authorized dispensers to distribute the side effects statement. We received two comments stating that while we indicated we exercised discretion in giving affected pharmacies flexibility in complying with the law by providing options, we failed to impose a proportionate burden on manufacturers. One comment stated that it is entirely feasible for manufacturers to adhere multiple copies of printed leaflets onto bulk containers of drug products that pharmacy personnel can then remove from bulk containers and dispense with each prescription filled.

(Comment 18) We received two comments expressing concern about the potential for consumers to lose or dispose of paper messages (e.g., the consumer medication information option or the separate sheet of paper option). One of these comments requested that we require manufacturers and pharmacists to work together to include the side effects statement on either the sticker or preprinted vial cap with any separate printed materials provided as a supplement. This comment stated that if the package has no cap, if there is no room on a package for a sticker, or if the product already requires a sticker for a different reason, they would suggest that the sticker be included inside the package so that consumers can affix the sticker in a place useful to them, such as a medicine chest or pill caddy. Another comment requested that we allow pharmacies the option to distribute the side effects statement by printing it directly on the bag in which the pharmacy puts prescription drugs before handing them to consumers.

(Comment 19) Two comments requested that pharmacies be allowed the option to e-mail the side effects statement to consumers along with notice to these consumers that their prescriptions are ready. These comments stated that this would obviate the need for the pharmacy to provide the patient with a paper version of the statement when the prescription is picked up. We received two comments requesting that we allow pharmacists to exercise their judgment and discretion in distributing the statement to a consumer if a pharmacist is reasonably sure that a consumer already knows about the agency's toll-free number.

(Response) We have considered the comments received and conclude that the range of options provided to pharmacies to distribute the side effects statement is adequate to meet the requirements of the BPCA. We disagree that placing the side effects statement on the pharmacy bag, sending the side effects statement by e-mail when a consumer is notified their prescription is ready, or providing the side effects statement on a separate sticker that consumers could then affix to their medicine chest or pill caddy would effectively reach the broadest consumer audience. While we recognize that a consumer may throw away any attachment a pharmacist provides when dispensing a drug product, including the CMI or a separate sheet of paper, there is an even greater likelihood that a consumer would throw away the pharmacy bag that the prescription came in or a small separate sticker, and thus would not have the side effects statement in proximity to the drug product when needed. Similarly, e-mail is easily deleted, and including the side effects statement in an e-mail notifying consumers when their prescription is ready makes it likely that the consumers will delete the e-mail before they even pick up the prescription.

Pharmacies may provide voluntarily a separate sticker to consumers with the side effects statement for attachment in the home as a public service if they choose; however, distribution of such a separate sticker would not meet the distribution requirements of this rule. Similarly, pharmacies may provide the side effects statement voluntarily on pharmacy bags or via e-mail, but distribution of the side effects statement using these methods likewise would not meet the distribution requirements of this rule. Also, we note that there is no provision in the BPCA or FDAAA that would allow us to grant pharmacists the right to exercise their judgment or discretion in deciding whether or not to distribute the side effects statement to an individual consumer.

E. Use of MedWatch System for Consumer Reporting

As stated in the preamble to the proposed rule, we proposed that FDA's existing MedWatch system be used to fulfill the requirements of the BPCA for providing a toll-free number for the purpose of receiving adverse event reports regarding drug products. While we received comments supporting the use of the MedWatch system to capture consumer's postmarket safety information, we received several comments suggesting changes to the MedWatch system. These comments are beyond the scope of this rule. This rule does not make specific changes to the MedWatch system.

F. Postmarketing Safety Reporting

While the proposed rule suggested no changes to FDA's postmarketing safety reporting system, we received several comments about our postmarketing safety reporting system and how data received from the side effects statement would affect the system. These comments are beyond the scope of this rule. This rule does not make specific changes to FDA's postmarketing safety reporting system.

G. Implementation of Regulation

(Comment 20) We received one comment expressing dissatisfaction with the agency for not implementing the rule in a timelier manner. This comment also stated that the compliance date FDA proposed was too long and suggested a bifurcated compliance structure whereby pharmacies would notify consumers immediately of the toll-free number, and manufacturers would have 1 year to make any required labeling changes. We also received comments supporting the 1-year compliance period from both pharmacy interests and drug manufacturing interests. These comments noted that pharmacies and drug manufacturers need time to integrate any printing/labeling changes into existing systems.

(Response) In implementing the requirements of the BPCA and FDAAA, we believe it is important to work with stakeholders and provide time for updating labels and systems so that we reach the best possible outcome for constituent groups, including consumers, pharmacists and other health care professionals, drug manufacturers, and the agency. With the publication of this final rule, we believe we have implemented the provisions of the BPCA and FDAAA effectively.

(Comment 21) Two comments suggested that, after full implementation of the laws and all necessary modifications to the MedWatch system, FDA undertake extensive consumer outreach, educating the public about the right to report under the new provisions. One comment suggested that FDA, in cooperation with the OTC drug manufacturers, implement a public relations program to raise consumer awareness of the necessity of reporting unexpected adverse events to the product manufacturer. These comments stated that FDA should work with consumer educators and health

professionals to provide clear information and educational materials on how, what, and when to report. Another comment suggested the agency add specific questions to the ongoing National Survey of Prescription Medicine Information Received by Consumers (at the physician's office and pharmacy) to track awareness of the side effects statement and to determine to what extent consumers contact FDA to report a side effect.

(Response) The agency is in the process of implementing numerous safety initiatives under FDAAA that will benefit consumers. Section 906(a) of FDAAA requires published direct-to-consumer advertisements to include a statement encouraging reporting of negative side effects to FDA and providing the MedWatch Web site and phone number. Given that section 502(f)(2) of FDAAA likely will reduce the number of voluntary reports FDA receives on application OTC drug products as a result of this rule, we do not believe it is necessary to undertake an extensive educational campaign targeted at voluntary reporting for application OTC drug products at this time. However, should our experience with reporting under these new provisions indicate otherwise, we will consider whether educational efforts for the general public would be beneficial.

In addition, we note that the National Survey of Prescription Medicine Information Received by Consumers is not currently ongoing. If this survey is reinstated at a future date, we will consider adding specific questions relevant to the side effects statement at that time as suggested by the comment.

IV. Analysis of Impacts

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the impact of the final rule will be proportional to sales volumes, the agency concludes that this final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $127 million, using the most current (2006) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

In accordance with Executive Order 12866, FDA has previously analyzed the potential economic effects of this final rule. We estimated that annualized costs of the proposed rule would be $9.3 million to $22.6 million (69 FR 21778 at 21783). For the final rule, we project that one-time costs will range from approximately $38.0 million to $49.6 million and annual costs will range from $12.4 million to $46.3 million. The total annualized impact of the final rule will range from $16.9 million to $52.2 million with a 3-percent discount rate and from $17.8 million to $53.4 million with a 7-percent discount rate. We are unable to quantify the benefits of the final rule. Although the estimated costs of this final rule are higher than the estimated costs of the preliminary regulatory impact analysis, the agency has determined that the rule is not an economically significant regulatory action as defined by the order.

A. Need for Regulation

The BPCA required that the labeling of each drug approved under section 505 of the act be accompanied by a toll-free number and statement that the number is for reporting adverse events, not to receive medical advice. Because OTC drug products may be approved under section 505 of the act, we proposed that the labeling for all application OTC drug products include the side effects statement. Subsequently, FDAAA exempted any application OTC drug products whose packaging includes a toll-free number that consumers can call to report complaints to the manufacturer or distributor of the product. Consequently, to fulfill these statutory requirements, the final rule will require pharmacies and authorized dispensers to provide patients with the side effects statement with each dispensed prescription drug, and will require drug manufacturers to include the side effects statement in FDA-approved Medication Guides for drugs approved under section 505 of the act and in the labeling of application OTC drug products not subject to the exclusion in section 502(f)(2) of FDAAA.

B. Costs of Regulation

(Comment 22) Most comments on the costs of the proposed rule asserted that we understated the number of affected OTC drug products and the costs to modify OTC drug product labeling.

(Response) In most cases, however, changes under FDAAA made many of these comments irrelevant. As noted in this final analysis, we have updated the initial analysis with current numbers whenever possible.

1. Pharmacy Industry

a. *Number of affected pharmacies.* We received no comments on our initial estimate of the number of pharmacies affected by the requirement to include the side effects statement with each dispensed prescription drug. For the final analysis, we update the number of affected outlets with data from the 2002 Economic Census on the number of establishments that have merchandise sales from prescription drugs (table 1 of this document). Both retail and nonretail pharmacies may dispense prescription drugs to patients. Retail channels include independent drug stores, chain drug stores, mass merchants, grocery stores with pharmacies, and mail or Internet services. Nonretail channels include health maintenance organizations (HMOs), hospital outpatient pharmacies, offices of health care practitioners, and ambulatory care clinics.

The agency solicited comment on its assumptions about the percentages of affected dispensing locations currently distributing some form of printed CMI (69 FR 21783). Because no comments were received and the agency has no other information about pharmacy practices, we continue to assume that printed CMI accompanies: (1) 89 percent of the prescriptions dispensed by retail pharmacies, (2) 89 percent of prescriptions dispensed in ambulatory outpatient settings, and (3) 0 percent of prescriptions dispensed in other health care settings. Table 1 of this document shows the estimated number of affected outlets distributing CMI.

b. *Prescriptions dispensed.* Although information on the number of prescriptions dispensed by retail

channels is publicly available, it is difficult to estimate the number of prescriptions dispensed by nonretail channels. For the initial analysis of impacts, we used 2001 data from IMS Health to approximate the volume of prescriptions from nonretail channels. Based on the IMS data, nonretail channels dispensed from 6 percent to 18 percent of the prescription volume dispensed from retail channels (69 FR 21778 at 21784). Although we solicited comment on our estimate, we received no additional information. Thus, we assume that the percentage of prescriptions dispensed by retail and nonretail outlets remains similar to our initial estimate. In 2007, IMS Health estimated that retail channels dispensed approximately 3.8 billion prescriptions (http://imshealth.com/vgn/images/portal/CIT_40000873/39/53/834329692007%20Channel%20Distribution%20by%20RXs.pdf). We estimate that nonretail channels dispensed from 228 million (6 percent of 3.8 billion) to 671 million (18 percent of 3.8 billion) prescriptions, for a total volume of prescriptions in 2007 ranging from 4.0 billion (= 3.8 billion + 0.2 billion) to 4.5 billion (= 3.8 billion + 0.7 billion).

c. *Compliance costs for pharmacies.* For the initial analysis of impacts, we assumed that pharmacies currently distributing printed CMI would choose to comply with the requirements of the proposed rule by distributing the side effects statement in the CMI. We anticipated that the side effects statement could be added to existing pharmaceutical information databases used to produce CMI at a negligible one-time cost. Moreover, we assumed that periodic updates of other drug labeling information included in pharmaceutical databases required pharmacies or their computer system vendors to test the printing of the CMI on a regular basis. Because most pharmacies distribute printed CMI, we assumed that only pharmacies and authorized dispensers not currently providing printed CMI would incur incremental costs to comply with the requirements of the proposed rule.

TABLE 1—NUMBER OF PHARMACY OUTLETS WITH SALES OF PRESCRIPTION DRUGS AND DISTRIBUTING PRINTED CONSUMER MEDICATION INFORMATION (CMI)

Type of Outlet	Number of Outlets[1]	Number of Outlets Distributing CMI
Retail outlets:		
Pharmacy, drug, and health care stores	39,159	34,711
Food and beverage stores	20,227	18,002
Warehouse clubs and supercenters	2,553	2,502
Other general merchandise stores	5,469	4,867
Electronic shopping	88	78
Mail-order houses	365	325
Other direct selling establishments	26	23
Nonretail outlets:		
Offices of health practitioners	7,424	0
Hospital outpatient services	5,506	0
Clinics	3,117	2,774
HMOs	162	144
Total outlets	84,096	63,427

Sources: Retail outlets from table 1 of 2002 Economic Census, Retail Trade, Subject Series, publication number EC02–44SL–LS issued October 2005; Nonretail outlets from 2002 Economic Census, Health Care of Social Assistance, Subject Series, publication number EC02–62SL–LS issued October 2005.

[1] Includes establishments in the 2000 North American Industry Classification System (NAICS) industry codes 445, 446, 452, 454, 621, 622 that had sales from product line code 20161 (Prescriptions).

(Comment 23) We received one comment from a professional organization representing pharmacists that supported our assumption that most pharmacies will adopt the CMI option. One comment from a provider of pharmaceutical databases stated that it will not be difficult to include the side effects statement in the CMI. Two comments noted that in our initial analysis we did not take into account the one-time effort required to modify and test computer programs controlling the printing of the CMI and auxiliary labels, but provided no detailed information about these costs.

(Response) We agree that pharmacies choosing to distribute revised CMI (i.e., CMI with the side effects statement) will need to ensure proper printing of the side effects statement if they choose this option. Pharmacies that choose to print their own labels to affix on the dispensing container will incur costs to modify and test the computer programs that control the printing of auxiliary labels. However, we lack sufficient information about the percentage of pharmacies that would choose in-house printing of auxiliary labels to modify our initial estimate.

To illustrate the potential costs of the proposed rule, we estimated the level of effort required by a pharmacy to manually affix a sticker preprinted with the side effects statement on each prescription container. Because this option would cause a pharmacy to incur additional costs for each prescription drug dispensed, the agency believes that this would be a higher cost option for pharmacies and authorized dispensers that currently distribute printed CMI with prescription drugs.

(Comment 24) Two comments on the proposed rule stated that FDA failed to understand the workflow in a modern pharmacy and that manually affixing stickers would be more costly than we estimated.

(Response) We acknowledge that manually affixing a sticker in a highly automated system might cause disruptions in workflow that were not captured in our initial analysis. However, we have no other information that we could use to modify our estimate. Nevertheless, we have increased our cost estimate in the proposed rule by 35 percent to account for the following: (1) A 23-percent increase in the number of prescriptions and (2) a 12-percent increase in costs

since 2003.[1] For pharmacies, the potential annual costs of the final rule in 2007 dollars will range from $12.4 million to $27.3 million. Similar to the range in the proposed rule, this range reflects uncertainty about the costs to affix the sticker to the prescription drug container, and the average number of prescriptions dispensed by affected pharmacy outlets.

2. Drug Manufacturers

We proposed to require that the labeling of application OTC drug products not subject to the exclusion in section 502(f)(2) of FDAAA include the OTC side effects statement in the warnings section of the drug facts format labeling. For the analysis of the proposed rule, we predicted that manufacturers would spend $3,000 per shelf-keeping unit (SKU) to modify the labeling of a new drug application (NDA) OTC drug product or $1,000 per SKU to modify the labeling of an abbreviated new drug application (ANDA) OTC drug product. We assumed that each affected OTC drug product would have, on average, up to 3 SKUs. For the proposed rule, we estimated that approximately 1,570 OTC drug packages would need to be revised to add the side effects statement. Furthermore, we estimated manufacturers would need to add the side effects statement to about 18 Medication Guides.

a. *Number of affected products.* Although we received no comments on our estimate of the number of Medication Guides that would be revised, more prescription drugs have added Medication Guides since our initial estimate. Based on current agency information, we have increased our estimate from 18 to 370 Medication Guides.

(Comment 25) Comments from the drug industry and a member of Congress stated that FDA should not have included application OTC drug products in the proposed rule. Some comments expressed concern that because the labeling of most NDA OTC drug products includes a manufacturer's toll-free telephone number, addition of the MedWatch telephone number could confuse consumers. It was suggested that FDA exempt from the requirements of the proposed rule any OTC drug product whose labeling contains a toll-free number for the manufacturer or distributor.

(Response) The proposed rule would have required the same side effects statement on all application OTC drug products. As discussed previously in this preamble, the interim final rule codified section 502(f)(2) of FDAAA, which states that the requirement to include the side effects statement does not apply to any OTC drug product approved under section 505 of the act if the product's packaging contains a toll-free telephone number through which consumers can report complaints to the manufacturer or distributor of the drug. Section 502(f)(2) of FDAAA thus creates a situation in which manufacturers and distributors of affected application OTC drug products will choose to either add the side effects statement or their own toll-free telephone number to OTC drug product labeling. Therefore, under the rule, the drug facts format labeling of application OTC drug products could vary depending on whether the affected manufacturer or distributor uses the side effects statement or its own toll-free number.

The agency previously estimated that certain retailers with more than 10 establishments would have some private label OTC drug products (62 FR 9046, February 27, 1997). Depending on the size of the firm, each private label OTC drug product could have numerous SKUs. Agency records indicate that there are about 60 unique application OTC products (i.e., a unique combination of active ingredient, dosage form, and strength). An informal convenience survey of stores in the Washington, DC, area and in northern New England looked at whether affected private label OTC drug product labeling contains a toll-free telephone number. We found that the packaging of most private label OTC drug products does not include a toll-free number for complaints.[2] It appears that most private label OTC drug product labeling will need to be modified to comply with the final rule. However, because most national brand OTC drug products affected by the rule already have a toll-free telephone number for complaints, current packaging for most national brand OTC drug products will conform to the requirements of the final rule without any further change.

For this final analysis, we assume that distributors of private label OTC drug products (i.e., the unique combination of active ingredient, dosage form, and strength) would not carry identical SKUs from different manufacturers. Although uncertain, the findings from our informal survey give us an idea of the number of private label OTC drug product SKUs that might be affected by the final rule. For the final analysis, therefore, we anticipate that any firm with 10 to 99 establishments will need to change the packaging of between 40 to 55 affected private label OTC drug products and any firm with 100 or more establishments will need to change the packaging of between 110 to 135 private label OTC drug products. Table 2 of this document illustrates the number of possible firms that could have private label OTC drug products.

TABLE 2—ESTIMATE OF THE NUMBER OF PRIVATE LABEL DISTRIBUTORS

Kind of Business	Number of Firms With 10–99 Establishments	Number of Firms With 100 or More Establishments
Supermarket and other grocery	194	37
Pharmacy, drug, and proprietary stores	59	16

[1] U.S. Department of Labor, Bureau of Economic Analysis, National Economic Accounts (*http://www.bea.gov/nationalnipaweb/SelectTable.asp?Selected=Y*).

[2] FDA employees visited three mass merchants, three chain grocery stores, and four chain drug stores to roughly estimate the following: (1) The number of SKUs per private label OTC product for categories of products with high sales volumes and (2) the proportion of the labeling of these products including a toll-free telephone number. At each site, at least one private label ANDA OTC drug product from the following categories was examined to determine the number of SKUs for the product and the percentage of SKUs with a toll-free telephone number—allergy and asthma, antifungal, feminine hygiene, pain, stomach-diarrhea, and stomach-digestion. In addition, at some locations, employees examined private label ANDA OTC drug products for smoking cessation, lice control, hair restoration, and cold and sinus. We examined over 300 packages and found that the labeling of smoking cessation products and allergy and asthma eye drops already appear to include a toll-free telephone number. Excluding these products, only about 20 percent of the labeling of private label ANDA OTC products would conform to the requirements of the final rule without change. Finally, to estimate a range of products whose labeling would need to be modified, we adjusted the average number of SKUs for each product (i.e., active ingredient, dosage form, and strength) by the proportion of SKUs with labeling including a toll-free telephone number.

TABLE 2—ESTIMATE OF THE NUMBER OF PRIVATE LABEL DISTRIBUTORS—Continued

Kind of Business	Number of Firms With 10–99 Establishments	Number of Firms With 100 or More Establishments
Warehouse clubs and supercenters	3	6
Total	256	59

Source: Data for NAICS numbers 445110, 4461101, 4461102, and 45291 from table 3 of 2002 Economic Census, Retail Trade, Subject Series, Establishment and Firm Size (Including Legal Form of Organization), publication number EC02–44SS–SZ issued November 2005.

b. *Cost to modify product labeling.*

(Comment 26) We received three detailed comments that included alternative estimates of the cost to revise NDA OTC drug product labeling. No comments were submitted on our estimate of the cost to revise ANDA or private label OTC drug product labeling or Medication Guides.

(Response) To account for inflation, we updated our estimate of the cost to revise a Medication Guide from $4,177 to $4,500 (2007 dollars) for an NDA prescription drug and from $1,580 to $1,800 (2007 dollars) for an ANDA prescription drug. The total one-time cost to add the side effects statement to Medication Guides will be $990,000 (= 120 Medication Guides x $4,500 + 250 Medication Guides x $1,800).

In recent years some large retailers have developed a single nationwide private label brand for all of their private label OTC drug products.[3] When comparing like OTC drug products, consumers could perceive a difference in the safety of the private label OTC drug products if the private label OTC drug product packaging displays the side effects statement instead of a manufacturer's toll-free number, such as is found on most innovators' branded products. Economic theory predicts that any labeling change which signals a decrease in product quality will be balanced by a decrease in the demand for the product. Large retailers will weigh the additional costs associated with the addition of their toll-free number on their OTC drug product packaging against the monetary value of the perceived decrease in product quality that could be signaled by the addition of the side effects statement. Private label retailers will choose to include their own toll-free telephone number instead of the side effects statement if they believe that the side effects statement will decrease the perceived quality of their products more than the cost to add the toll-free telephone number.

We have increased our estimate of the cost to modify the labeling of private label OTC drug products from $1,000 per SKU to $2,140 per SKU. As shown in table 3 of this document, private label distributors might spend from $36.4 million to $47.9 million in one-time costs to modify drug labeling to include a telephone number or side effects statement. In addition, each distributor might spend up to 40 hours deciding whether to include its own toll-free telephone number at a one-time cost of $640,000 (= 320 distributors x $50 per hour x 40 hours), for total one-time costs ranging from $37.0 million to $48.6 million.

We expect that there would be some impact of the toll-free telephone number on the workload of private label distributors who choose to add their own toll-free telephone number. Although this impact is uncertain, distributors may need to hire up to one full-time employee (FTE) at a cost of about $53,500[4] to answer additional telephone calls generated by the addition of their toll-free telephone number on private label OTC drug product packaging. If the incremental increase in telephone calls is minimal, distributors will not incur these costs. However, if all 320 distributors incurred this incremental expense, it will cost the pharmacy industry an additional $17.1 million dollars annually. In total, the final rule will cost drug manufacturers or private label distributors from $4.5 million to $22.9 million annualized at a 3-percent discount rate and from $5.4 million to $24.2 million annualized at a 7-percent discount rate.

3. Burden on FDA

(Comment 27) Several comments stated that the side effects statement would increase the volume of non-serious calls to MedWatch and potentially dilute the value of direct adverse event reports.

(Response) In our initial analysis, we were uncertain about the burden this rule would place on FDA. Although we are still uncertain about the burden of the final rule, the results of our Internet study are encouraging. Most people understood the meaning of the side effects statement and understood that the FDA toll-free number was intended only to report serious side effects. Participants in the study showed little inclination to use the FDA toll-free number and would be more likely to expect their health care provider to report side effects. Without other information, we leave our initial analysis of the FDA burden unchanged.

4. Summary of the Impacts of the Final Rule

Table 4 of this document summarizes the costs of the final rule. The total annualized impact of the final rule will range from $16.9 million to $52.2 million with a 3-percent discount rate and from $17.8 million to $53.4 million with a 7-percent discount rate. Most of this cost will likely be passed on to consumers. Even though the total annualized costs are uncertain, they are significantly below the threshold of an economically significant rule. Moreover, the final rule gives pharmacies flexibility to select the option that is least burdensome for their individual business situation and fulfills the statutory requirements of the BPCA and FDAAA. Finally, these costs represent a small proportion of affected product sales.

[3] "Consolidated Medicine," January/February 2005, Private Label Magazine, at *http://www.privatelabelmag.com.*

[4] U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2007 (*http://www.bls.gov/oes/current/oes292052.htm*).

TABLE 3—ESTIMATED COST TO MODIFY PRIVATE LABEL OTC LABELING

Type of Distributor	Number of Distributors	Estimate of the Number of Private Label SKUs		Number of Affected SKUs		Cost to Revise OTC Labeling ($ million)	
		Low	High	Low	High	Low	High
Small	260	40	55	10,400	14,300	22.3	30.6
Large	60	110	135	6,600	8,100	14.1	17.3
Total	320			17,000	22,400	36.4	47.9

TABLE 4—COST SUMMARY

Affected Sector	One-Time Cost ($ mil)		Annual Costs ($ mil)		Annualized at 3% ($ mil)		Annualized at 7% ($ mil)	
	low	high	low	high	low	high	low	high
Retail and nonretail pharmacies			12.4	27.3	12.4	27.3	12.4	27.3
Drug manufacturers and private label distributors	38.0	49.6	0.0	17.1	4.5	22.9	5.4	24.2
FDA			0.0	1.9	0.0	1.9	0.0	1.9
Total	38.0	49.6	12.4	46.3	16.9	52.2	17.8	53.4

C. Benefits of Regulation

(Comment 28) One comment from an organization representing drug manufacturers stated that the proposed rule had no obvious benefits and in contrast could have a detrimental effect on adverse event reporting and detection.

(Response) The agency agrees that the benefits of this rule are uncertain. As described elsewhere in this preamble, the results of our Internet labeling comprehension study suggest that most consumers understand the side effects statement and would be unlikely to call FDA. Even if they experienced a serious side effect, most participants indicated that they would contact their health care provider and would assume that he or she would report their side effect to FDA. If the final rule increases reports of serious side effects by health care providers, it might aid the agency's efforts to monitor the postmarket safety of drug products.

D. Final Regulatory Flexibility Analysis

We received no comments that would change our initial analysis of the impacts on small entities. Most impacts on small entities represent a small proportion of sales and the rule would probably have a minimal effect on even the smallest entities. For our initial analysis, we estimated that adding a preprinted sticker to each prescription container would cost about $.03 per prescription and could reduce a retail pharmacy's average revenues by about 0.3 percent. For the final analysis, we adjust the per prescription cost of the sticker option by 12 percent, increasing the cost of this option to approximately $0.04 per prescription. The National Association of Chain Drug Stores (NACDS) reports that in 2007 the average cost of a retail prescription was $69.91. Retail pharmacies received about 17 percent or an average of $13.17 for each prescription.[5] At current revenue levels, the average cost for small pharmacies to comply with the final rule will still be about 0.3 percent of the average per-prescription revenue.

The costs for private label distributors were not included in the initial analysis. However, all distributors large enough to maintain private labels have annual sales above the SBA size standards. Because many of the impacts of the final rule are uncertain, we are not able to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act of 1995

This regulation imposes no new collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VII. Environmental Impact

The agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule will have a preemptive effect on State law. Section 4(a) of the Executive order requires agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Section 751 of the act (21 U.S.C. 379r) is an express preemption provision. Section 751(a) of the act provides that ''* * * no State or political subdivision of a State may establish or continue in effect any requirement—(1) that relates to the regulation of a drug that is not subject to the requirements of section 503(b)(1) or 503(f)(1)(A); and (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under this act, the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 *et seq.*), or the Fair Packaging and Labeling Act (15 U.S.C. 1451 *et seq.*).'' Currently, this provision operates to preempt States from imposing requirements related to the regulation of nonprescription drug products. Section 751(b) through (e) of the act outlines the scope of the express

[5] *http://www.nacds.org/wmspage.cfm?parm1=507#pharmpricing.*

preemption provision, the exemption procedures, and the exceptions to the provision.

Even where the express preemption provision is not applicable, implied preemption may arise. *See Geier* v. *American Honda Co.* 529 U.S. 861 (2000). Under the principles of implied conflict preemption, courts have found State law preempted where it is impossible to comply with both Federal and State law or where the State law ''stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'' *See English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990); *Florida Lime & Avocado Growers, Inc.*, 373 U.S. 132, 142–43 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

This rule amends the labeling requirements for certain application OTC drug products to require the addition of a side effects statement, and to require pharmacies and authorized dispensers to distribute the side effects statement with each prescription drug approved under section 505 of the act and dispensed. This rule would have a preemptive effect to the extent that a State requires labeling that directly conflicts with, is different from, or is in addition to, the side effects statement required by this rule for certain application OTC drug products. This preemptive effect is consistent with what Congress set forth in section 751 of the act. Section 751(a) of the act displaces both State legislative requirements and State common law duties. The rule would also have a preemptive effect to the extent that a State imposes requirements on pharmacies or authorized dispensers that conflict with the requirements of this rule or frustrate the federal purpose with respect to distribution of the side effects statement. Preemption with respect to these requirements is consistent with the doctrine of implied conflict preemption. FDA believes that the preemptive effect of the final rule, if finalized as proposed, would be consistent with Executive Order 13132. Section 4(e) of the Executive order provides that ''when an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.'' FDA provided the States with an opportunity for appropriate participation in this rulemaking when it sought input from all stakeholders through publication of the proposed rule (69 FR 21778). FDA received no comments from any States on the proposed rulemaking. On January 3, 2008, FDA published an interim final rule codifying the proposed rule which, under FDAAA, became effective by operation of law on January 1, 2008 (73 FR 402). FDA received no comments from any State on the interim final rule.

In addition, on July 31, 2008, the FDA Division of Federal and State Relations provided notice via fax and e-mail transmission to elected officials of State governments and their representatives of national organizations. The notice provided the States with further opportunity for comment on the rule. It advised the States of the publication of the proposed rule and interim final rule and encouraged State and local governments to review the notice and interim final rule to provide any comments to Docket No. FDA–2003–N–0313 (formerly Docket No. 2003N–0342) opened in the April 22, 2004, **Federal Register** proposed rule, by a date 30 days from the date of the notice (i.e., by August 31, 2008, or to contact certain named individuals. FDA received no comments in response to this notice. The notice has been filed in Docket No. FDA–2003–N–0313.

In conclusion, FDA believes that it has complied with all of the applicable requirements under the Executive order and has determined that the preemptive effects of this rule are consistent with Executive Order 13132.

(FDA has verified all Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, the interim final rule amending 21 CFR parts 201 and 208 and adding 21 CFR part 209, which was published at 73 FR 402 (January 3, 2008), is adopted as a final rule without change.

Dated: October 21, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–25670 Filed 10–27–08; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 272

[EPA–R06–RCRA–2008–0753; FRL–8729–6]

New Mexico: Incorporation by Reference of Approved State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate 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. The EPA uses the regulations entitled ''Approved State Hazardous Waste Management Programs'' to provide notice of the authorization status of State programs and to incorporate by reference those provisions of the State statutes and regulations that will be subject to the EPA's inspection and enforcement. The rule codifies in the regulations the prior approval of New Mexico's hazardous waste management program and incorporates by reference authorized provisions of the State's statutes and regulations.

DATES: This regulation is effective December 29, 2008, unless the EPA receives adverse written comment on this regulation by the close of business November 28, 2008. If the EPA receives such comments, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** informing the public that this rule will not take effect. The Director of the Federal Register approves this incorporation by reference as of December 29, 2008 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *E-mail: patterson.alima@epa.gov.*

3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning

and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

Instructions: Direct your comments to Docket ID No. EPA–R06–RCRA–2008–0753. EPA's policy is that all comments received will be included in the public docket without change, including personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov,* or e-mail. The Federal *www.regulations.gov* Web site is an ''anonymous access'' system, which means the 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 the EPA without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the 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 the EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. (For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.spa.gov/epahome/dockets.htm).*

You can view and copy the documents that form the basis for this codification and associated publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following location: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number (214) 665–8533. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, Region 6 Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, (214) 665–8533, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, and e-mail address *patterson.alima@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. What Is Codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste management program into the Code of Federal Regulations (CFR). Section 3006(b) of RCRA, as amended, allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in lieu of the Federal hazardous waste management regulatory program. The EPA codifies its authorization of State programs in 40 CFR part 272 and incorporates by reference State statutes and regulations that the EPA will enforce under sections 3007 and 3008 of RCRA and any other applicable statutory provisions.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and State requirements that can be Federally enforced. This effort provides clear notice to the public of the scope of the authorized program in each State.

B. What Is the History of the Authorization and Codification of New Mexico's Hazardous Waste Management Program?

New Mexico initially received Final authorization effective January 25, 1985 (50 FR 1515), to implement its Base Hazardous Waste Management program. Subsequently, the EPA approved additional program revision applications effective April 10, 1990 (55 FR 4604); July 25, 1990 (55 FR 28397); December 4, 1992 (57 FR 45717); August 23, 1994 (59 FR 29734); December 21, 1994 (59 FR 51122); July 10, 1995 (60 FR 20238); January 2, 1996 (60 FR 53708) as affirmed by the EPA in the **Federal Register** notice published on January 26, 1996 (61 FR 2450); March 10, 1997 (61 FR 67474); October 9, 2001 (66 FR 42140); and October 16, 2007 (72 FR 46165). The EPA incorporated by reference New Mexico's then authorized hazardous waste program effective December 13, 1993 (58 FR 52677); August 21, 1995 (60 FR 32113); November 18, 1996 (61 FR 49265); July 13, 1998 (63 FR 23224); and October 27, 2003 (68 FR 51487). In this document, the EPA is revising Subpart GG of 40 CFR part 272 to include the recent authorization revision action effective October 16, 2007 (72 FR 46165).

C. What Codification Decisions Have We Made in This Rule?

The purpose of today's **Federal Register** document is to codify New Mexico's base hazardous waste management program and its revisions to that program. The EPA provided notices and opportunity for comments on the Agency's decisions to authorize the New Mexico program, and the EPA is not now reopening the decisions, nor requesting comments, on the New Mexico authorizations as published in the **Federal Register** notices specified in Section B of this document.

This document incorporates by reference New Mexico's hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and Federally enforceable program. By codifying New Mexico's authorized program and by amending the Code of Federal Regulations, the public will be more easily able to discern the status of Federally approved requirements of the New Mexico hazardous waste management program.

The EPA is incorporating by reference the New Mexico authorized hazardous waste program in subpart GG of 40 CFR part 272. Section 272.1601 incorporates by reference New Mexico's authorized hazardous waste statutes and regulations. Section 272.1601 also references the statutory provisions (including procedural and enforcement provisions) which provide the legal basis for the State's implementation of the hazardous waste management program, the Memorandum of Agreement, the Attorney General's Statements and the Program Description, which are approved as part of the hazardous waste management program under Subtitle C of RCRA.

D. What Is the Effect of New Mexico's Codification on Enforcement?

The EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013 and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in authorized States. With respect to these actions, the EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than any authorized State analogues to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved New Mexico procedural and enforcement authorities. Section 272.1601(c)(2) of 40 CFR lists the statutory provisions which provide the legal basis for the State's implementation of the hazardous waste management program, as well as those procedural and enforcement authorities that are part of the State's approved program, but these are not incorporated by reference.

E. What State Provisions Are Not Part of the Codification?

The public needs to be aware that some provisions of New Mexico's hazardous waste management program are not part of the Federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are ''broader in scope'' than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Federal rules for which New Mexico is not authorized, but which have been incorporated into the State regulations because of the way the State adopted Federal regulations by reference.

State provisions that are ''broader in scope'' than the Federal program are not part of the RCRA authorized program and the EPA will not enforce them. Therefore, they are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.1601(c)(3) lists the New Mexico regulatory provisions which are ''broader in scope'' than the Federal program and which are not part of the authorized program being incorporated by reference. ''Broader in scope'' provisions cannot be enforced by the EPA; the State, however, may enforce such provisions under State law.

With respect to any requirement pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized, the EPA will continue to enforce the Federal HSWA standards until the State is authorized for these provisions.

F. What Will Be the Effect of Federal HSWA Requirements on the Codification?

The EPA is not amending 40 CFR part 272 to include HSWA requirements and prohibitions that are implemented by the EPA. Section 3006(g) of RCRA provides that any HSWA requirement or prohibition (including implementing regulations) takes effect in authorized and not authorized States at the same time. A HSWA requirement or prohibition supersedes any less stringent or inconsistent State provision which may have been previously authorized by the EPA (50 FR 28702, July 15, 1985). The EPA has the authority to implement HSWA requirements in all States, including authorized States, until the States become authorized for such requirement or prohibition. Authorized States are required to revise their programs to adopt the HSWA requirements and prohibitions, and then to seek authorization for those revisions pursuant to 40 CFR part 271.

Instead of amending the 40 CFR part 272 every time a new HSWA provision takes effect under the authority of RCRA section 3006(g), the EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's 40 CFR part 272 incorporation by reference. Until then, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

Some existing State requirements may be similar to the HSWA requirement implemented by the EPA. However, until the EPA authorizes those State requirements, the EPA can only enforce the HSWA requirements and not the State analogs. The EPA will not codify those State requirements until the State receives authorization for those requirements.

G. Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This rule incorporates by reference New Mexico's authorized hazardous waste management regulations 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 rule merely incorporates by reference certain existing State hazardous waste management program requirements which the EPA already approved under 40 CFR part 271, and with which regulated entities must already comply, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104(4)).

This 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 (64 FR 43255, August 10, 1999), because it merely incorporates by reference existing authorized State hazardous waste management program requirements without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also does not have Tribal implications within the meaning of Executive Order 13175 (65 FR 67249, November 6, 2000).

This action also is not subject to Executive Order 13045 (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.

The requirements being codified are the result of New Mexico's voluntary participation in the EPA's State program authorization process under RCRA Subtitle C. 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 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (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 amended 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. The 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 December 29, 2008.

List of Subjects in 40 CFR Part 272

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, Water pollution control, Water supply.

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: September 17, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ For the reasons set forth in the preamble, 40 CFR part 272 is amended as follows:

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

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

Authority: Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

■ 2. Subpart GG is amended by revising § 272.1601 to read as follows:

§ 272.1601 New Mexico State-Administered Program: Final Authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), the EPA granted New Mexico final authorization for the following elements as submitted to EPA in New Mexico's base program application for final authorization which was approved by EPA effective on January 25, 1985. Subsequent program revision applications were approved effective on April 10, 1990, July 25, 1990, December 4, 1992, August 23, 1994, December 21, 1994, July 10, 1995, January 2, 1996, March 10, 1997, October 9, 2001, and October 16, 2007.

(b) The State of New Mexico has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) *State Statutes and Regulations.* (1) The New Mexico statutes and regulations cited in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the New Mexico regulations that are incorporated by reference in this paragraph from the New Mexico Commission of Public Records, State Records Center and Archives, Administrative Law Division, 1205 Camino Carlos Rey, Santa Fe, NM 87507; Phone number (505) 476–7907; Web site: *http://www.nmcpr.state.nm.us/.* The statutes are available from ConwayGreene Company, 1400 East 30th Street, Suite #402, Cleveland, OH 44114; Phone number (216) 619–8091; Web site: *http://www.conwaygreene.com.* You may inspect a copy at EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202 (Phone number (214) 665–8533), or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

(i) The binder entitled ''EPA Approved New Mexico Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program'', dated October 2007.

(ii) [Reserved]

(2) The following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal authorities:

(i) New Mexico Rules Annotated, Rules of Civil Procedure for the District Courts, Article 4, (1995), Section 1–024.

(ii) New Mexico Statutes 1978 Annotated, Inspection of Public Records Act, Chapter 14, Article 2, (2003 Replacement Pamphlet), Sections 14–2–1 *et seq.*

(iii) New Mexico Statutes 1978 Annotated, Hazardous Waste Act, Chapter 74, Article 4, (2000 Replacement Pamphlet), Sections 74–4–4.1, 74–4–4.2.C through 74–4–4.2.F, 74–4–4.2.G(1), 74–4–4.2.H, 74–4–4.2.I, 74–4–4.7.B and .C, 74–4–5, 74–4–7, 74–4–10.1 (except 74–4–10.1.C), and 74–4–14.

(iv) New Mexico Statutes 1978 Annotated, Hazardous Waste Act, Chapter 74, Article 4, (2002 Cumulative Supplement), Sections 74–4–4 (except 74–4–4E), 74–4–4.3 (except 74–4–4.3.A(2) and 74–4–4.3.F), 74–4–10, 74–4–11 through 74–4–13.

(v) Title 20, Chapter 4, Part 1, New Mexico Administrative Code, effective October 1, 2003, unless otherwise indicated: Sections 20.4.1.901 (except 20.4.1.901.B.1 through 20.4.1.901.B.6, and 20.4.1.901.E), 20.4.1.1100 (June 14, 2000), 20.4.1.1104 (June 14, 2000), 20.4.1.1105 (June 14, 2000), and 20.4.1.1107.

(3)(i) The following statutory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(ii) New Mexico Statutes 1978 Annotated, Hazardous Waste Act, Chapter 74, Article 4, (2000 Replacement Pamphlet), Sections 74–4–3.3 and 74–4–4.2.J.

(4) *Unauthorized State Amendments.* The State's adoption of the Federal rules listed in the following table is not approved by the EPA and are, therefore, not enforceable:

Federal requirement	**Federal Register** reference	Publication date
Biennial Report	48 FR 3977	01/28/83
Permit Rules; Settlement Agreement	48 FR 39611	09/01/83
Interim Status Standards; Applicability	48 FR 52718	11/22/83
Chlorinated Aliphatic Hydrocarbon Listing (F024).	49 FR 5308	02/10/84
National Uniform Manifest	49 FR 10490	03/20/84
Recycled Used Oil Management Standards.	57 FR 41566: Amendments to 40 CFR Parts 260, 261 and 266	09/10/92
	58 FR 26420: Amendments to 40 CFR Parts 261, 264 and 265	05/03/93
	58 FR 33341: Amendments to 40 CFR Parts 261, 264 and 265	06/17/93
	63 FR 24963: Amendments to 40 CFR Part 261	05/06/98

Federal requirement	Federal Register reference	Publication date
Mineral Processing Secondary Materials	63 FR 28556; Amendments to 40 CFR Part 261	05/26/98

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 6 and the State of New Mexico, signed by the EPA Regional Administrator on July 25, 2007, is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(6) *Statement of Legal Authority.* ''Attorney General's Statement for Final Authorization'', signed by the Attorney General of New Mexico January 1985, and revisions, supplements and addenda to that Statement dated April 13, 1988; September 14, 1988; July 19, 1989; July 23, 1992; February 14, 1994; July 18, 1994; July 20, 1994; August 11, 1994; November 28, 1994; August 24, 1995; January 12, 1996; June 14, 2000, and August 3, 2006, are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(7) *Program Description.* The Program Description and any other materials submitted as supplements thereto are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

■ 3. Appendix A to part 272 is amended by revising the listing for ''New Mexico'' to read as follows:

Appendix A to Part 272—State Requirements

* * * * *

New Mexico

The statutory provisions include:

New Mexico Statutes 1978 Annotated, Hazardous Waste Act, Chapter 74, Article 4 (2000 Replacement Pamphlet). Please note that for a few provisions the version found in the 2002 Cumulative Supplement to NMSA 74–4 is the approved version of the statutes.

Chapter 74, Article 4, Sections 74–4–2, 74–4–3 (except 74–4–3.A, 74–4–3.N, 74–4–3.R, and 74–4–3.V) (2002 Cumulative Supplement), 74–4–3.1, 74–4–4.2.A, 74–4–4.2.B, 74–4–4.2.G introductory paragraph, 74–4–4.2.G(2), 74–4–4.3.F (2002 Cumulative Supplement), 74–4–4.7 (except 74–4–4.7.B and 74–4–4.7.C), 74–4–9, and 74–4–10.1.C, as published by ConwayGreene Company, 1400 East 30th Street, Suite #402, Cleveland, OH 44114; Phone number (216) 619–8091; Web site: *http://www.conwaygreene.com.*

The regulatory provisions include:

Title 20, Chapter 4, Part 1, New Mexico Annotated Code, effective October 1, 2003, unless otherwise indicated, Sections 20.4.100, 20.4.1.101, 20.4.1.200, 20.4.1.300, 20.4.1.400, 20.4.1.401, 20.4.1.500, 20.4.1.501, 20.4.1.600, 20.4.1.601, 20.4.1.700, 20.4.1.800, 20.4.801, 20.4.1.900, 20.4.1.901.B.1 through 20.4.1.901.B.6, 20.4.1.901.E, 20.4.1.1000, 20.4.1.1001 (June 14, 2000), 20.4.1.1102 (June 14, 2000), and 20.4.1103. Copies of the New Mexico regulations can be obtained from the New Mexico Commission of Public Records, State Records Center and Archives, Administrative Law Division, 1205 Camino Carlos Rey, Santa Fe, NM 87507; Phone number (505) 476–7907; Web site: *http://www.nmcpr.state.nm.us/.*

[FR Doc. E8–25533 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2276; MB Docket No. 07–182; RM–11393; MB Docket No. 07–194; RM–11397]

Radio Broadcasting Services; Antlers, OK; Hico, TX, and Hugo, OK

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Liberman Broadcasting of Dallas License LLC, allots FM Channel 293A in lieu of vacant FM Channel 285A at Hico, Texas. Channel 293A can be allotted at Hico, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 km (3.4 miles) south of Hico at the following reference coordinates: 31–56–00 North Latitude and 98–02–00 West Longitude. The Audio Division further amends the reference coordinates of vacant FM Channel 285A at Broken Bow, Oklahoma, to reflect a site restrict of 12.8 km (7.9 miles) northeast of Broken Bow at the following reference coordinates: 34–06–21 North Latitude and 94–38–09 West Longitude.

DATES: Effective November 24, 2008.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket Nos. 07–182 and 07–194, adopted October 8, 2008, and released October 10, 2008. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 285A and adding Channel 293A at Hico.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–25726 Filed 10–27–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 080320453–8705–01]

RIN 0648–XG60

Endangered and Threatened Species; Final Rule to Remove the Caribbean Monk Seal From the Federal List of Endangered and Threatened Wildlife

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), publish this final rule to remove the Caribbean monk seal (*Monachus tropicalis*) from the list of endangered marine and anadromous species at 50 CFR 224.101 due to extinction of the species. We have reviewed the status of this species and determined that removal of the protections of the Endangered Species Act (ESA) for the Caribbean monk seal is warranted. The U.S. Fish and Wildlife Service (USFWS) concurred with our recommendation to delist this species in a letter dated October 17, 2008.

DATES: The effective date of this rule is October 28, 2008.

ADDRESSES: Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 263 13th Ave. South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Kyle Baker, NMFS, Southeast Regional Office at 727–824–5312; or Marta Nammack, NMFS, Office of Protected Resources at 301–713–1401. Reference materials regarding this determination are available upon request or on the Internet at *http://sero.nmfs.noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

On June 9, 2008, we proposed to delist the Caribbean monk seal under the ESA due to extinction of the species (73 FR 32521). Under the ESA, a list of endangered and threatened wildlife and plant species must be maintained. NMFS lists threatened and endangered species under its jurisdiction in 50 CFR parts 223 and 224. The USFWS maintains the official lists of threatened and endangered species, which are published at 50 CFR 17.11 (for animals) and 17.12 (for plants). NMFS and USFWS regulations published at 50 CFR, part 424, specify the procedures and requirements for adding or removing species from the list of endangered and threatened species. In addition, section 4(a)(2)(B)(i) of the ESA requires that, when determining that a species should be removed from any list published pursuant to section 4(c), the Secretary of Commerce shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action. These responsibilities have been delegated to NMFS and USFWS, respectively.

We are additionally required by ESA section 4(c)(2) and 50 CFR 424.12 to review each species on the list every 5 years (''5–year review'') to determine whether a species' classification on the list of threatened or endangered species is accurate. We evaluate whether the species continues to meet the definition of a threatened or endangered species, and we evaluate the five factors under ESA section 4(a)(1) to specify the ongoing reasons for the species' status: (1) The present or threatened destruction, modification or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. A species may be delisted pursuant to 50 CFR 424.11(d) if the best scientific and commercial data available substantiate that the species is neither endangered nor threatened for one or more of the following reasons: (1) the species is considered extinct; (2) the species is considered to be recovered; (3) the original data available when the species was listed, or the interpretation of such data, was in error.

We initiated a 5–year review for the Caribbean monk seal on November 29, 2006 (71 FR 39327), to ensure that the listing classification of the species endangered is accurate. We completed the 5–year review on March 7, 2008. The 5–year review synthesized the best available scientific and commercial data on the status of the species and concluded that the Caribbean monk seal is extinct.

Summary of Comments Received

We received no comments on the proposed delisting of Caribbean monk seals during the public comment period.

Assessment of the Species Status

The following presents a summary of the data on which this determination is based, including a review of the taxonomy, biology, life history, and historic distribution of the Caribbean monk seal; previous statutory and regulatory actions associated with this species; and an analysis of the best available information on the Caribbean monk seals' status.

Taxonomic Classification and Phylogeny

The Caribbean monk seal, also known as the Caribbean seal, the West Indian seal, and the West Indian monk seal, was described from the scientific literature in 1849 from a specimen taken in Jamaica (Gray, 1849). Early references to this species referred to these animals as sea wolves, hair seals, or simply seals. Although the species had several common names, it is taxonomically described according to the following:

Kingdom: Animalia
Phylum: Chordata
Class: Mammalia
Subclass: Eutheria
Order: Carnivora
Suborder: Pinnipedia
Family: Phocidae
Subfamily Monachinae
Genus: *Monachus*
Species: *tropicalis*

The genus *Monachus* includes 3 allopatric species: *M. tropicalis* (Caribbean monk seals), *M. schauinslandi* (Hawaiian monk seals), and *M. monachus* (Mediterranean monk seals). A thorough description of the Caribbean monk seal was completed by Adam (2004). Caribbean monk seals are more closely related to Mediterranean monk seals than to Hawaiian monk seals (Wyss, 1988). However, the phylogenetic relationship among species of monk seals remains in dispute (Lavigne, 1998). No genetic studies of Caribbean monk seals have been conducted.

Biology

The Caribbean monk seal had a typical seal-like appearance, with a well-developed blubber layer, flipper-like limbs, a short tail, and a smooth body contour. The head was large and prominent, its eyes were large and light reddish-brown in color (Ward, 1887), and external pinnae were absent. Pups were born black in color and remained that way for about 1 year (Allen, 1887a). Adult pelage was variably dark dorsally (brown to black) and graded into a lighter yellowish-white countershade ventrally. Ventral fur ranged from pale yellow to yellowish-gray or yellowish-brown and was sometimes mottled with darker patches. The front and sides of the muzzle and the edge of the full and fleshy lips were yellowish-white.

Caribbean monk seals were sexually dimorphic females were smaller than males (Allen, 1887b). However, the size difference was slight and could not be used to distinguish between the sexes. The two sexes were also alike in color and form (Allen, 1887b). Females had two pairs of mammae (Ward, 1887). Measurements of adults of both sexes generally ranged from 2.0–2.5 m (Allen, 1887b; Allen, 1887c; Ward, 1887).

Caribbean monk seal vocalizations have been described as roaring, pig-like snorting, moaning, dog-like barking, growling, and snarling (Gosse, 1851; Hill, 1843; Nesbitt, 1836; Townsend, 1909). Pup vocalizations have been reported as a long, drawn out, guttural

''ah'' with a series of vocal hitches during enunciation (Ward, 1887). Underwater vocalizations of Caribbean monk seals have not been described and are unknown.

Both Mediterranean and Hawaiian monk seals are known to consume a variety of fish, cephalopods, and crustaceans (Marchessaux, 1989; Goodman-Lowe, 1998), and it has been speculated that Caribbean monk seals had a similar diet (Nesbitt, 1836; Gosse, 1851; Ward, 1887). The three species of Monachus have no obvious functional dental or osteological features to suggest that their feeding habits are significantly different from each other (Adam and Berta, 2002).

The incidence of disease in the wild has not been reported, but an occurrence of a condition that may have been cataracts has been noted (Gaumer, 1917; Ward, 1887). The nasal mite *Halarachne americana* was recovered in great numbers and in all stages of its life cycle from the respiratory passages of a single captive specimen. The mite, which is only known from Caribbean monk seals and has not been identified from any other species or habitats since that time, also may now be extinct (Adam, 2004). Caribbean monk seals were reported to have heavy parasitic helminth loads (Adam and Garcia, 2003; Ward, 1887), but a detailed description and species identification was not described.

Life History

Most observations of life history and behavior of Caribbean monk seals were based on short-term observations of seals in isolated colonies following heavy exploitation of the species. Due to the decline of this species after the arrival of the Europeans in the wider Caribbean region and its rarity by the time the species was first described in the scientific literature, remarkably little is known about its life history. Prior to its depletion, Caribbean monk seals hauled out in groups of up to 500 individuals (Nesbitt, 1836). Accounts of Caribbean monk seals were usually from isolated islands, keys, and atolls surrounded by shallow, reef-protected waters, and only occasionally from mainland beaches. Haul out sites were usually sandy beaches that remain exposed at high tide (Gaumer, 1917; and Hill, 1843; as summarized in Adam, 2004; Kerr, 1824; Ward, 1887), but also included near shore rocks and rocky islets (Allen, 1880; as cited in Adam and Garcia, 2003). Haul out sites typically had sparse or no vegetation and no fresh water (Ward, 1887). Adam and Garcia (2003) and Ward (1887) reported that the seals usually hauled out on beaches to rest in the early morning, though sometimes they would haul out and rest overnight.

Very little is known about the effects of over-exploitation on sex ratios of the species. The male to female ratio of specimens collected during a 1900 expedition in Mexico was 24:76, but by then the species was already severely depleted. Because such data are limited to a single sample size from one colony, it is not possible to determine whether that reported sex ratio is representative, reflective of previous hunting on the sex ratio of the population, or due to some other unknown factor. Therefore, the relevance of those data to life history characteristics should be interpreted with caution.

Observations of feeding seals have not been reported, and there are no reports of prey items from the few examinations of stomach contents cited in the available literature. Pregnant females were known only from the Triangle Keys off Mexico, where a newborn suckling pup and five females with fetuses were collected in early December 1886 (Ward, 1887) and a single pregnant seal was killed in late June 1900 (original unpublished field notes of W.E. Nelson as cited in Adam and Garcia, 2003). Adam and Garcia (2003) speculate that Caribbean monk seals had low pupping synchrony due to the limited seasonal variations in climate and prey abundance. An annual birth rate of 15 percent has been calculated, but this is likely an underestimate (Rice, 1973). Rice (1973) concluded that females rarely bore young in successive years and likely produced a pup every other year; however, research on Hawaiian monk seals (Johanos *et al.*, 1994) and Mediterranean monk seals (Johnson *et al.*, 2006) has demonstrated that pupping in successive years is common for those species. Weaning reportedly began 2 weeks after parturition; however, this also may be an underestimate based on weaning behavior in Hawaiian and Mediterranean monk seals. Pups apparently developed quickly (Nesbitt, 1836). Subadult seals were speculated to have foraged nocturnally in shallow, nearshore waters to avoid direct competition with adults, which fed at dawn and dusk (Adam and Garcia, 2003). Caribbean monk seals were estimated to have a life span of 20–30 years (Adam, 2004), but long-term studies of the species in the wild were not conducted. However, this estimate is consistent with that of the Hawaiian monk seal, which is thought to have a life span of approximately 25–30 years.

Distribution

The historic distribution of Caribbean monk seals has been estimated from historical sightings, archeological records, fossil evidence, and geographical features bearing names suggestive of their presence (Adam and Garcia, 2003; Adam, 2004). The species' northernmost record is from a fossil recovered near Charleston, South Carolina. There is evidence that Caribbean monk seals used mainland beaches of North or Central America as haul-out sites in great numbers. Most sightings records were from isolated islands, cays, and reefs in the eastern Gulf of Mexico (Ray, 1961; Timm *et al.*, 1997) and western Caribbean Sea. The only evidence Caribbean monk seals occurred in the Lesser Antilles is from archeological remains in the northern end of the chain (Wing, 1992) and a single sighting record (Timm *et al.*, 1997). A few sightings records, archeological finds, and suggestive place names extend the known range of Caribbean monk seals to include the northern coast of South America (Timm *et al.*, 1997; Debrot, 2000).

Previous Regulatory and Statutory Actions for the Caribbean Monk Seal

The Caribbean monk seal was listed as endangered in 1967 under the Endangered Species Preservation Act of 1966 (32 FR 4001; March 11, 1967) and then again in 1979 following its re-assessment under the ESA (44 FR 21288; April 10, 1979). The first Caribbean monk seal 5–year review was published on November 9, 1984 (49 FR 44774). At the time of that review, no sightings or evidence of Caribbean monk seals were documented since the last confirmed sighting at Seranilla Bank, between Jamaica and the Yucatan Peninsula, in 1952. Therefore, that 5–year review concluded that the best available information indicated the Caribbean monk seal may be extinct.

Following the 1984 status review, the U.S. Marine Mammal Commission contracted a study to interview local fishermen, residents, and sailors along the north coast of Haiti. Although there were two reported seal sightings obtained during the survey, there was no tangible evidence to confirm whether those sightings involved Caribbean monk seals or some other species. Based upon a credible account of a sighting, however, some isolated animals were believed to potentially remain in some remote regions off the northern coast of Haiti (Woods and Hermanson, 1987). A subsequent survey of fishermen in waters of Haiti and Jamaica also generated a few oral accounts of seal

sightings, but again, there was no corroborating proof that the sightings involved seals, much less Caribbean monk seals (Boyd and Stanfield, 1998). We decided not to delist the species in 1999, however, because the question of the possible existence of a remnant population in the wild remained as a result of these surveys.

Since the time of these additional surveys, there has been no new information to support the continued existence of Caribbean monk seals. A review of sightings and stranding data provided evidence of several positively identified arctic phocids (true seals, or earless seals) in tropical and sub-tropical waters of the Western North Atlantic from 1917 through 1996 (Mignucci-Giannoni and Odell, 2001). Due to confirmed sightings of arctic species in the Caribbean region outside their normal ranges, mostly hooded seals (*Cystophora cristata*), and lack of any Caribbean monk seal sightings since 1952, the authors concluded that the unidentified sightings in the period reviewed were not Caribbean monk seals (Mignucci-Giannoni and Odell, 2001). We recently analyzed data between 1996 and 2007 and determined 22 additional sightings of hooded seals have been confirmed in southeast U.S. waters in that time period, of which 7 occurred in the Caribbean Sea (Southeast U.S. Marine Mammal Stranding Database, 2007). No confirmed sightings of Caribbean monk seals have been reported since 1952.

Detailed Information on Sightings of the Caribbean Monk Seal

Since passage of the ESA, several efforts have been made to investigate unconfirmed reports of the species in or near the Caribbean Sea, Gulf of Mexico, the Southern Bahamas, and Atlantic coast of the Greater Antilles. There have been several reports of pinnipeds within the range of Caribbean monk seals since the last authoritative sighting at the Seranilla Banks in 1952. Unconfirmed sightings of pinnipeds up to that time resulted in speculation that the Caribbean monk seal still existed in a few, isolated colonies as late as the mid-to-late 1900s. The historical accounts of the species, unsuccessful expeditions to locate remnant colonies, and confirmed sightings of pinniped species other than Caribbean monk seal within the species' historical range now provide useful perspective on the species' decline. The following provides a brief historical account of sightings and survey efforts for the species.

1494: The first sightings records of Caribbean monk seals were made during the second voyage of Columbus, when eight individuals were killed for their meat (Kerr, 1824).

1600s to 1900s: Caribbean monk seals were exploited intensively for their oil, and to a lesser extent for food, scientific study, and zoological collection following European colonization (Allen, 1887b; Elliot, 1884; Townsend, 1923; Moore, 1953, Ward, 1887).

1849: The type specimen for the Caribbean seal was described from the scientific literature from a specimen taken in Jamaica (Gray, 1849).

1886: Caribbean monk seals were reported to occur in the Triangle Keys in the Gulf of Campeche, where 49 seals were killed during a scientific expedition (Ward, 1887).

1897: The New York Aquarium acquired two specimens captured from the Triangle Keys (Townsend, 1909).

1906: On February 25, 1906, fishermen killed a Caribbean monk seal five miles off Key West, Florida. The 1906 account was the first sighting of the species in Florida in approximately 30 years (Townsend, 1906).

1909: The New York Aquarium received four live Caribbean monk seals from a dealer in Progresso, Yucatan. At the time, the last known population of the Caribbean monk seal was restricted to islands and reefs off the Yucatan, Mexico (Townsend, 1909).

1911: An expedition off the coast of Mexico killed approximately 200 seals for scientific study and collection (Townsend, 1909).

1922: A monk seal was killed by a fisherman near Key West, Florida, on March 15, 1922. This was the last confirmed sighting of the seal in the United States. Townsend noted a small breeding colony still remained in the Triangulos reef group (i.e., the Triangle Islands) in the Campeche Bank islands off Mexico (Townsend, 1923).

1932: Following interviews with men having seen seals in the lower Laguna Madre region of Texas, Gordon Gunter concluded that a few Caribbean monk seals were scattered along the Texas coast as late as 1932 (Gunter, 1947). It was later suggested that the sightings of seals along the Texas coast were probably feral California sea lions (Gunter, 1968).

1949: The International Union for the Conservation of Nature and Natural Resources (IUCN) included the Caribbean monk seal in a list of 14 mammals whose survival was considered to be a matter of international concern requiring immediate protection (Westerman, 1953).

1952: C.B. Lewis made the last authoritative sighting of Caribbean monk seals at a small seal colony off Seranilla Banks (Colombia) in 1952, located between Jamaica and the Yucatan peninsula (Rice, 1973).

1973: The IUCN distributed circulars in both English and Spanish throughout the Caribbean region in 1973, offering U.S. $500 for information on recent sightings of the species. No confirmed sightings were made (Boulva, 1979).

1973: The USFWS conducted aerial surveys off the Yucatan, south to Nicaragua, and east to Jamaica, of all the areas where Rice suggested that Caribbean monk seals may still exist. The species was not sighted in the survey area (Kenyon, 1977).

1980: Canada's Department of Fisheries and Oceans, Arctic Biological Station, supported a search for evidence of Caribbean monk seals in remote islands of the southeastern Bahamas by vessel and interviews with local fishermen. The vessel survey produced no sightings of seals. Interviews with fishermen produced a few new accounts of seals in the area during the 1960s and 1970s, but the sightings could not be confirmed as Caribbean monk seals. (Sergeant *et al.*, 1980)

1984: From September 5–15, 1984, a survey was conducted across the Gulf of Mexico to Campeche, Mexico, aboard the Scripps Institution of Oceanography research vessel, Robert G. Sproul. The survey crew landed at three island groups off the north coast of the Yucatan Peninsula considered possible haul-out sites still used by monk seals: Islas Triangulos, Cayo Arenas and Arrecife Alacran. Another island, Cayo Arcas, was visited by helicopter on September 7, 1984. The survey yielded no seal sightings or evidence of their continued existence (LeBoeuf *et al.*, 1986).

1985: The U.S. Marine Mammal Commission contracted for a survey of local fishermen, coastal residents, and sailors in northern Haiti. Two of 77 people interviewed reported having seen a seal, one of which—a sighting at Ile Rat in the Baie de l'Acul in 1981—was considered a reliable account. In neither case, however, was it possible to confirm the sighting as a Caribbean monk seal (Woods and Hermanson, 1987).

1996: The IUCN Seal Specialist Group listed the Caribbean monk seal as extinct on its Red List of threatened and endangered species (Seal Specialist Group, 1996).

1997: Based on interviews with 93 fishermen in northern Haiti and Jamaica during 1997, it was concluded that there was a likelihood that Caribbean monk seals may still survive in this region of the West Indies. Fishermen were asked to select marine species known to them from randomly arranged pictures: 22.6

percent (n=21) selected monk seals of which 78 percent (n=16) had seen at least one in the past 1–2 years (Boyd and Stanfield, 1998).

2001: A review of seal sightings and marine mammal stranding data in the Southeast U.S. and Caribbean region documented evidence of several pinnipeds positively identified as arctic phocids between 1917 and 1996 that had strayed into the tropical and subtropical waters of the Western North Atlantic. Due to confirmed sightings of arctic species, mostly hooded seals (*Cystophora cristata*) in the Caribbean region outside their normal ranges, confirmed sightings and recaptures of feral California sea lions that had escaped from captivity, and lack of any confirmed Caribbean monk seal sightings since 1952, the authors concluded that unidentified sightings since 1952 were likely species other than Caribbean monk seals (Mignucci-Giannoni and Odell, 2001).

2007: Between 1996 and 2008, 22 additional, confirmed sightings of hooded seals have been reported from the tropical and subtropical waters of the Western North Atlantic, including nine from the tropical and subtropical waters of the Western North Atlantic (Southeast U.S. Marine Mammal Stranding Database, 2008).

2008: NMFS status review of the species concludes that recent pinniped sightings have been of species other than Caribbean monk seals, and that sufficient time has passed since the last sighting to infer extinction of the species (NMFS, 2008).

Although Caribbean monk seals could be cryptic while at sea and a low number of individuals in a population may lower the detectability of individuals, hauled out individuals at rest or females with pups would be conspicuous to an observer. The United Nations Environment Programme, Caribbean Environment Programme, was contacted in December 2007 regarding any new information on surveys or sightings of Caribbean monk seals that may have been missed by NMFS' review of sightings and stranding data; however, the inquiry resulted in no new information. With pervasive human presence in the wider Caribbean region and the necessity for seals to haul-out to rest and pup, it would be expected that any remaining individuals in the wild would have been sighted and confirmed over the past 50 years. Furthermore, there are few, if any, remaining areas where Caribbean monk seals were known to occur that have not been frequented by at least periodic human visits (e.g., fishing activities, recreational activities, and scientific expeditions). No Caribbean monk seal sightings have been reported from the numerous scientific surveys conducted in the former range of the species (e.g., avian nesting colonies, sea turtle nesting beaches, coral reef studies, and other biological and ecological research). Fishermen, shrimping boats, and abandoned camps have been ubiquitous throughout the species' known hauling grounds for decades (Kenyon, 1977; LeBoeuf *et al.*, 1986).

Because the range of Caribbean monk seal lies well outside the normal distribution of all other pinnipeds, sightings of seals are remarkable events in the wider Caribbean region. Hooded seals, usually juveniles, have been documented wandering over large ranges. The wide-ranging movement of hooded seals was recently supported by DNA research showing genetic exchange between four main breeding areas (Coltman *et al.*, 2007). NMFS' analysis of stranding data shows that the occurrence of arctic phocids outside their normal ranges occurs with some regularity. Current technology allows for near real-time communication when such rare or unusual species are sighted. Better methods also exist to confirm species identification when such sightings are made (e.g., photographs and genetic analysis of tissue samples). Although some seal sightings inevitably are not identifiable to a particular species, all those that have been confirmed in recent decades within the known range of the Caribbean monk seal have proven to be other species, namely feral California sea lions (Rice, 1973), manatees (Trichechus manatus), or hooded seals (Mignucci-Giannoni and Odell, 2001; NMFS Southeast U.S. Marine Mammal Stranding Database data, 2007). The occurrence of juvenile hooded seals in subtropical and tropical waters (outside the normal range of these seals) occurs with enough frequency to account for most recent pinniped sightings within the former range of the Caribbean monk seal (Mignucci-Giannoni and Haddow, 2002; Mignucci-Giannoni and Odell, 2001).

A sufficient amount of time has passed since the last sighting of this species to indicate clearly the status of this species. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the IUCN have set 50 years with no sightings as the cut-off for species extinction (IUCN, 1982). In 1949, the IUCN included the Caribbean monk seal in a list of 14 mammals whose survival was considered to be a matter of international concern requiring immediate protection (Westerman, 1953). However, the last confirmed sighting of the species occurred in 1952, limiting any opportunity for conservation efforts of any remaining animals in the wild. It has been over 50 years since the last confirmed sighting of Caribbean monk seals in the wild, despite multiple survey efforts to locate the species. Solow (1993) used survey data of Caribbean monk seals to demonstrate statistically that the likelihood of extinction is high based on the lack of sightings of this species. The IUCN concluded the Caribbean monk seal was extinct in 1996 (Seal Specialist Group, 1996), but the species remained listed under the ESA in the United States based on the results of survey data conducted after the 1984 status review indicating a possibility that some Caribbean monk seals persisted for a few years after their last confirmed sighting in 1952 at Seranilla Bank.

Although there were no sightings, it is possible that the Caribbean monk seal persisted for a short period in the years following the last confirmed sighting in 1952 at Seranilla Bank. If so, with an estimated life span of 20–30 years, some newborn individuals may have possibly persisted in the wild between the 1950s and early 1980s. If any remnant population did survive, it seems likely they consisted of scattered individuals, with no remaining colonies large enough to be viable in the wild. Considering the absence of seal sightings since 1952, the fact that all confirmed seal sightings have been of other species, and the ubiquitous presence of humans throughout the species' range, the Caribbean monk seal appears to have been extirpated before any meaningful conservation and recovery efforts could be taken for the species.

Although documentation of harvest levels and practices that led to this species' population decline is nearly absent, it is evident from early reports that relatively large numbers of seals persisted in at least some areas as late as the early 1800s and that their precipitous decline in abundance was due to heavy exploitation by sealers and others. During the 1800s their distribution became increasingly fragmented. By the time scientific expeditions were organized in the late 1800s to document and study the species, their range was already drastically curtailed. Rice (1973) noted that the last confirmed sighting of this species was in 1952 at Seranilla Banks in the western Caribbean. The Caribbean monk seal population was already severely depleted, and likely extirpated throughout most, and possibly all, of its

range prior to the passage of the ESA and Marine Mammal Protection Act.

Consideration of the Factors Listed under Section 4(a)(1) of the ESA

The two main factors leading to the listing of the Caribbean monk seal as endangered are the modification and curtailment of its habitat and range, and overutilization for commercial and educational purposes. Details about these factors and how they impacted the species are provided below, but because we have determined that this species is extinct, they no longer have any bearing on the status of the species.

Modification and Curtailment of its Habitat and Range

When hauled out on beaches, Caribbean monk seals were reported to have been sensitive to human disturbance (Allen, 1880; Gaumer, 1917; Ward, 1887). As with both Hawaiian and Mediterranean monk seals, Caribbean monk seals apparently became sensitized to human presence after exposure to hunting or other human activity. Thus, although many recent descriptions of monk seals state that they are highly sensitive to human disturbance, some accounts, including early accounts of the species (e.g., E.W. Nelson, as cited in Adam and Garcia, 2003), describe them as being very approachable when hauled out on beaches. When disturbed, Caribbean monk seals reportedly returned to the water where they remained until the people or vessels left the area (Adam and Garcia, 2003; Allen, 1880). As human settlements expanded in areas inhabited by this species and persistent hunting reinforced evasive seal behaviors, avoidance of human presence near populated shorelines and areas regularly visited by fishermen likely caused seals to abandon historic haul-out sites. Human encroachment also likely exacerbated stresses on the population as it declined. Although the species was reported as common in the early to mid 1700s, it was already considered rare by the mid 1880s (Allen, 1887b; Elliot, 1884; Gratacap, 1900).

Overutilization for Commercial and Educational Purposes

Caribbean monk seals were utilized as a source of meat by early mariners and heavily exploited as a source of oil following European colonization (Allen, 1880). Other human-caused factors, such as entanglement and drowning in fishing nets or slaughter by fishermen viewing the seals as competitors for fish, contributed to their decline (Rice, 1973). Caribbean monk seals were also killed for scientific collection and study, as well as for display in zoological gardens. Adam (2004) provides an excellent review of the historical exploitation of Caribbean monk seals. He reports the species was the most readily exploited source of oil in the tropical West Atlantic Ocean prior to the early 1800s, and that it was hunted to near extinction for its blubber until the early 1900s.

Blubber was processed and used for lubrication, coating the bottom of boats, and as lamp and cooking oil. Caribbean monk seal skins were sought to make trunk linings, articles of clothing (e.g., caps and belts), straps, and bags. In the early 1700s, a girdle fashioned from a Caribbean monk seal pelt was believed to relieve lower back pain. At least some sailors reportedly prized monk seal pelts, believing that their hairs became erect during rough seas, but remained flat in calm seas. The Swiss naturalist Konrad Gesner reported accounts from seafarers in the Caribbean (near the island of Hispaniola) in the 1550s, writing: ''Its hair is reputed to be of such a wondrous nature that the skins or belts are worn by mariners. When thunderstorms, tempests and other inclement weather is nigh, the hair shall rise and bristle, but when it turns still and mild, it shall lay down smoothly'' (Gesner, 1558, as cited in Johnson, 2004).

Caribbean monk seals were taken for food by sailors stranded on the Arricifes Viboras (Cuba) in 1520, on the Islas de Lobos (Veracruz, Mexico) in 1524, Dry Tortugas (Florida) in 1742, and in the Triangle Keys (Mexico) in 1846. Guano gatherers visiting the Triangle Keys in 1856 reportedly made a bonfire of 100 barrels of Caribbean monk seal skins and skeletons left behind by sealers, suggesting that they were heavily exploited for their oil in this region. Fishermen sometimes hunted the seals for meat until about 1885. In at least one instance, two monk seals were killed simply ''for fun'' (Allen, 1880). Aside from heavy hunting pressure by humans, the only known natural predator reported is an unidentified species of shark (Fernandez de Oviedo, 1944).

As a result of this species' increasing rarity in the wild, live specimens were eagerly sought by zoological gardens following the discovery of remnant populations in the late 1800s. In 1897, two live specimens sold for $50.00 each, and dead or mounted specimens also were sold to museums. Two scientific expeditions to the Triangle Keys are believed to have contributed to the extirpation in that region. On 4 days in December 1886, 49 seals were killed in the Triangle Keys (Allen, 1887; Ward, 1887). Live specimens obtained by the New York Aquarium in 1897 and 1909 also were captured from the Triangle Keys (Townsend, 1909).

Conclusions Regarding Listing Determination

Based upon the best available commercial and scientific information, we have determined that the Caribbean monk seal has become extinct. A sufficient period of time has passed since the last confirmed sighting of the species, and the best available information supports this finding. The USFWS concurred with our recommendation to delist this species in a letter dated October 17, 2008, and will remove the species from the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) in a separate **Federal Register** notice. Therefore, we remove the species from our endangered species list at 50 CFR 224.101(b) in this final rule.

References Cited

A complete list of all references cited in this final rule is available upon request from the NMFS (see **ADDRESSES**) and our website at *http://sero.nmfs.noaa.gov/pr/protres.htm*.

Peer Review

On July 1, 1994, we and the USFWS published a series of policies regarding delistings under the ESA, including a policy for peer review of scientific data (59 FR 34270). In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106–554), is intended to enhance the quality and credibility of the Federal Government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005.

To satisfy our requirements under our peer review policy and the OMB Bulletin, independent peer review was obtained from three individual subject matter experts to ensure the best biological and commercial information was used to make the recommendation to delist the species due to extinction. Peer review was also obtained to ensure that reviews by recognized experts were incorporated into the 5–year review that supports this final rule to delist the Caribbean monk seal, and we

incorporated the peer review comments prior to dissemination of this final rule. The 5–year review upon which the information in this final rule is based was completed for the Caribbean monk seal on March 7, 2008, and is available on our website at *http://sero.nmfs.noaa.gov/pr/protres.htm*.

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing to the best scientific and commercial data available. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus*, 657 F 2d 829 (6th Cir.1981), we have concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act. (see also NOAA Administrative Order 216 6.)

Executive Order (E.O.) 12866, Regulatory Flexibility Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under E. O. 12866.

Paperwork Reduction Act

This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of these circumstances is applicable to this proposed listing determination. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual State and Federal interest, the proposed rule was given to the relevant state agencies in each state in which the Caribbean monk seal formerly occurred, and each agency was invited to comment.

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: October 22, 2008.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, we amend 50 CFR part 224 as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531 1543 and 16 U.S.C. 1361 *et seq.*

§ 224.101 [Amended]

■ 2. Amend § 224.101(b) by removing the phrase ''Caribbean monk seal (*Monachus tropicalis*);''.

[FR Doc. E8–25704 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 209
Tuesday, October 28, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2008–0093]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security Claims Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Proposed Rule Making.

SUMMARY: The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the Department of Homeland Security Claims Records system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before November 28, 2008.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0093, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel, III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern claims submitted to DHS.

As part of its efforts to streamline and consolidate its Privacy Act records systems, DHS is establishing a new agency-wide system of records under the Privacy Act (5 U.S.C. 552a) for DHS claims records. This will ensure that all components of DHS follow the same privacy rules for collecting and handling claims. DHS will use this system to collect and maintain claims submitted to it by DHS personnel and others as well as claims it files against others. In this notice of proposed rulemaking, DHS now is proposing to exempt Claims Records, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for Claims Records. Some information in Claims Records relates to official DHS national security, law enforcement, immigration, intelligence activities, and protective services to the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS' ability to obtain information from third parties and other sources; to protect the privacy of third parties; to safeguard classified information; and to safeguard records in connection with providing protective services to the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for Claims Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph 10:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

10. The Department of Homeland Security Claims Records system of records consists of electronic and paper records and will be used by DHS and its components. Claims Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security, intelligence activities; and protection of the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. Claims Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(1), (2) and (3), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: October 15, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–25613 Filed 10–27–08; 8:45 am]

BILLING CODE 4410–10–P

FEDERAL RESERVE SYSTEM

12 CFR Parts 222, 226, 227, and 230

[Regulations V, Z, AA, and DD; Docket Nos. R–1286; R–1314; R–1315, and R–1316]

Missing Comments Submitted Through the Federal eRulemaking Portal

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of opportunity to resubmit comments.

SUMMARY: Because of a software problem at the Federal eRulemaking Portal (*http://www.regulations.gov*), the Board did not receive certain public comments submitted through that portal. This problem affected comments on four of the Board's proposed rules [Docket Nos. R–1286; R–1314, R–1315; and R–1316] that were submitted only through the Federal eRulemaking Portal between

March 22, 2008, and September 8, 2008. A total of 83 comments on the four proposals were not relayed to the Board. As set forth below, the Board will accept resubmission of those comments that were not received.

DATES: Comments must be received on or before November 12, 2008.

ADDRESSES: Affected commenters may re-submit comments by using this link: *http://www.federalreserve.gov/generalinfo/foia/lostcomments.cfm.*

SUPPLEMENTARY INFORMATION: The Board of Governors of the Federal Reserve System recently received notice that 83 comment letters submitted between March 22, 2008, and September 8, 2008, via the Federal eRulemaking Portal (*http://www.regulations.gov*) on four of the Board's rulemaking proposals [Docket No. R–1286, Regulation Z, Truth in Lending (73 FR 28867, May 19, 2008); Docket No. R–1314, Regulation AA, Unfair or Deceptive Acts or Practices (73 FR 28905, May 19, 2008); Docket No. R–1315, Regulation DD, Truth in Savings (73 FR 28739, May 19, 2008); and Docket No. R–1316, Regulation V, Fair Credit Reporting (73 FR 28966, May 19, 2008)] that have not been acted on were not forwarded to the Board, due to a software problem at that portal.[1] The problem affects comments that were sent only to the eRulemaking Portal. Comments sent by other means (by e-mail to the Board's comments mailbox, by facsimile, or by mail) are not affected. Because the identities of the commenters affected by this software problem are not retrievable, the Board requests that before resubmitting a comment, you review the Board's Web site at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* to determine if your comment has been posted. If the comment that you submitted has not been posted, you may re-submit your comment by using this link: *http://pubdev.frb.gov/generalinfo/foia/LostComments.cfm.*

Dated: October 23, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–25610 Filed 10–27–08; 8:45 am]

BILLING CODE 6210–01–P

[1] The interagency ''eRulemaking Program'' launched the Web site *http://www.regulations.gov* in January 2003 to provide access and an opportunity to comment on all proposed federal regulations at one online portal. The Federal Reserve has received assurances that the software problem has been corrected and safeguards are now in place to ensure the error will not occur for future proposed rules. Questions about this matter may be directed to John Moses, Chief, eRulemaking Program Branch, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, 202/566–1352, or *Moses.John@epamail.epa.gov.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0997; Airspace Docket No. 08–AAL–28]

Proposed Amendment of Class E Airspace; Bethel, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend Class D and E airspace at Bethel, AK. The Airport and Navigation Aids will be soon undergoing a magnetic variation change. This change will result in the necessity to revise the airspace descriptions. Additionally, the present 1,200 foot airspace is no longer necessary, because Bethel lies within a larger section of controlled airspace called the Yukon-Kuskokwim Delta Class E airspace covering the area required for the airport. Adoption of this proposal would result in amendment of existing Class D and E airspace upward from the surface, and from 700 feet (ft.) and 1,200 ft. above the surface at the Bethel Airport, Bethel, AK.

DATES: Comments must be received on or before December 12, 2008.

ADDRESSES: Send comments on the proposal to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0997/Airspace Docket No. 08–AAL–28, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–0997/Airspace Docket No. 08–AAL–28.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of Notice of Proposed Rulemakings (NPRMs)

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara/index.html.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being

placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71, which would amend the Class D and E airspace at the Bethel Airport, in Bethel, AK. The intended effect of this proposal is to amend Class D and E airspace upward from the surface, and from 700 ft. and 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at the Bethel Airport, Bethel, AK.

The Bethel Airport and its Navigation Aids will be soon undergoing a magnetic variation change. This change will result in the necessity to amend the airspace descriptions. There will be no visible change to the airspace currently depicted on aeronautical charts. Additionally, the present 1,200 foot airspace description is no longer necessary, because Bethel, Alaska lies within a larger section of Class E5 airspace, called Yukon-Kuskokwim Delta, covering the area required for the airport. Class D and E controlled airspace extending upward from the surface, and from 700 ft. and 1,200 ft. above the surface in the Bethel Airport area would be amended by this action. The proposed airspace is sufficient in size to contain aircraft executing the instrument procedures at the Bethel Airport, Bethel, AK.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class D airspace area designations are published in paragraph 5000 of FAA Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as surface areas are published in paragraph 6002 and 6004 in FAA Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore —(1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to create Class D and E airspace sufficient in size to contain aircraft executing instrument procedures at the Bethel Airport, AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71— DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, is to be amended as follows:

* * * * *

Paragraph 5000 Class D Airspace Extending Upward from 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK D Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

That airspace extending upward from the surface to and including 2,600 feet MSL and within a 4.1-mile radius of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL between the 058°(T)/044°(M) radial and the 078°(T)/064°(M) radial of the Bethel VORTAC, AK, from 2.9 miles northeast of the Bethel VORTAC, AK. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

AAL AK E2 Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

Within a 4.1-mile radius of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL between the 058°(T)/044°(M) radial and the 078°(T)/064°(M) radial of the Bethel VORTAC, AK, from 2.9 miles northeast of the Bethel VORTAC, AK. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D Surface Area.

* * * * *

AAL AK E4 Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

That airspace extending upward from the surface within 3 miles each side of the 023°(T)/009°(M) radial of the Bethel

VORTAC, AK, extending from the 4.1-mile radius of the Bethel Airport, AK, to 8.2 miles northeast of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL between the 058°(T)/044°(M) radial and the 078°(T)/064°(M) radial of the Bethel VORTAC, AK, from 2.9 miles northeast of the Bethel VORTAC, AK, and within 3.4 miles each side of the 008°(T)/354°(M) radial of the Bethel VORTAC, AK, extending from the 4.1-mile radius of the Bethel Airport, AK, to 11 miles north of the Bethel VORTAC, AK, and within 3.5 miles each side of the 215°(T)/201°(M) radial of the Bethel VORTAC, AK, extending from the 4.1-mile radius of the Bethel Airport, AK, to 5 miles southwest of the Bethel Airport, AK.

* * * * *

Paragraph 6005 Class E Airspace Extending Upward from 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Bethel, AK [Amended]

Bethel, Bethel Airport, AK
(Lat. 60°46′47″ N., long. 161°50′17″ W.)
Bethel VORTAC
(Lat. 60°47′05″ N., long. 161°49′28″ W.)

That airspace extending upward from 700 feet above the surface within a 16.8-mile radius of the Bethel Airport, AK, and within 8 miles west and 4 miles east of the Bethel Localizer front course extending from the 16.8-mile radius of the Bethel Airport, AK, to 22.8 miles north of the Bethel Airport, AK, and within 8 miles east and 4 miles west of the Bethel Localizer back course extending from the 16.8-mile radius of the Bethel Airport, AK, to 21.4 miles south of the Bethel Airport, AK.

* * * * *

Issued in Anchorage, AK, on October 20, 2008.

Marshall G. Severson,

Acting Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–25714 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0982; Airspace Docket No. 08–ANM–6]

Proposed Modification of Class E Airspace; Alamosa, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to modify Class E airspace at Alamosa, CO. Additional controlled airspace is necessary to accommodate aircraft using a new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) at Alamosa, San Luis Valley Regional/Bergman Field. The FAA is proposing this action to enhance the safety and management of aircraft operations at Alamosa, San Luis Valley Regional/Bergman Field, CO.

DATES: Comments must be received on or before December 12, 2008.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366–9826. You must identify FAA Docket No. FAA–2008–0982; Airspace Docket No. 08–ANM–6, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Area, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2008–0982 and Airspace Docket No. 08–ANM–6) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2008–0982 and Airspace Docket No. 08–ANM–6''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the **Federal Register**'s Web page at *http://www.gpoaccess.gov/fr/index.html.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Area, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying Class E airspace at Alamosa, CO. Additional controlled airspace is necessary to accommodate aircraft using the new RNAV (GPS) SIAP at Alamosa, San Luis Valley Regional/Bergman Field. This action would enhance the safety and management of aircraft operations at Alamosa, San Luis Valley Regional/Bergman Field, CO.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9R, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current.

Therefore, this proposed regulation; (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code, Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes additional controlled airspace at Alamosa, San Luis Valley Regional/ Bergman Field, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2006, and effective September 15, 2007 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM CO, E5 Alamosa, CO [Modified]

Alamosa, San Luis Valley Regional/Bergman Field, CO
(Lat. 37°26′06″ N., long. 105°52′00″ W.)
Alamosa VORTAC
(Lat. 37°20′57″ N., long. 105°48′56″ W.)

That airspace extending upward from 700 feet above the surface within 8.7 miles northeast and 10.5 miles southwest of the Alamosa VORTAC 335° and 155° radials extending from 20.1 miles northwest to 10.5 miles southeast of the VORTAC, and within 1.8 miles northwest and 5.3 miles southeast of the Alamosa VORTAC 200° radial extending from the VORTAC to 14 miles southwest of the VORTAC; that airspace extending upward from 1,200 feet above the surface within an area bounded by a point beginning at lat. 37°37′00″ N., long. 106°14′00″ W.; lat. 37°44′00″ N., long. 105°55′00″ W.; lat. 37°52′00″ N., long. 105°43′00″ W.; lat. 37°49′00″ N., long. 105°31′00″ W.; lat. 37°20′30″ N., long. 105°18′00″ W.; lat. 37°03′30″ N., long. 105°18′00″ W.; lat. 37°01′30″ N., long. 105°46′00″ W.; lat. 36°48′00″ N., long. 105°48′00″ W.; lat. 36°58′00″ N., long. 106°17′00″ W.; lat. 37°09′00″ N., long. 106°19′00″ W.; lat. 37°17′00″ N., long. 106°21′00″ W.; thence to the point of beginning.

* * * * *

Issued in Seattle, Washington, on October 16, 2008.

William Buck,

Acting Manager, Operations Support Group, Western Service Area.

[FR Doc. E8–25732 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–115457–08]

RIN 1545–BH88

Extension of Time for Filing Returns; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of a public hearing on proposed regulations by cross-reference to temporary regulations relating to the simplification of procedures for automatic extensions of time to file certain returns. These simplified procedures are aimed at reducing overall taxpayer burden.

DATES: The public hearing is being held on Tuesday, January 13, 2009, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the public hearing by Tuesday, December 9, 2008.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC 20224.

Send submissions to CC:PA:LPD:PR (REG–115457–08), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG–115457–08), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically via the Federal erulemaking Portal at *http://www.regulations.gov* (IRS–REG–115457–08).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Matthew P. Howard (202) 622–4910; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking by cross-reference to temporary regulations (REG–115457–08) that was published in the **Federal Register** on Tuesday, July 1, 2008 (73 FR 37389).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments must submit an outline of the topics to be addressed and the amount of time to be denoted to each topic (Signed original and eight copies) by December 9, 2008.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom of Information Reading Room (FOIA RR) (Room 1621) which is located at the 11th and Pennsylvania Avenue, NW., entrance, 1111 Constitution Avenue, NW., Washington, DC.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER**

INFORMATION CONTACT section of this document.

LaNita VanDyke,

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

[FR Doc. E8–25638 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG–120476–07]

RIN 1545–BG71

Employer Comparable Contributions to Health Savings Accounts Under Section 4980G, and Requirement of Return for Filing of the Excise Tax Under Section 4980B, 4980D, 4980E or 4980G; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed rulemaking providing guidance on employer comparable contributions to Health Savings Accounts (HSAs) under section 4980G of the Internal Revenue Code as mended by sections 302, 305, and 306 of the Tax Relief and Health Care Act of 2006. The proposed regulations also provide guidance relating to the requirement of a return to accompany payment of the excise tax under section 4980B, 4980D, 4980E or 4980G of the Code and the time for filing that return. These proposed regulations would affect employers that contribute to employees' HSAs and Archer MSAs, employers or employee organizations that sponsor a group health plan, and certain third parties such as insurance companies or HMOs or third-party administrators who are responsible for providing benefits under the plan.

DATES: The public hearing, originally scheduled for October 30, 2008, at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Richard A. Hurst of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration), at *Richard.A.Hurst@irscounsel.treas.gov*.

SUPPLEMENTARY INFORMATION: A notice of public hearing that appeared in the **Federal Register** on Wednesday, July 16, 2008 (73 FR 40793), announced that a public hearing was scheduled for October 30, 2008, at 10 a.m., in room 2116, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The subjects of the public hearing are under sections 4980B, 4980D, 4980E and 4980G of the Internal Revenue Code.

The public comment period for these regulations expired on October 14, 2008. Outlines of topics to be discussed at the hearing were due on October 13, 2008. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Wednesday, October 15, 2008, no one has requested to speak. Therefore, the public hearing scheduled for October 30, 2008, is cancelled.

LaNita Van Dyke,

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

[FR Doc. E8–25635 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AM99

Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA): Preauthorization for Durable Medical Equipment

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department of Veterans Affairs (VA) regulations for the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) related to preauthorization requirements that apply to the purchase or rental of durable medical equipment. It would increase from $300 to $2,000 the cost of purchase or rental above which preauthorization would be required. This is intended to remove from the CHAMPVA claims process an administratively inefficient requirement.

DATES: Comments must be received on or before December 29, 2008.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (02REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AM99—CHAMPVA: Preauthorization for DME.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Richard M. Trabert, Policy Management Division, VA Health Administration Center, 3773 Cherry Creek Drive North, Denver, CO 80246–9061; (303) 331–7549. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This document proposes to amend VA's medical regulations in 38 CFR part 17 concerning CHAMPVA. CHAMPVA is a VA medical benefits program for (1) spouses and children of veterans who have a permanent and total service-connected disability and (2) surviving spouses and children of veterans who died as a result of a service-connected disability or while rated permanently and totally disabled from a service-connected disability, or who died in the active military, naval, or air service in the line of duty. CHAMPVA is authorized at 38 U.S.C. 1781. To be eligible for CHAMPVA benefits, among other requirements, the spouses, surviving spouses, and children may not be otherwise eligible for medical care under 10 U.S.C. chapter 55 (authorizing TRICARE, medical care that is furnished to certain dependents and survivors of active duty and retired members of the Armed Forces). Needed medical care is largely provided to CHAMPVA beneficiaries through non-VA providers.

Durable medical equipment (DME) is included among the health care items that are available to CHAMPVA beneficiaries, provided the DME is medically necessary and appropriate for the care of the CHAMPVA beneficiary's condition. The determination of medical necessity and appropriateness is made by appropriate VA officials. For purposes of this regulation, DME is generally equipment or supply that: (1) Can withstand repeated use; (2) is primarily and customarily to serve a medical purpose; (3) is medically necessary for the treatment of a covered illness or injury; and (4) is not otherwise excluded by regulation from CHAMPVA coverage.

To ensure that DME purchases and rental are medically necessary and

appropriate as well as within the Department's budgetary constraints, VA has required non-VA providers to obtain preauthorization before the purchase or rental of DME for a CHAMPVA beneficiary when the cost of the DME exceeds $300.

We propose to amend § 17.273(e) by increasing the dollar amount above which preauthorization will be required for purchase or rental of DME. The proposed rule would increase the dollar amount above which preauthorization would be required from $300 to $2,000.

This increase in the dollar amount above which preauthorization is required is necessary to remove an administrative inefficiency in the CHAMPVA claims process. Since the $300 ceiling was put into place in 1973, the cost of common DME items has steadily increased. We conducted a review of a sample of our claims that demonstrated we had approved 98 percent of all requests for DME, but only 93 percent of requests for DME having a purchase or total rental price of over $2,000. When DME claims are disapproved, it is generally because the DME is determined by VA not to be medically necessary and appropriate. We concluded that it is not cost effective to review claims of $2,000 or less for medical necessity twice, i.e., to review a request when submitted for preauthorization and again when the claim is officially submitted for payment.

Raising the dollar amount to $2,000 would make the administrative processing of DME claims easier for CHAMPVA beneficiaries and providers, as well as for VA. We expect that it would not affect the number of claims that are approved. As noted, 98 percent of these claims are currently already approved for payment.

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Individuals eligible for CHAMPVA benefits are widely dispersed geographically and thus services provided to them would not have a significant impact on any small entity. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analyses requirements of section 603 and 604.

Paperwork Reduction Act of 1995

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a regulatory action as a ''significant regulatory action'' requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, if it is a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Catalog of Federal Domestic Assistance

This proposed rule affects the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), for which there is no Catalog of Federal Domestic Assistance program number.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—Health, Health facilities, Health professionals, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Travel and transportation expenses, and Veterans.

Approved: August 19, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons stated above, the Department of Veterans Affairs proposes to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, 1721, and as noted in specific sections.

§ 17.273 [Amended]

2. Amend § 17.273(e) by removing ''$300.00'' and adding, in its place, ''$2,000.00''.

[FR Doc. E8–25646 Filed 10–27–08; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2008–0694; FRL–8735–9]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of West Virginia. This revision pertains to establishing ambient air quality standards for sulfur oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead equivalent to the national primary and secondary ambient air quality standards. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before November 28, 2008.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–

R03–OAR–2008–0694 by one of the following methods:

A. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

B. E-mail: *Fernandez.cristina@epa.gov.*

C. Mail: EPA–R03–OAR–2008–0694, Cristina Fernandez, Chief, Air Quality Planning, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket(s normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2008–0694. 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 electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street, SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Gobeail McKinley, (215) 814–2033, or by e-mail at *mckinley.gobeail@epa.gov.*

SUPPLEMENTARY INFORMATION: On April 25, 2008, the West Virginia Department of Environmental Protection submitted a revision to its State Implementation Plan. The SIP revision restructures and consolidates all of the West Virginia ambient air quality standards into Rule 45CSR8 to be consistent with 40 CFR Part 50.

I. Summary of SIP Revision

On April 25, 2008, the State of West Virginia submitted as a SIP revision Rule 45CSR8—Ambient Air Quality Standards, which updates and incorporates all six criteria pollutants to be equivalent to the NAAQS in 40 CFR Part 50. The revision repeals rules 45CSR9—Ambient Air Quality Standards for Carbon Monoxide and Ozone, and 45CSR12—Ambient Air Quality Standard for Nitrogen Dioxide, and moves these ambient air quality standards into Rule 45CSR8.

The revision includes a correction of the sulfur dioxide annual primary standard from 0.003 to 0.030 ppm; removes the annual PM_{10} standard, and incorporates the annual $PM_{2.5}$ standard, the 24-hour $PM_{2.5}$ standard of 35 $\mu g/m^3$, the primary and secondary standards for lead, and the primary and secondary 1-hour and 8-hour ozone standards. The SIP revision includes the revocation of the 1-hour ozone standard except for Berkeley and Jefferson Counties and it identifies the 1-hour ozone maintenance areas. The SIP revision also adds new reference conditions for $PM_{2.5}$ and measurement methods for $PM_{2.5}$ and lead.

II. Proposed Action

EPA is proposing to approve the West Virginia SIP revision for establishing ambient air quality standards for sulfur oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, establishing ambient air quality standards in West Virginia, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249,

November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: October 20, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–25655 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R10–RCRA–2008–0588; FRL–8734–9]

Idaho: Proposed Authorization of State Hazardous Waste Management Program Revision Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: In the **Federal Register** of September 30, 2008, EPA announced that Idaho has applied to EPA for final authorization of certain changes to its hazardous waste program under the Resource Conservation and Recovery Act, as amended (RCRA). EPA has reviewed Idaho's application, has preliminarily determined that these changes satisfy all requirements needed to qualify for final authorization, and is proposing to authorize the State's changes. This is an administrative extension of the public comment period for this proposed rule. The public comment period for this proposed rule has been extended from October 30, 2008 to November 20, 2008.

DATES: Comments on this proposed rule must be submitted on or before November 20, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–RCRA–2008–0588, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: Kocourek.Nina@epa.gov.*
- *Mail:* Nina Kocourek, U.S. Environmental Protection Agency, Region 10, Office of Air, Waste & Toxics (AWT–122), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101.

Instructions: Direct your comments to Docket ID No. EPA–R10–RCRA–2008–0588. 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 or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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 during normal business hours at the U.S. Environmental Protection Agency, Region 10, Office of Air, Waste & Toxics, Mailstop AWT–122, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, contact: Nina Kocourek, phone number: (206) 553–6502; or the Idaho Department of Environmental Quality, 1410 N. Hilton, Boise, Idaho, contact: John Brueck, phone number: (208) 373–0458.

FOR FURTHER INFORMATION CONTACT: Nina Kocourek, U.S. Environmental Protection Agency, Region 10, Office of Air, Waste & Toxics (AWT–122), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101, phone number: (206) 553–6502, e-mail: *kocourek.nina@epa.gov*.

SUPPLEMENTARY INFORMATION: Refer to the **Federal Register** of September 30, 2008 (73 FR 56775) (FRL–8722–5), for additional supplemental information about this proposed rulemaking.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This proposed 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: October 20, 2008.

Elin D. Miller,

Regional Administrator, Region 10.

[FR Doc. E8–25685 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 272

[EPA–R06–RCRA–2008–0753; FRL–8729–5]

New Mexico: Incorporation by Reference of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to codify in the regulations entitled ''Approved State Hazardous Waste Management Programs,'' New Mexico's authorized hazardous waste program. The EPA will incorporate by reference into the Code of Federal Regulations (CFR) those provisions of the State regulations that are authorized and that the EPA will enforce under the Solid Waste Disposal Act, commonly referred to as the Resource Conversation and Recovery Act (RCRA). In the ''Rules and Regulations'' section of this **Federal Register**, the EPA is codifying and incorporating by reference the State's

hazardous waste program as an immediate final rule. The EPA did not make a proposal prior to the immediate final rule because we believe these actions are not controversial and do not expect comments that oppose them. We have explained the reasons for this codification and incorporation by reference in the preamble to the immediate final rule. Unless we get written comments which oppose this incorporation by reference during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. If we get comments that oppose these actions, we will withdraw the immediate final rule and it will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send written comments by November 28, 2008.

ADDRESSES: Send written comments to Alima Patterson, Region 6 Regional Authorization Coordinator, State/Tribal Oversight Section (6PD–O), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, Phone number: (214) 665–8533. You may also submit comments electronically or through hand delivery/courier; please follow the detailed instructions in the **ADDRESSES** section of the immediate final rule which is located in the Rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, (214) 665–8533.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: September 17, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. E8–25535 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2235; MB Docket No. 08–208; RM–11495]

Television Broadcasting Services; Fort Wayne, IN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by WISE–TV License, LLC (''WISE''), the licensee of WISE–DT, post-transition DTV channel 19, Fort Wayne, Indiana. WISE requests the substitution of DTV channel 18 for post-transition DTV channel 19 at Fort Wayne.

DATES: Comments must be filed on or before November 28, 2008, and reply comments on or before December 12, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve petitioner as follows: WISE–TV License, LLC, Attn: Jerry Giesler, 3401 Butler Road, Fort Wayne, IN 46808.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, *adrienne.denysyk@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–208, adopted October 1, 2008, and released October 6, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com*. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Indiana, is amended by adding DTV channel 18 and removing DTV channel 19 at Fort Wayne.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–25724 Filed 10–27–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2234; MB Docket No. 08–209; RM–11496]

Television Broadcasting Services; Superior, NE

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by Colins Broadcasting Corporation (''Colins''), the permittee of KSNB–DT, post-transition DTV channel 34, Superior, Nebraska. Colins requests the substitution of DTV channel 4 for post-transition DTV channel 34 at Superior.

DATES: Comments must be filed on or before November 28, 2008, and reply

comments on or before December 12, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Michael D. Basile, Esq., Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW., Suite 800, Washington, DC 20036–6802.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, *joyce.bernstein@fcc.gov*, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–209, adopted October 1, 2008, and released October 6, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com*. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Nebraska, is amended by adding DTV channel 4 and removing DTV channel 34 at Superior.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–25725 Filed 10–27–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2008–0086; 92210–5008–3922–10–B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Dusky Tree Vole (Arborimus longicaudus silvicola) as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the dusky tree vole (*Arborimus longicaudus silvicola*) in all of its range as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). The petitioners also requested the Service to list either the north Oregon coast population of the red tree vole (*A. longicaudus*) as a Distinct Population Segment (DPS) or the red tree vole throughout all of its range because it is threatened or endangered in a significant portion of its range, if we determined that the subspecies, *A. l. silvicola*, was not a valid taxon.

We find that the petition presents substantial scientific or commercial information indicating that listing the dusky tree vole as a subspecies may be warranted. Therefore, with the publication of this notice we are initiating a status review of the species, including the evaluation of the north Oregon coast population of red tree vole and the red tree vole throughout its range, and we will issue a 12-month finding on our determination as to whether the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data and other information regarding this species. We will make a determination on critical habitat for this species if, and when, we initiate a listing action.

DATES: To allow us adequate time to conduct this review, we request that information you submit be received by us on or before December 29, 2008.

ADDRESSES: You may submit information by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R8–ES–2008–0086; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Paul Henson, Project Leader, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Portland, OR 97266; by telephone (503) 231–6179; or by facsimile (503) 231–6195. Persons who use a telecommunications device for the deaf (TTD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting

information concerning the status of the red tree vole (*Arborimus longicaudus*), a species that includes the dusky tree vole (*A. l. silvicola*). We request information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the red tree vole, inclusive of the dusky tree vole. We are seeking information regarding (1) the taxonomic validity of *A. l. silvicola*; (2) the discreteness and the significance of the red tree vole population on the north Coast of Oregon; and (3) that area constituting a significant portion of the species' range; including: (a) Information on the historical and current distribution of the red tree vole, inclusive of the dusky tree vole, throughout its range and the effects of past habitat management on that distribution; (b) information related to red tree vole population abundance, dynamics, and trends in this area; (c) genetic, morphological, behavioral, and other information relating to the taxonomy of the red tree vole, inclusive of the dusky tree vole; and (d) information relevant to whether any population of the red tree vole in western Oregon may qualify as a DPS in accordance with the ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Act'' (Service 1996) (the policy is available at *http://www.fws.gov/endangered/policy/pol005.html* or at the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**)).

We seek additional information on the distribution of the red tree vole to clarify the range of the three potential listable entities described by the petitioner: (1) The dusky tree vole subspecies; (2) the north Oregon coast population of the red tree vole, which occupies the same range as the dusky tree vole; and (3) the red tree vole throughout all of its range.

We are also seeking information pertaining to the following five threat factors used to determine if a species, as defined under the Act, is threatened or endangered pursuant to Section 4(a)(1) of the Act:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence and threats to the species or its habitat.

If we determine that listing the dusky tree vole, listing the north Oregon coast DPS of the red tree vole, or listing the red tree vole throughout all of its range because it is threatened or endangered in a significant portion of its range, is warranted, it is our intent to propose critical habitat to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, with regard to areas within the geographical range currently occupied by the species, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the species that are essential to the conservation of the species. Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of the Act.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' Based on the status review, we will issue a 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on *http://www.regulations.gov*, or by appointment during normal business hours at the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. Such findings are based on information contained in the petition, supporting information submitted with the petition, and information otherwise readily available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species. We base this finding on information provided by the petitioner that we determined to be reliable after reviewing sources referenced in the petition and available in our files. We evaluated that information in accordance with 50 CFR 424.14(b). Our process in making this 90-day finding under section 4(b)(3)(A) of the Act and § 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial information'' threshold.

On June 22, 2007, we received a petition dated June 18, 2007, from the Center for Biological Diversity, Oregon Chapter of the Sierra Club, Cascadia Wildlands Project, Oregon Wild, Audubon Society of Portland, Noah Greenwald, and Amanda Garty (hereafter, ''the petitioners''). The petitioners requested that we list the dusky tree vole as a threatened or endangered species and to designate critical habitat for it. The petition clearly identifies itself as such, but it does not include the requisite identification information of addresses,

telephone numbers, and signatures of petitioners, as stipulated in 50 CFR 424.14(a). Nevertheless, we recognize the document as a petition. The petitioners assert that the dusky tree vole is a valid subspecies of the red tree vole, but they also note that recent scientific studies question the validity of this subspecies. The petitioners request if we find that the dusky tree vole is not a listable entity as a subspecies, that we either list the north Oregon coast population of the red tree vole as a DPS, or list the red tree vole because it is threatened or endangered in a significant portion of its range, including the north Oregon coast population.

On September 26, 2007, we sent a letter to Noah Greenwald, Center for Biological Diversity, acknowledging our receipt of the petition and providing our determination that emergency listing was not warranted for the species at that time. We also stated our intention to make an initial 90-day finding within 90 days of the date of our response letter. This notice constitutes our 90-day finding for the petition to list the dusky tree vole as a subspecies in all of its range, or, if the subspecies is not considered valid, to list the north Oregon coast population of the red tree vole as a DPS, or the red tree vole throughout all of its range because it is threatened or endangered in a significant portion of its range (inclusive of the range of the dusky tree vole).

Listable Entity Evaluation

Under Section 3(16) of the Act, we may consider for listing any species or subspecies of fish, wildlife, or plants, or any distinct population segment of vertebrate fish or wildlife which interbreeds when mature. Such entities are considered eligible for listing under the Act (and are, therefore, referred to as ''listable entities''), should they be determined to meet the definition of a threatened or endangered species. In this case, the petitioner has requested that we consider the following entities for listing, presented in priority order: (1) The dusky tree vole if it can be considered a valid subspecies of the red tree vole; (2) the north coast population of the red tree vole, which occupies the same range as the dusky tree vole as a DPS; or (3) the entire range of the red tree vole because it is threatened or endangered in a significant portion of its range. Each of these entities may be considered for listing under the Act (16 U.S.C. 1532(16)).

The petitioners describe the range of the dusky tree vole as extending ''throughout north coastal Oregon, in Clatsop, Tillamook and Lincoln Counties [citations omitted].'' In the absence of information to the contrary in the petition, we have assumed that this range description also applies to the presumed north Oregon coast DPS of the red tree vole, and includes all or part of the significant portion of the range of the red tree vole in which the petitioners believe threats exist such that listing may be appropriate.

The petitioners assert that the dusky tree vole is a subspecies of the red tree vole based on pelage color (Hall 1981, p. 788), and believe genetic work by Miller *et al.* (2006) may provide support for distinguishing genetic differences between the dusky tree vole and the red tree vole. The petitioners also note that Howell (1926, p. 35) described several physical differences between the dusky and red tree voles. The petitioners, however, acknowledge other work noting no differences between the taxa based on physical measurements, chromosomal analysis, and mitochondrial DNA (Johnson and George 1991, p. 12; Bellinger *et al.* 2005, p. 207). We note, as do the petitioners, that the taxonomic validity of the dusky tree vole as a subspecies is in question. Furthermore, we note that information readily available in our files does not support the petitioners' contention that the dusky tree vole is a recognized subspecies of the red tree vole (Integrated Taxonomic Information System 2007 (ITIS; *http://www.itis.gov*)).

The standard of review for a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.'' We determine that the petitioners have met the threshold for review in their characterization of the debate over the taxonomy of the dusky tree vole, and presented substantial information indicating that recognition of the dusky tree vole as a subspecies may be valid, although this does not constitute a final determination on the taxonomic validity of the dusky tree vole as a subspecies.

If we determine that the dusky tree vole does not warrant listing as a subspecies, the petitioner requested that we assess either whether the north coast population of the red tree vole, which occupies the same range as the dusky tree vole, warrants listing as a DPS, or whether the red tree vole warrants listing because it is threatened or endangered in a significant portion of its range. As appropriate, we will further evaluate these other entities in the status review.

Species Information

As a putative subspecies, the dusky tree vole is a member of the red tree vole taxon. Some of the scientific literature is specific to the dusky tree vole, but much of it describes the red tree vole and does not distinguish among subspecies. For that reason, available information on the red tree vole is presented below with the assumption that it may also apply to the dusky tree vole. If the information source makes distinctions between the two, they are noted, as appropriate. Published literature on the red tree vole also includes work conducted on the closely related Sonoma tree vole (*Arborimus pomo*). Prior to 1991, these two taxa were considered to be the red tree vole (Johnson and George 1991, entire). Where pertinent information is lacking or limited for the red tree vole, information on the Sonoma tree vole (*A. pomo*) is presented.

Information presented in this section is preliminary. We have reviewed the references cited by the petitioners, summarized that information, and have provided additional information from references cited within documents referenced by the petitioners. We have also included information obtained from our ITIS database.

Taxonomy and Description

Tree voles are small rodents, less than 8 inches (206 millimeters) long and weighing up to 2 ounces (50 grams) (Hayes 1996, p. 1; Verts and Carraway 1998, p. 301). Their coat color ranges from brownish red to bright brownish-red or orange-red (Maser *et al.* 1981, p. 201). The darker coat color is characteristic of the dusky tree vole (Bailey 1936, p. 198; Maser *et al.* 1981, p. 201). Melanistic (all black) forms of the dusky (Hayes 1996, p. 1) and red tree vole (Swingle 2005, p. 46) also occur, as do cream-colored red tree voles (Swingle 2005, p. 82).

Howell (1926, p. 35) described several physical differences between the dusky and red tree voles. These differences include coat color, as well as skull and dental characteristics. However, Howell (1926, p. 34) based his description of the red tree vole on the observations of 40 voles, 32 of which were from California. At least 28 of the California voles were collected from locales within the range of what is now considered the Sonoma tree vole (*e.g.*, specimens from Carlotta, located in Humboldt County (Howell 1926, p. 41). Hence, his description of the red tree vole and comparison to the dusky tree vole was from a collection that was comprised primarily of Sonoma tree voles.

The red tree vole was first described from a specimen collected in Coos County, Oregon (True 1890, p. 303–304), and originally placed in the genus *Phenacomys.* The dusky tree vole was first described from a dead specimen found in Tillamook County (Howell 1921, entire). The dusky tree vole was originally classified as a distinct species, *Phenacomys silvicolus;* Miller (1923, p. 400, as cited in Hayes 1996, p. 1) later renamed it *P. silvicola.* Johnson (1968, p. 27; 1973, p. 243) suggested separating the tree voles from the genus *Phenacomys,* and putting them into their own genus, *Arborimus.* There is no agreement on the generic classification of tree voles, with some authors continuing to use *Phenacomys* (*e.g.*, Verts and Carraway 1998, pp. 309–311), while others refer to *Arborimus* (*e.g.*, Hayes 1996, entire). The specific name, *longicaudus,* however, is not in dispute. For the purposes of this finding, we use the generic classification, *Arborimus,* adopted by the petitioners.

Johnson (1968, p. 27) concluded from his analysis of blood proteins and hemoglobin of the dusky and red tree voles that the named forms of *Arborimus* should be combined into a single species. Hall (1981, p. 788) cited Johnson (1968, p. 27) as suggesting a ''subspecific relationship of the two taxa,'' and others have cited Johnson as well in supporting the classification of the dusky tree vole as a subspecies (*e.g.*, Maser and Storm 1970, p. 64; Johnson and George 1991, p. 1). However, Bellinger *et al.* (2005, p. 207) suggested that subspecific status may not be warranted based on a lack of detectable genetic differences and a lack of consistently verifiable morphological differences between the dusky and red tree voles. Miller *et al.* (2006, entire) found genetic discontinuities in the red tree vole along north-south and east-west gradients within its range, but remained silent on its taxonomic status. Information in our files does not refer to the dusky tree vole as a subspecies of the red tree vole (information retrieved 19 December 2007, from the ITIS database).

Range and Distribution

The *Arborimus* genus is endemic to the humid coniferous forests west of the crest of the Cascade Mountains in Oregon and northwestern California (Maser 1966, p. 7). The red tree vole occurs in western Oregon from the Cascade crest to the Pacific coast (Hayes 1996, p. 2; Verts and Carraway 1998, pp. 309–310), with a geographic range covering approximately 16.3 million acres across multiple ownerships (USDA and USDI 2007, p. 287).

The southern boundary of the red tree vole's range grades into the range of the Sonoma tree vole, which has only recently been classified as a separate species from the red tree vole (Johnson and George 1991, p. 12). Johnson and George (1991, pp. 11–12) concluded that the range break between these two species is the Klamath Mountains along the Oregon-California border. Murray (1995, p. 26), however, considers the boundary to be the Klamath River, which would extend the red tree vole's range into northwestern California.

The northern extent of the red tree vole's distribution is spotty, with collection records along the Columbia River at Cascade Locks (Maser 1966, p. 15). The red tree vole has not been found north of the Columbia River (Verts and Carraway 1998, p. 309). Its distribution in Clatsop and Columbia Counties in northwestern Oregon is less certain, with a single specimen recorded from central Clatsop County (Verts and Carraway 1998, pp. 310, 546). The red tree vole range includes the west slope of the Cascade Mountains (Corn and Bury 1986, p. 405), with the known eastern-most limit occurring in the Columbia River Gorge at Mitchell Point, about 2 miles west of Hood River, Oregon (USDA and USDI 2007, p. 289).

Surveys conducted for red tree voles by Federal land management agencies as part of the Survey and Manage program under the Northwest Forest Plan have provided additional information on the distribution of the red tree vole (USDA and USDI 2007, p. 289). These surveys indicate that red tree voles are uncommon or absent in much of the North Coast Range and North Cascades of Oregon. Forsman *et al.* (2004, p. 300) also reached the same conclusion based on remains of red tree voles in northern spotted owl (*Strix occidentalis caurina*) pellets, though data were sparse from these regions as compared to the rest of the red tree vole's range. Based on surveys, the eastern limit of red tree vole distribution in southwestern Oregon includes Josephine County and a narrow band along the western and northern edges of Jackson County (USDA and USDI 2007, p. 289).

Red tree voles are generally restricted to lower elevation coniferous forests, although a few records of this species above 4,265 feet (1300 meters) have been reported (Manning and Maguire 1999, entire; Forsman *et al.* 2004, p. 300). Red tree voles may be limited to lower elevations because their nests don't provide adequate insulation, and foraging along snow and ice-covered branches may be more difficult (Hamilton 1962, p. 503).

The limits of the range of the dusky tree vole are even less clear than the red tree vole. Johnson and George (1991, p. 12) describe its range as restricted to the west slope of the Coast Range in Tillamook and Lincoln Counties, Oregon. However, Maser (1966, p. 16) summarized collection and nest records for the dusky tree vole that were from locations east of the Coast Range crest down to the western edge of the Willamette Valley in Washington, Yamhill, Polk, Benton, and Lane Counties. Brown (1964, p. 648) mentions four dusky tree voles collected near Molalla in Clackamas County. Howell (1926, p. 34) refers to second-hand information as ''unmistakable evidence'' of red tree voles being found in old nests near Bonneville, in far eastern Multnomah County, and then goes on to say, ''Though this sign may possibly have been of *longicaudus*, it is considered more likely to have been of *silvicola*.'' However, he does not describe the ''unmistakable evidence,'' nor does he elaborate on why he concluded that it was indicative of the dusky tree vole. Maser (1966, p. 8) observed that tree voles historically collected north of Eugene and west of the Willamette Valley were typically classified as the dusky tree vole, while those collected north of Eugene and east of the Willamette Valley were almost all identified as red tree voles.

Home Range and Dispersal

The only published data on home range sizes and dispersal comes from red tree voles radio-collared in the southern Coast Range and southern Cascades of Douglas County in southwestern Oregon (Swingle 2005, pp. 51–63, 84–89). Of 52 radio-collared red tree voles, 20 had home ranges consisting of their nest tree and a few adjacent trees, whereas the remainder occupied up to 6 different nests spaced up to 431 feet (131 meters) apart in different trees (Swingle 2005, p. 52). Home range sizes did not differ among sexes nor among voles occurring in young and old forests (Swingle 2005, p. 56). Dispersal distances of subadults ranged from 10 feet to 246 feet (3 meters to 75 meters) (Swingle 2005, p. 63).

Habitat

Red tree voles are primarily and predominantly associated with conifer forests (Hayes 1996, p. 3) and use a variety of tree species. Red tree voles are principally associated with Douglas-fir (Jewett 1920, p. 165; Bailey 1936, p. 195), feeding on Douglas-fir needles and nesting in Douglas-fir trees. Red tree vole nests have also been documented in Sitka spruce (*Picea sitchensis*) (Jewett

1920, p. 165), grand fir (*Abies grandis*), western hemlock (*Tsuga heterophylla*), Pacific yew (*Taxus brevifolia*), and two non-conifers, bigleaf maple (*Acer macrophyllum*) and golden chinquapin (*Castanopsis chrysophylla*) (Swingle 2005, p. 31). While red tree vole nests have been documented in non-conifers, data indicate their principal diet consists of conifer needles (Howell 1926, p. 52) (see Diet section for further discussion). Dusky tree voles in the North Coast Range are also associated with Sitka spruce and western hemlock forests (Walker 1930, pp. 233–234). While Booth (1950, as cited in Maser 1966, p. 42) noted that dusky tree voles live mainly in Sitka spruce and hemlock trees rather than Douglas-fir, Maser (1966, p. 42) contended that they are not restricted to Sitka spruce and Douglas-fir habitat based on his data and earlier observations by Howell (1921) and Jewett (1930, pp. 81–83) as referenced by Maser (1966, p. 42).

Although it occurs and nests in younger, second-growth forests (Jewett 1920, p. 165; Brown 1964, p. 647; Maser 1966, p. 40; Corn and Bury 1986, p. 404), the red tree vole tends to be more abundant in older forests (Corn and Bury 1986, p. 404; Carey 1989, p. 157; Aubry *et al.* 1991, p. 293). Carey (1991, p. 8) reported that this species seems to be especially well-suited to the stable conditions of old-growth Douglas-fir (*Pseudotsuga menziesii*) forests. However, Swingle (2005, pp. 78, 94) found red tree voles nesting in young forests (22 to 55 years old) as frequently as older forests (110 to 250 years old) and concluded that young forests may be more important than originally thought, and perhaps especially critical for tree vole persistence in areas where old forests have been largely eliminated.

Trees containing tree vole nests are significantly larger in diameter and height than those without nests (Gillesberg and Carey 1991, p. 785; Meiselman and Doyle 1996, p. 36 for the Sonoma tree vole). Live, old-growth trees may be optimum tree vole habitat because primary production is high and leaves are concentrated, allowing maximum food availability. In addition, old-growth canopy buffers weather changes and has high water-holding capacity, providing fresh foliage and a water source (Gillesberg and Carey 1991, pp. 786–787).

Howell (1926, p. 40) reported that ''considerable'' expanses of land without suitable trees are a barrier to tree vole movements. However, there are a few records of red tree voles captured in early successional forest stages, such as clearcuts (Corn and Bury 1986, p. 405; Verts and Carraway 1998, p. 310), and infrequent observations of them crossing roads (Swingle 2005, p. 79), suggesting that ''small forest gaps'' (Swingle 2005, p. 79) may not be much of an impediment to tree vole movement. The point at which forest gaps become large enough to impede tree vole movement is not known.

Reproduction

Red tree vole litter sizes are among the smallest compared to other rodents of the same subfamily, averaging 2.9 young per litter (range 1 to 4) (Maser *et al.* 1981, p. 205; Verts and Carraway 1998, p. 310). Swingle (2005, p. 71) documented females breeding throughout the year, with most reproduction occurring between February and September. Red tree voles are capable of breeding and becoming pregnant immediately after a litter is born (Brown 1964, pp. 647–648), resulting in females potentially having two litters of differently aged young in their nests (Swingle 2005, p. 71). However, the frequency of breeding and the number of litters born to a female in a year are unknown. Young tree voles develop more slowly than do non-arboreal vole species (Howell 1926, pp. 49–50; Maser *et al.* 1981, p. 205). Tree vole nests are located in the tree canopies and are constructed from twigs, resin ducts discarded from feeding, lichens, feces, and conifer needles (Gillesberg and Carey 1991, p. 785).

Diet

Tree voles are unique in that they specialize on conifer needles as their principal diet, with Douglas-fir needles the primary species consumed (Howell 1926, p. 52; Benson and Borell 1931, p. 230; Maser *et al.* 1981, p. 205). However, tree voles will consume needles from other conifers, such as Sitka spruce, western hemlock, grand fir, bristlecone fir (*Abies bracteata*), and introduced conifers (Jewett 1920, p. 166; Howell 1926, p. 52; Walker 1930, p. 234; Benson and Borell 1931, p. 229). Walker (1930, p. 234) observed a captive dusky tree vole that preferred hemlock needles over spruce or fir needles. He also observed that dusky tree vole nests tended to be constructed of conifer twigs of the same species of tree in which the nest was located. This led him to suggest that young dusky tree voles may feed solely on the needles of the tree in which they live and develop a forage preference for needles from that conifer species. Tree voles are known to also eat bark, cambium, and lichen (Wight 1925, p. 283; Maser 1966, p. 144).

Tree voles appear to obtain water from their food and from fog or dew that forms on conifer needles, lichen, and moss (Maser 1966, p. 148; Maser *et al.* 1981, p. 205; Carey 1996, p. 75). In keeping captive Sonoma tree voles, Hamilton (1962, p. 503) noted that it was important to keep leaves upon which they feed moist, otherwise the voles would lose weight and die. This may explain the distribution of tree voles being limited to more humid forests (Howell 1926, p. 40; Hamilton 1962, p. 503).

Mortality

Many different species feed on tree voles, including carnivorous mammals (Maser 1966, p. 124; Alexander *et al.* 1994, p. 97; Swingle 2005, p. 69) and a variety of raptors (Maser 1965; Forsman and Maser 1970; Reynolds 1970; Forsman *et al.*, 1984, p. 40; Graham and Mires 2005, p. 39). Other documented predators include the Steller's jay (*Cyanocitta stelleri*) (Howell 1926, p. 60) and the gopher snake (*Pituophis catenifer*) (Swingle 2005, p. 69). In addition, Maser (1966, p. 164) found evidence of tree vole nests being torn apart by northern flying squirrels (*Glaucomys sabrinus*), raccoons (*Procyon lotor*), western gray squirrels (*Sciurus griseus*) and Douglas' squirrels (*Tamiasciurus douglasii*), potentially in search of young voles. Swingle (2005, p. 69) observed weasels (*Mustela* spp.) to be the primary predator of red tree voles.

Other mortality sources include disease, old age, storms, forest fires, and logging (Maser *et al.* 1981, p. 206). Carey (1991, p. 8) claimed that forest fires and logging are far more important mortality factors than predation in limiting vole abundance.

Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In making this finding, we evaluated whether information on threats to the red tree vole and the

dusky tree vole presented in the petition and available in our files at the time of the petition review constitute substantial scientific or commercial information such that listing the species may be warranted. Our evaluation of this information is discussed below. Unless clearly stated that the information is from our files, all threats described below and their effects on the red tree vole and the dusky tree vole are as described in the petition.

A. Present or Threatened Destruction, Modification or Curtailment of the Species' Habitat or Range

According to the petition, tree voles depend on trees for their survival and are considered to have the narrowest niche of all arboreal mammals in the Pacific Northwest (Carey 1996, p. 75). Our files indicate that, while primarily dependent on older Douglas Fir, they are secondarily capable of using several tree species and younger stands. They are considered among arboreal mammals to be the most vulnerable to habitat loss and fragmentation (Huff *et al.* 1992). Due to their low mobility and poor dispersal capability, tree voles are unable to respond to loss of forests from logging (Maser *et al.* 1981; Carey 1989, 1991; Hayes 1996) and other habitat-removing disturbances such as development (USDA and USDI 2000), recreation, and roads. Maser *et al.* (1981, p. 206) claim that clear-cut logging has nearly eliminated entire tree vole populations in many areas and is responsible for local population disappearances and the widely scattered population distribution that currently exists. The petitioners assert that low reproductive rates do not allow tree vole populations to bounce back as readily from declines. The petitioners also state that based on the tree vole's association with old-growth forest and the loss of that habitat through timber harvest, fire, and other disturbances, the historical distribution of the species was likely more extensive than it is today (USDA and USDI 2000). As tree vole populations are reduced and become more isolated, inbreeding becomes a threat if genetic interchange does not occur (USDA and USDI 2000).

As described in the petition, although primarily associated with old-growth forest, tree voles have also been found in young forests (Maser 1966; Corn and Bury 1986; Gillesberg and Carey 1991; Swingle 2005) in association with structural complexity such as tree deformities, increased canopy cover, interconnected tree crowns, broken tops, or dense limb whorls. In landscapes where old forests have been mostly eliminated, such stands may play an important role in dispersal and persistence of tree vole populations (Swingle 2005, p. 94). Consequently, both old-growth and younger forests with structural complexity may play key roles in regards to the species' persistence.

The petitioners claim that most of the land within the range of the dusky tree vole is managed for timber production, with 28 percent managed by the Oregon Department of Forestry at the Clatsop and Tillamook State Forests, 41 percent owned and managed by private timber industry, 11 percent owned by other private entities, and 16 percent administered by the Forest Service and the Bureau of Land Management (BLM). Timber harvest through clearcutting and thinning, as well as intensive forest management practices that include short rotations and even-aged, single-tree species plantations, have significantly reduced and isolated tree vole populations, increasing their risk of extinction (USDA and USDI 2000). Moreover, unlike other red tree vole populations, the dusky tree vole forages on the needles of spruce and hemlock trees. Replanting following logging and fire has resulted in the conversion of many spruce and hemlock stands in the range of the dusky tree vole to single-species plantations of Douglas-fir, dramatically altering the species' forage base.

The petitioners contend that habitat of the red tree vole, inclusive of the dusky tree vole, is also threatened by the development of homes, hotels, and resorts in western Oregon, particularly on the Oregon coast. Given the infrequent observations of tree voles crossing roads, the petitioners believe that existing roads continue to fragment tree vole habitat and isolate populations. Human population growth in western Oregon has been rapid in the past 100 years and is expected to continue at a rate above the national average (ODF 2001). Between 1990 and 2000, human populations in Clatsop and Tillamook Counties grew by 7 percent and 12.5 percent, respectively (U.S. Census Bureau 2006). Tourism is a significant component of the economy in the north Oregon coast area, bringing with it a demand for more development such as resorts, hotels, restaurants, and recreation (ODF 2001).

The petitioners assert that old-growth forest habitat loss and fragmentation has substantially impacted and reduced the distribution and abundance of the dusky tree vole in all of its range and the red tree vole throughout its range in western Oregon. Information in our files is consistent with this assertion, although we also acknowledge that both old-growth and younger forests with structural complexity may play key roles in regards to the species' persistence. Therefore, we conclude that the petitioners have presented substantial information to indicate that the present or threatened destruction or modification of habitat or range may present a threat to the dusky tree vole in all of its range and the red tree vole throughout its range in western Oregon.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Neither the petition nor information in our files presents information indicating that overutilization of red tree voles, inclusive of the dusky tree vole, for commercial, recreational, scientific, or educational purposes is a threat. Therefore, we find that the petition does not present substantial information to indicate that the overutilization for commercial, recreational, scientific, or educational purposes may present a threat to the dusky tree vole in all of its range or the red tree vole throughout its range in western Oregon.

C. Disease or Predation

Neither the petition nor information in our files presents information indicating that disease or predation are significant threats to the red tree vole, inclusive of the dusky tree vole. Therefore, we find that the petition does not present substantial information to indicate that disease or predation may present significant threats to the dusky tree vole in all of its range or the red tree vole throughout its range in western Oregon.

D. Inadequacy of Existing Regulatory Mechanisms

The petitioners cite USDA and USDI (2000) as the basis for concluding that most dusky tree vole habitat throughout the north Oregon coast is owned by private logging companies or is managed by the State to the extent that there are no specific regulations to protect or enhance the dusky tree vole as part of their forest management activities. As discussed above under Factor A, the petitioners assert that existing forest management in the north Oregon coast area is not conducive to tree vole persistence because it does not protect sufficient amounts of older forest used by tree voles.

The petitioners assert that buffer requirements and tree retention standards on State and private forest lands in the north Oregon coast area do not provide adequate protection for dusky tree voles. They state that current

tree retention standards do not provide for the maintenance of sufficient canopy closure needed by dusky tree voles and are not sufficient to protect individuals or populations. They further note that riparian buffers may provide some habitat protection, but such areas are likely to be fragmented and not large enough to support dusky tree vole populations. Required buffers around the nests of some protected bird species such as the bald eagle and the northern spotted owl may incidentally protect some individual voles. However, because nest tree buffers do not target dusky tree vole populations, cover a small and fragmented portion of the landscape, and, in some cases, are only in effect as long as the site is occupied by the target species, the petitioners conclude that these buffers are unlikely to protect viable populations of dusky tree voles.

The petitioners assert that requirements on the Tillamook and Clatsop State Forests to maintain 25 percent older forest structure are inadequate because they fail to protect existing dusky tree vole populations and they do not ensure that tree vole habitat is distributed such that populations will be connected. Rather, under current regulatory mechanisms, older forest stands will likely occur as scattered, isolated parcels. Currently, private timber companies and the State are not funding or conducting dusky tree vole surveys or providing protection for habitat that is currently occupied.

The petitioners assert that with only 16 percent of the forest land within the range of the dusky tree vole on Federal land (USDA and USDI 1994, 2000, 2004), protection measures on these lands provide little benefit to the dusky tree vole or its habitat. All Federal lands in the north Oregon coast area within the range of the dusky tree vole are managed as the North Coast Range Adaptive Management Area, of which nearly 70 percent is managed as Late-Successional Reserves (LSRs). Although LSRs are managed to maintain and restore late-successional forest conditions, some thinning and salvage logging activities are still occurring within them that may impact dusky tree vole populations. Outside of LSRs, the dusky tree vole receives some protection on Federal land from the Survey and Manage Program, which requires surveys and protection of known occupied sites. However, this Program, which is implemented on Forest Service and BLM lands within the Northwest Forest Plan area, is scheduled to be discontinued (see discussion below).

The petitioners state that, based on USDA and USDI (2000), over 70 percent of the known occupied sites and 47 percent of the known and suspected range of the red tree vole (inclusive of the range of the dusky tree vole) are on Federal lands. Data from our files indicate that 35 percent of red tree vole habitat, (inclusive of the range of the dusky tree vole) on Federal land in Oregon is in a reserve allocation on Federal lands (*e.g.* LSRs, Wilderness Areas and other Congressionally and administratively withdrawn areas), and 27 percent of the known and suspected range of the species, across all ownerships, is in reserve land allocations (USDA and USDI 2000, pp. 385–386). However, the petitioners cite the USDA and USDI (2000, p. 386) as the basis for concluding that only about 34 percent of the land base in reserve allocations is in an older age condition that provides good tree vole habitat.

Outside of Federal lands, the petitioners assert that, like the dusky tree vole, the red tree vole is not adequately protected by existing regulatory mechanisms on private lands where clearcut logging, heavy thinning, and short rotations are the primary silvicultural activities. The petition concludes that there is little State-owned land in central and southern Oregon such that State land management will have little effect on red tree voles.

The petition notes that the red tree vole, inclusive of the dusky tree vole, is vulnerable to the impacts of logging because of its dependence on trees for food and shelter, its limited dispersal ability, and low reproductive rates (Maser *et al.* 1981; Carey 1991; USDA and USDI 2000). Although red tree vole populations outside the range of the dusky tree vole are larger than the dusky tree vole population, local populations of the red tree vole are small and isolated (USDA and USDI 2000). The greatest amount of logging in Oregon over the next 50 years is projected to occur in the southern portion of the red tree vole's range, where it is considered the most widespread (USDA and USDI 2000; Haynes 2003, in Zhou *et al.* 2005). In addition, a recent settlement agreement between the Bureau of Land Management (BLM) and counties in western Oregon could lead to a substantial increase in logging throughout western Oregon.

Our files indicate that since we received the petition, the Forest Service and the BLM have signed Records of Decision to eliminate the Survey and Manage Guidelines throughout the range of the red tree vole, which includes the range of the dusky tree vole (USDA 2007; USDA and USDI 2007; USDI 2007). Although the dusky tree vole would be included under the Forest Service and BLM Special Status Species Program (SSSP) in the North Coast Range (USDA and USDI 2007), the petitioners did note before the Survey and Manage Program was discontinued that the SSSP will not have a substantial impact on the protection and recovery of the dusky tree vole because of limited Federal ownership and because survey and mitigation measures under the SSSP program are optional. As part of its Record of Decision to discontinue the Survey and Manage program, the Forest Service did add mitigation measures requiring pre-project clearances and managing known red tree vole sites in the north Cascades range (north of Highway 22) because of limited habitat in this area (USDA 2007); this area does not include the range of the dusky tree vole, as described by the petitioners. While the Forest Service and BLM have signed decision documents discontinuing the Survey and Manage program, their ability to implement those decisions has been challenged in court (*Conservation Northwest, et al.* v. *Mark E. Rey, et al.*, No. C–04–844P).

The petition asserts that much of the red tree vole's habitat in Oregon, inclusive of the range of the dusky tree vole, is not subject to adequate, current regulatory mechanisms that protect it from loss and fragmentation. The petitioners note that only a portion of current tree vole habitat in Oregon is protected on Federal lands within reserves established under the Northwest Forest Plan. Information in our files is consistent with these assertions in that we note 35 percent of red tree vole habitat, (inclusive of the range of the dusky tree vole) on Federal land in Oregon is in a reserve allocation on Federal lands, with the remaining 65 percent subject to possible land disturbing activities. For these reasons, we conclude that the petitioners have presented substantial information to indicate that existing regulatory mechanisms may be inadequate to protect the red tree vole throughout its range in western Oregon, inclusive of the range of the dusky tree vole.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The petitioners noted fire, population size, genetic isolation, and life history traits as threats in this category. The specific life history traits included narrow habitat requirements, low mobility, low dispersal ability, and low reproductive potential. As these traits were addressed above in sections discussing previously mentioned threats and no new information was presented

by the petitioners for this threat category, the previous discussions are not repeated here.

The petition notes that, while the fire regime of the North Coast Range of Oregon is infrequent, with fires occurring at intervals of 300 to 400 years, the fires that do occur tend to be stand-replacing (Agee 1993; ODF 2001). High-severity fires have a similar impact on red tree voles as logging by removing trees and directly impacting populations (Carey 1991, p. 8). In addition, the proliferation of even-aged, high-density single species plantations resulting from clearcutting may be increasing fire risk because such areas more effectively carry fire than uneven-aged stands (USDA and USDI 1994; DellaSalla *et al.* 1995; Morrison *et al.* 2000).

The petitioners assert that small, isolated populations of the dusky tree vole place the species at risk of extirpation because of inbreeding depression and demographic and environmental stochasticity (USDA and USDI 2000), leading to irreversible population crashes (Lehmkuhl and Ruggiero 1991, p. 37). Low numbers of dusky tree vole sites and low abundance at known sites indicate the species numbers may be at dangerously low levels (USDA and USDI 2000, 2003; Forsman *et al.* 2004; ONHIC 2004). Stochastic events that put small populations at risk of extinction include variation in birth and death rates, fluctuations in gender ratio, inbreeding depression, and random environmental disturbances such as fire, wind, and climatic shifts (Gilpin and Soule 1986). Genetic inbreeding due to small, isolated populations may already be occurring as evidenced by the occurrence of cream-colored and melanistic tree voles (Swingle 2005). The petitioners assert that because dusky tree vole populations are already isolated, declining populations will not be rescued through genetic interchange and population augmentation. In addition, the petitioners assert that due to narrow habitat requirements, low reproductive rates, and low mobility, dusky tree voles are at an increased risk of extirpation because they are from small populations that are especially vulnerable to anthropogenic and stochastic events (Maser *et al.*1981; Carey 1991; USDA and USDI 2000).

The petition asserts that the dusky tree vole may be threatened by intrinsic population factors that make it especially vulnerable to anthropogenic and stochastic events. Information in our files relative to the potential impacts of stochastic events on small populations is consistent with this assertion. For these reasons, we conclude that the petitioners have presented substantial information to indicate that other natural or manmade factors may be affecting the continued existence of the dusky tree vole.

Finding

We have reviewed the petition, supporting information provided by the petitioner, and information in our files, and we evaluated that information to determine whether the sources cited support the claims made in the petition. Based on this review, we find that the petition presents substantial information indicating that listing one of the following three entities as threatened or endangered may be warranted: (1) The dusky tree vole subspecies of the red tree vole; (2) the north Oregon coast DPS of the red tree vole, whose range corresponds to that of the dusky tree vole; or (3) the red tree vole in a significant portion of its range. This conclusion is based on information that indicates the species' continued existence may be affected by loss and fragmentation of old-growth forest habitat from timber harvest, development, and roads (Factor A); inadequate protection from threats by regulatory mechanisms (Factor D); and other natural or manmade factors such as increased fire severity, small population size, and genetic isolation (Factor E). The petition did not contain information indicating that Factors B and C are considered a threat to this species. As a result of this finding, we are initiating a status review of the species, including an evaluation of the north Oregon coast population of red tree vole and the red tree vole throughout its range. At the conclusion of the status review we will issue a 12-month finding, in accordance with section 4(b)(3)(B) of the Act, as to whether or not the Service believes a proposal to list the species is warranted.

We have reviewed the available information to determine if the existing and foreseeable threats pose an emergency. We have determined that although there are apparent threats to the species, they do not appear to be of such a magnitude as to pose an immediate and irreversible threat to the species such as to warrant emergency listing at this time. However, if at any time we determine that emergency listing of the dusky tree vole is warranted, we will seek to initiate an emergency listing.

References Cited

A complete list of all references cited herein is available, upon request, from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this notice is the staff of the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 17, 2008.

Kenneth Stansell,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–25574 Filed 10–27–08; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R6–ES–2008–008; 92220–1113–0000; ABC Code: C6]

RIN 1018–AW37

Endangered and Threatened Wildlife and Plants; Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: On February 8, 2007, we, the U.S. Fish and Wildlife Service (Service), published a proposed rule to establish a distinct population segment (DPS) of the gray wolf (*Canis lupus*) in the Northern Rocky Mountains (NRM) of the United States and to remove the gray wolf in the NRM DPS from the List of Endangered and Threatened Wildlife under the Endangered Species Act of 1973, as amended (Act) (72 FR 6106). On February 27, 2008, we issued a final rule establishing and delisting the NRM gray wolf DPS (73 FR 10514). Several parties filed a lawsuit challenging our final rule and asking to have it enjoined. On July 18, 2008, the U.S. District Court for the District of Montana enjoined the Service's implementation of the final delisting rule, after concluding that Plaintiffs were likely to prevail on merits of their claims. In light of this decision, we asked the court to vacate the final rule and remand it to us. On October 14, 2008, the court issued an order vacating our February 27, 2008, final rule (73 FR 10514) and remanding

it back to the Service for further consideration.

We announce the reopening of the comment period for our February 8, 2007, proposed rule (72 FR 6106). We now intend to reconsider our 2007 proposed rule and issue a new listing determination. We seek information, data, and comments from the public regarding the 2007 proposal with an emphasis on new information relevant to this action, the issues raised by the Montana District Court (described in more detail below), and the issues raised by the September 29, 2008, ruling of the U.S. District Court for the District of Columbia with respect to the Western Great Lakes gray wolf DPS (also described in more detail below). If you have previously submitted comments, please do not resubmit them because we have already incorporated them in the public record and will fully consider them in our final decision.

DATES: We request that comments on this proposal be submitted by the close of business on November 28, 2008.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AW37; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on http://www.regulations.gov. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Edward E. Bangs, Western Gray Wolf Recovery Coordinator, U.S. Fish and Wildlife Service, 585 Shepard Way, Helena, MT 59601 or telephone (406) 449–5225, extension 204. Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at 1–800–877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we hereby request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) Whether it is appropriate or necessary to revise our recovery goal (described below) to clarify that the genetic exchange called for can be satisfied through either natural migration or managed genetic exchange.

(2) What additional management, protections, and regulatory mechanisms may be needed to facilitate genetic exchange (including both natural migration and managed genetic exchange) including the actions outlined in the draft memorandum of understanding regarding the protection of genetic diversity of NRM gray wolves (available online at: *http://westerngraywolf.fws.gov*).

(3) What portions of Wyoming need to be managed as a trophy game area, how Wyoming should manage wolves in the trophy game area, and the significance of all portions of the range in the State of Wyoming in maintaining the viability of the NRM DPS.

(4) The adequacy of existing regulatory mechanisms in Montana, Idaho, and Wyoming, including whether Wyoming's regulatory mechanisms do or should manage for 15 breeding pairs and 150 wolves in mid-winter and if Wyoming's malleable trophy game area affects its ability to manage for such numbers of wolves.

(5) If we determine that Wyoming's State law and State wolf management plan do not constitute adequate regulatory mechanisms, the area in northwestern Wyoming that is a significant portion of the range of the NRM DPS that should retain its nonessential experimental population status under section 10(j) of the Act, even if we determine the rest of the DPS should be delisted.

(6) How Idaho, Montana, and Wyoming's management of take associated with their defense of property laws and hunting regulations affects each State's commitment and ability to manage for 15 breeding pairs and 150 wolves in mid-winter.

(7) Whether and under what authority the Service may identify and designate a DPS within a broader pre-existing listing and determine that this DPS should be removed from the endangered species list.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. We will not accept anonymous comments; your comment must include your first and last name, city, State, country, and postal (zip) code. Finally, we will not consider hand-delivered comments that we do not receive or mailed comments that are not postmarked by the date specified in the **DATES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information in addition to the required items specified above, such as your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Background

Northern Rocky Mountains DPS Rulemaking and Litigation—On February 8, 2007, we proposed to designate the NRM DPS of the gray wolf and to delist all or most of the NRM DPS (72 FR 6106). Specifically, we proposed to delist wolves in Montana, Idaho, and Wyoming, and parts of Washington, Oregon, and Utah. The proposal noted that the area in northwestern Wyoming outside the National Parks (i.e., Yellowstone National Park, Grand Teton National Park, and John D. Rockefeller Memorial Parkway) would only be delisted in the final rule if the Service subsequently determined that adequate State regulatory mechanisms were developed. If adequate regulatory mechanisms were not developed, we were considering a final rule that would have continued to protect wolves under the Act and retained their nonessential experimental status in the significant portion of the range in northwestern Wyoming, outside the National Parks, while removing the Act's protections in the remainder of the DPS.

On July 6, 2007, the Service extended the comment period in order to consider a 2007 revised Wyoming wolf management plan and State law (available online at: *http://westerngraywolf.fws.gov*) that we stated, if implemented, could allow the wolves in northwestern Wyoming to be removed from the List of Endangered and Threatened Wildlife (72 FR 36939). On November 16, 2007, the Wyoming Game and Fish Commission unanimously approved the 2007 Wyoming Plan (Cleveland 2007, p. 1). We then determined this plan provided adequate regulatory protections to conserve Wyoming's portion of a recovered wolf population into the foreseeable future (Hall 2007, pp. 1–2).

On February 27, 2008, we issued a final rule establishing the NRM gray wolf DPS and removing the entire DPS from the List of Endangered and Threatened Wildlife (73 FR 10514).

On April 28, 2008, 12 parties filed a lawsuit challenging the designation and delisting of the NRM DPS. The plaintiffs also moved to preliminarily enjoin the delisting. On July 18, 2008, the U.S. District Court for the District of Montana granted the plaintiffs' motion for a preliminary injunction and enjoined the Service's implementation of the final delisting rule for the NRM DPS of the gray wolf. The court stated that we acted arbitrarily in delisting a wolf population that lacked evidence of genetic exchange between subpopulations. The court also stated that we acted arbitrarily and capriciously when we approved Wyoming's 2007 statute and wolf management plan because the State failed to commit to managing for 15 breeding pairs and Wyoming's 2007 statute allowed the Wyoming Fish and Wildlife Commission to diminish the trophy game area if it ''determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming's management of wolves.'' The court's preliminary injunction order (available online at: *http://westerngraywolf.fws.gov*) concluded that the Plaintiffs were likely to prevail on the merits of their claims. In light of the district court decision, on September 22, 2008, we asked the court to vacate the final rule and remand it to us. On October 14, 2008, the court vacated the final delisting rule and remanded it back to the Service for further consideration.

Western Great Lakes DPS Rulemaking and Litigation—Some persons who commented on our proposed rule asserted that the Service may not designate a DPS within a broader pre-existing listed entity for the purpose of delisting the DPS. This issue is also the subject of a recent decision of the U.S. District Court for the District of Columbia, which remanded and vacated the February 7, 2008, final rule that established the Western Great Lakes DPS of gray wolves and determined that it should be delisted (72 FR 6052). The court found that the Service had made that decision based on its interpretation that the plain meaning of the ESA authorizes the Service to create and delist a DPS within an already-listed entity. The court disagreed, and concluded that the Act is ambiguous as to whether the Service has this authority. The court accordingly remanded the final rule so that the Service can provide a reasoned explanation of how its interpretation is consistent with the text, structure, legislative history, judicial interpretations, and policy objectives of the Act (*Humane Society of the United States* v. *Kempthorne*, Civil Action No. 07–0677 (PLF) (D.D.C., Sept. 29. 2008)).

The Service is considering how to proceed with the Western Great Lakes gray wolf DPS. In the meantime, it is our view that the plain language of the Act does provide the Service with the flexibility to designate a DPS within a broader pre-existing listed entity and then to determine the correct conservation status of the DPS pursuant to section 4(a)(1) of the Act (i.e., endangered, threatened, or neither), even though the conservation status of the broader entity may differ. Alternatively, the Service has reasonably interpreted the Act through the DPS Policy (61 FR 4722, February 7, 1996) and other actions as authorizing the Service to designate a DPS within a broader entity and determine its proper conservation status, even if that means that the DPS is delisted.

Given the court rulings and orders described above, we now intend to issue a revised listing determination for the NRM gray wolf DPS to address the issues noted by the courts and other new information relevant to this action. We also will comprehensively address other issues outlined in the complaint and a notice of intent to sue. Several of the most important issues being reconsidered are discussed below. Comments are also requested on each of these issues.

Recent Status and Distribution Information

In mid-September of each year we estimate the number of wolves, packs, and breeding pairs, as well as livestock depredations and wolves killed as a result of agency-authorized control. These counts are preliminary, because wolf counting conditions are most accurate in early winter due to snow cover. Consequently, the estimates given below should be interpreted cautiously. The only ''official'' annual wolf population statistics are provided in the interagency annual report, which is normally available in March each year.

Our annual mid-September wolf population estimate indicates that the overall NRM wolf population in 2008 will be about the same as it was in 2007. We also predict that both livestock depredations and problem wolf removal in 2008 will be slightly higher than they were in 2007.

Our mid-September 2007 estimate indicated that this time last year there were approximately 1,544 wolves (394 in Montana; 788 in Idaho; 362 in Wyoming) in 179 packs (71 in Montana; 75 in Idaho; 33 in Wyoming) with 105 of those classified as breeding pairs (37 in Montana; 41 in Idaho; 27 in Wyoming). Our mid-September 2007 estimate indicated wolves had killed 112 cattle (48 in Montana; 36 in Idaho; 28 in Wyoming), 185 sheep (19 in Montana; 150 in Idaho; 16 in Wyoming), 10 dogs (1 in Montana; 7 in Idaho; 2 in Wyoming), and a horse (in Montana). In response, 135 depredating wolves (50 in Montana; 40 in Idaho; 45 in Wyoming) had been killed.

Our mid-September 2008 estimate indicated there were approximately 1,463 wolves (360 in Montana; 771 in Idaho; 332 in Wyoming) in 197 packs (74 in Montana; 89 in Idaho; 34 in Wyoming) with 97 of those classified as breeding pairs (36 in Montana; 39 in Idaho; 22 in Wyoming). Our mid-September 2008 estimate indicated wolves had killed 170 cattle (44 in Montana; 81 in Idaho; 45 in Wyoming), 244 sheep (39 in Montana; 189 in Idaho; 16 in Wyoming), 10 dogs (in Idaho), and 6 llamas (in Montana). In response, 172 depredating wolves (60 in Montana; 81 in Idaho; 31 in Wyoming) had been killed.

No unusual wolf dispersal events were documented in the NRM DPS in 2008. A radio-collared wolf from central Idaho continues to live in Yellowstone National Park, but it has not joined an existing pack, nor did it appear to breed in 2008. A report of a pack of wolves in northeastern Utah east of Flaming Gorge Reservoir (outside the proposed NRM DPS) was investigated in spring 2008. The existence of this pack was not confirmed. A report of a wolf pack with pups in northeastern Oregon (inside the proposed NRM DPS) was investigated in August 2008. The existence of this pack was not confirmed.

A wolf pack (2 adults and 6 pups) was discovered near Twisp, Washington, in July 2008. Their territory is outside the proposed NRM DPS border. Genetic analysis indicated the two adults did not come from the wolf population in the NRM DPS. Instead, they likely originated from southcentral British Columbia. The pack is being monitored via radio telemetry by Washington Department of Fish and Wildlife (WDFW). On August 22, 2008, the WDFW published a draft State wolf management plan for public review and comment. The comment period for this plan runs through October 27, 2008. The WDFW anticipates their proposed plan will be revised and sent to the Washington Fish and Wildlife Commission for approval in late 2009.

We are reopening the public comment period on our 2007 delisting proposal to

allow the public to consider and comment on all new information on the NRM wolf population and issues regarding the proposed delisting on this population including that which is summarized in this notice.

Genetics Relative to Our Recovery Criteria

The Service's current recovery goal for the NRM gray wolf population is: Thirty or more breeding pairs (an adult male and an adult female that raise at least 2 pups until December 31) comprising 300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between subpopulations (USFWS 1994; Fritts and Carbyn 1995). Step-down recovery targets require Montana, Idaho, and Wyoming to each maintain at least 10 breeding pairs and 100 wolves by managing for a safety margin of 15 breeding pairs and 150 wolves in mid-winter. The NRM wolf population met the numeric recovery goal of at least 30 breeding pairs and at least 300 wolves in mid-winter for the first time in 2000. By the end of 2008, the NRM wolf population will have surpassed the numerical recovery goal for 9 consecutive years.

As stated above, the current recovery goal also notes the goal of a metapopulation with genetic exchange between subpopulations. In its discussion of this issue, our 1994 environmental impact statement (Service 1994, appendix 9) said a recovered NRM wolf population would be composed of three parts or subpopulations (Yellowstone, central Idaho, and northwestern Montana), which in combination would be called a metapopulation. Such a metapopulation structure would depend on wolves from a healthy subpopulation to rekindle a neighboring subpopulation should it experience disruptions from stochastic events like fire, disease, human-caused mortality, or reduced genetic viability (Service 1994, appendix 9). The 1994 environmental impact statement (Service 1994, appendix 9) stated that the need for ongoing genetic exchange is lessened where the population is large, not completely isolated, and diversity is inherently high due to a large number of genetically diverse founders; all three NRM DPS subpopulations meet this standard.

Currently, genetic diversity throughout the NRM is very high (Forbes and Boyd 1996, p. 1084; Forbes and Boyd 1997, p. 226; vonHoldt *et al.* 2007, p. 19). Wolves in northwestern Montana and both the reintroduced populations are as genetically diverse as their source populations in Canada; thus, inadequate genetic diversity is not a wolf conservation issue in the NRM at this time (Forbes and Boyd 1997, p. 1089; vonHoldt *et al.* 2007, p. 19). As a result, there is currently no need for management activities designed to increase genetic diversity anywhere in the NRM DPS.

The July 18, 2008, U.S. District Court for the District of Montana decision cited vonHoldt *et al.* (2007), which concluded ''if the Yellowstone [National Park] wolf population remains relatively constant at 170 individuals (estimated to be Yellowstone [National Park's] carrying capacity), the population will demonstrate substantial inbreeding effects within 60 years,'' resulting in an ''increase in juvenile mortality from an average of 23 to 40%, an effect equivalent to losing an additional pup in each litter.'' The court also cited previous Service statements that call for ''genetic exchange'' among recovery areas. The court further stated that dispersal of wolves between the Greater Yellowstone Area and the northwestern Montana and central Idaho core recovery areas was ''a precondition to genetic exchange.'' The preliminary injunction order cited our 1994 environmental impact statement (Service 1994) and vonHoldt *et al.* (2007) to support its conclusion.

We question many of the assumptions that underpin the vonHoldt *et al.* (2007) study's conclusions. First, while the study found no evidence of genetic exchange into Yellowstone National Park (8,987 km^2 (3,472 mi^2)), the Park is only a small portion of the Greater Yellowstone Area (63,700 km^2 (24,600 mi^2)). Further limiting the study's ability to detect genetic exchange among subpopulations is the fact that most wolves that disperse to the Greater Yellowstone Area tend to avoid areas with existing resident packs or areas with high wolf densities, such as Yellowstone National Park. Moreover, even among the Yellowstone National Park wolves the study was limited to a subsample of Park wolves from 1995–2004 (i.e., the radio collared wolves). It is important to consider that our ability to detect genetic exchange within the NRM population is further limited by the genetic similarity of the NRM subpopulations. Specifically, because both the central Idaho and Greater Yellowstone Area subpopulations originate from a common source, only first generation offspring of a dispersing wolf can be detected. Additional genetic analysis of wolves from throughout the NRM population, including a larger portion of the Greater Yellowstone Area than just Yellowstone National Park, is ongoing.

Second, the vonHoldt *et al.* (2007) prediction of eventual inbreeding in Yellowstone National Park relies upon several unrealistic assumptions. One such assumption limited the wolf population analysis to Yellowstone National Park's (8,987 km^2 (3,472 mi^2)) carrying capacity of 170 wolves, instead of the more than 300 wolves likely to be managed for in the entire Greater Yellowstone Area (63,700 km^2 (24,600 mi^2)) by Montana, Idaho, and Wyoming. The vonHoldt *et al.*, (2007) predictive model also capped the population at the Yellowstone National Park population's winter low point, rather than at higher springtime levels when pups are born. Springtime levels are sometimes double the winter low.

It is our current professional judgment that even in the highly unlikely event that no new genes enter Yellowstone National Park or the Greater Yellowstone Area in the next 100 years, that wolf population's currently high genetic diversity would be slightly reduced, but not to the point the Greater Yellowstone Area wolf population would be threatened. Review of the scientific literature shows that, throughout the world, truly isolated wolf populations that are far smaller and far less genetically diverse than the Greater Yellowstone Area population have persisted for many decades and even centuries (Fritts and Carbyn 1995, p. 33; Boitani 2003, pp. 322–23, 330–335; Liberg 2005, pp.5–6; 73 FR 10514, February 27, 2008). Additionally, in mate selection, wolves have a strong tendency to avoid inbreeding by selecting breeders based on genetic difference; the vonHoldt *et al.* (2007) study proved this in Yellowstone National Park. Thus, the predictions by the Vortex model used by vonHoldt *et al.* (2007) were overly pessimistic regarding the potential effect of theoretical future inbreeding, because it ignored the strong outbreeding selection by wolves. Natural wolf mate selection tendencies show that future dispersers into a system experiencing some level of inbreeding would be much more likely to be selected for breeding and have their genes incorporated into the inbred population (Bensch *et al.*, 2006, p. 72; vonHoldt *et al.*, 2007, p. 1; 73 FR 10514, February 27, 2008). Introduction of just one or two new genetic lines can save a severely inbred small wolf population (Vila *et al.*, 2003, p. 9; Liberg *et al.*, 2004; Liberg 2005, pp. 5–6; Mills 2007, pp. 195–196; Fredrickson *et al.*, 2007, p. 2365; 73 FR 10514, February 27, 2008).

Multiple approaches may be taken to facilitate genetic exchange between

subpopulations, including natural migration or, if necessary, genetic management (moving individual wolves or their genes into the affected population segment). We have never suggested, nor does the recovery goal require, that natural migration is the only approach to address this potential issue (USFWS 1994, appendix 9). Furthermore, detection of such natural genetic exchange is not required by the recovery goal and would not be practical to require in routine monitoring protocols. Therefore, a revised listing determination may review the recovery goal and any inaccurate implication that the recovery goal requires natural connectivity. This review could result in a revision of our recovery goal and a clarification of the appropriate range of options for maintaining or increasing genetic diversity in the NRM wolf population.

In terms of natural migration, the northwestern Montana and central Idaho core recovery areas are well connected to each other, and to wolf populations in Canada, through regular dispersals. These subpopulations have established genetic and demographic linkages. The Greater Yellowstone Area is the most isolated core recovery area within the NRM DPS (Oakleaf *et al.*, 2006, p. 554; vonHoldt *et al.*, 2007, p. 19). Radio telemetry data indicate that about one wolf per year disperses into the Greater Yellowstone Area from the other recovery areas. However, natural connectivity is not and has never been required to achieve our recovery goal.

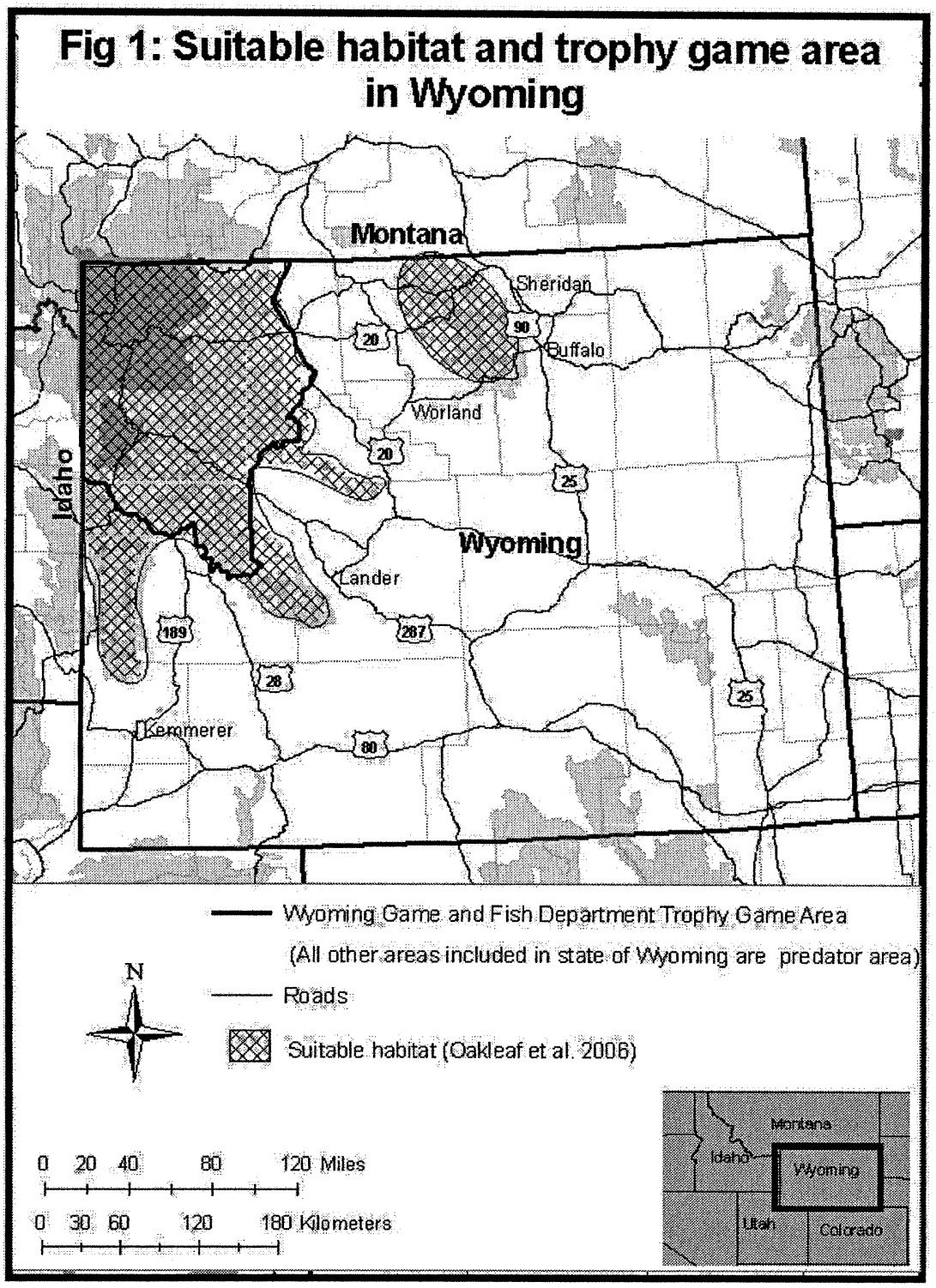
Human intervention in maintaining recovered populations is necessary for many conservation-reliant species and a well-accepted practice in dealing with population concerns (Scott *et al.*, 2005). The 1994 wolf reintroduction environmental impact statement indicated that intensive genetic management might become necessary if any of the sub-populations developed genetic demographic problems (USFWS 1994). The 1994 wolf reintroduction environmental impact statement went on to say that other wolf programs rely upon such agency-managed genetic exchange and that the approach should not be viewed negatively (USFWS 1994). An example of successful managed genetic exchange in the NRM population was the release of 10 wolf pups/yearlings translocated from northwestern Montana to Yellowstone National Park in the spring of 1997. Future managed genetic exchange could include relocating other wolf age and sex classes, cross-fostering young pups, artificial insemination, or other means of introducing novel wolves or wolf DNA (deoxyribonucleic acid) into a recovery area if it were ever to be needed.

As we continue to evaluate and possibly reconsider this portion of our recovery goal, we request comments on the role, if any, that natural genetic exchange should play in maintenance of the NRM wolf population's genetic diversity. Applying specific management practices in targeted geographic areas may further encourage successful natural wolf dispersal and natural genetic exchange. Some possible management practices to consider include: reducing the rate of population turnover and fostering persistent wolf packs in all or select core recovery segments or all or select areas of suitable habitat (Oakleaf *et al.*, 2006; 72 FR 6106, February 8, 2007); creating occasional disruptions of wolf pack structure or reduced wolf density in select areas of suitable habitat to create social vacancies or space for dispersing wolves to fill; maintaining higher rather than lower overall wolf numbers in all or select recovery areas; maintaining more contiguous and broader wolf distribution instead of disjunction and limited breeding pair distribution; minimizing or precluding human-caused wolf mortality between and around core recovery segments during critical wolf dispersal and breeding periods (December through April); and reducing the rates of or eliminating human-caused mortality in core recovery segments during denning and pup rearing periods (April through September).

The current post-delisting wolf management approach encourages, but does not require, natural dispersal and natural genetic exchange between core recovery areas. Under this approach some State management practices for delisted wolves could preclude or significantly reduce the opportunity for natural genetic exchange between core recovery segments. Under the current post-delisting wolf management approach, should any genetic problems materialize, they would be addressed through the managed genetic exchange committed to by the States.

Given the recent court ruling, we intend to consider in our new listing determination if additional monitoring and management of wolf dispersal and natural genetic exchange between core recovery areas is necessary. A draft memorandum of understanding (available at: *http://westerngraywolf.fws.gov*) outlines some of the strategies that we and the States might use to further facilitate natural genetic exchange. We welcome comments on this draft memorandum of understanding.

Wyoming's current regulatory framework for delisted wolves minimizes the likelihood of successful migration through the area designated as predatory animals by Wyoming statute. As part of an expanded effort to facilitate natural genetic exchange, we also intend to consider whether it would be appropriate or necessary for Wyoming's trophy game area to be expanded and its predatory control area decreased. Wolf dispersal patterns suggest dispersing wolves moving into the Greater Yellowstone Area from Idaho or Montana tend to move through the predatory area. Physical barriers (such as high-elevation mountain ranges that are difficult to traverse in winter) appear to discourage dispersal through the National Parks' northern and western boundaries. Limited social openings in the National Parks' wolf packs also direct dispersing of wolves from Idaho and Montana toward the predatory area portions of Wyoming. Finally, Wyoming's winter elk feeding grounds attract and could potentially hold dispersing wolves in the predatory area. We believe dispersal is more likely to lead to genetic exchange if dispersers have safe passage through the predatory area. Figure 1 illustrates the current Wyoming trophy game area and the suitable habitat in Wyoming (Oakleaf *et al.*, 2006; 72 FR 6106, February 8, 2007). We are accepting comments on the current and adequate alternative boundaries of Wyoming's trophy game area, the current authority of the State to reduce the trophy game area, as well as the significance of all portions of the range in the State of Wyoming in maintaining the viability of the NRM wolf population. Additional information on significant portion of its range can be found in the 2007 solicitor's opinion (available at: *http://www.doi.gov/solicitor/opinions/M37013.pdf*) and in our 2007 proposed rule (72 FR 6106, February 8, 2007).



Implementation of the draft memorandum of understanding and protecting wolves throughout a larger portion of Wyoming would make it even more unlikely that managed genetic exchange would be necessary in the foreseeable future. However, if genetic problems ever materialize, they could be resolved by agency-managed genetic exchange.

Both the current post-delisting wolf management approach and the expanded effort to facilitate natural genetic exchange described above allow for eventual managed genetic exchange should it become necessary. During our recent litigation, the plaintiffs contended that delisting required an all-natural approach to maintaining genetic diversity. We invite the public to comment on the potential application of an all-natural approach versus the alternative approaches laid out above.

New State Laws, Policies, and Regulations

Since publication of our 2007 proposed rule, a number of State laws, policies, and regulations have been developed that could impact the long-

term viability of the NRM gray wolf population. Below we discuss each of these regulatory developments.

Wyoming—The U.S. District Court for the District of Montana's preliminary injunction order cited several examples of what it perceived as deficiencies in the adequacy of Wyoming's regulatory mechanisms. The court stated that plaintiffs were likely to prevail on their claim that Wyoming State law did not commit the State to maintaining 15 breeding pairs of wolves. We have long maintained that Wyoming, Montana, and Idaho must each manage for 15 breeding pairs and 150 wolves in mid-winter to ensure the population never falls below the minimum recovery goal of 10 breeding pairs and 100 wolves per State. We are accepting comments on the ability of Wyoming State law and their management plan to satisfy this necessary commitment.

Further, the preliminary injunction order questioned our approval of a trophy game area that we estimate as 12 percent of the land area of the State and 70 percent of the suitable habitat (Oakleaf *et al.* 2006; 72 FR 6106, February 8, 2007) and that could be reduced by the Wyoming Fish and Wildlife Commission. Wolves are unlikely to survive in the 88 percent of Wyoming where they are classified as predatory animals. Potential expansion of the predatory animal area could further limit occupancy in Wyoming. The court concluded that the plaintiffs were likely to prevail on their claim that the Wyoming State law and management plan were not adequate regulatory mechanisms. Based on the concerns expressed by the U.S. District Court, we also are accepting comments on the size and ''malleability'' of the trophy game area, including whether a larger or Statewide trophy game area designation for wolves is necessary.

The court also stated that the State management regime in regard to control of wolves in defense of property and take associated with a hunt presented the possibility of irreparable harm to the population. The court also was concerned about the ''expansive'' nature of take authorized Wyoming's depredation control law. On March 13, 2008, the Wyoming Game and Fish Commission adopted regulations (Wyoming Chapter 21) for the management and control of gray wolves designated as trophy game animals.

Wyoming's hunting season was designed around an allowable hunter-caused mortality in each of four hunting districts in the trophy game area. Hunting would end by December 31 or when 25 wolves had been harvested, whichever is sooner. This level of hunter-caused mortality would likely result in a Wyoming wolf population outside the National Parks of just under 200 wolves by mid-winter 2008. Wolves in the National Parks would not be substantially affected by a regulated public hunt, as hunting is not allowed in National Parks and our data demonstrate that wolves rarely leave the parks during the time period when the fall hunting season would occur. As a result of the court's July 18, 2008, order, the delisting was preliminarily enjoined, thus barring the implementation of the 2008 hunting season. We invite public comment on Wyoming's management regime in regard to control of wolves in defense of property and take associated with a hunt.

The Wyoming State law, their wolf management plan, their implementing regulations (Wyoming Chapter 21), and other supporting information are available on our Web site at: *http://westerngraywolf.fws.gov*.

Idaho—The court stated that Idaho's depredation control law was not likely to threaten the continued existence of the wolf in Idaho because that State has committed to managing for at least 15 breeding pairs. However, the court also specifically noted that Idaho's final wolf hunting regulations set a quota of 428 wolves from all causes of mortality Statewide with the season set to end December 31, 2008. Mortality limits also were set by zone so that once reached, the hunting season for that zone would be closed. As implemented, Idaho included all take in defense of property in the above total allowable mortality levels. Mandatory reporting of harvest or defense of property take is required within 72 hours. The court's July 18, 2008, order preliminarily enjoining the delisting rule prevented implementation of the 2008 hunting season. Had the hunting season occurred, this level of wolf mortality would have likely resulted in a remaining wolf population in Idaho of at least 518 wolves by mid-winter 2008. We invite public comment on these potential sources of take and the adequacy of Idaho's regulatory mechanisms. Hunt and defense of property laws, regulations, and other background information can be viewed at: *http://westerngraywolf.fws.gov*.

Montana—The court stated that Montana's depredation control law was also not likely to threaten the continued existence of the wolf. Montana's wolf hunting regulations would have established a quota-based system in which the total hunter harvest within a hunting district was pre-determined after taking into account the level and causes of non-hunting wolf mortality, reproduction, immigration, and emigration. Montana was to establish wolf harvest quotas for each district and sub-area annually. Up to, but not more than, 25 percent of the total quota for a district was to be harvested in December. The agency recommended, and the Montana Fish, Wildlife, and Parks Commission adopted, a tentative Statewide total harvest quota of 75 wolves for the fall 2008 season. This conservative level of harvest would likely still result in a Statewide increase in the total wolf population and the number of breeding pairs from the previous year. As a result of the court's July 18, 2008, order, the delisting was preliminarily enjoined, thus barring the implementation of the 2008 hunting season. Montana's commitment to manage for at least 15 breeding pairs ensured licensed public hunting would not occur unless this minimum standard was satisfied. The Montana defense of property policy is similar to the Service's regulations and policies under the experimental population regulations for States with approved post-delisting wolf management plans. Hunt and defense of property laws, regulations, and other background information can be viewed at: *http://westerngraywolf.fws.gov*. We invite public comment on these potential sources of take and the adequacy of Montana's regulatory mechanisms.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 21, 2008.

Kenneth Stansell,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–25629 Filed 10–27–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–AV80

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 30B

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

ACTION: Announcement of availability of fishery management plan amendment; request for comments.

SUMMARY: NMFS announces the Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 30B to the Fishery Management Plan (FMP) for the Reef Fish Resources of the Gulf of Mexico for review, approval, and implementation by NMFS. The amendment proposes actions to end overfishing of gag, revise red grouper management measures as a result of changes in the stock condition, establish annual catch limits (ACLs) and accountability measures (AMs) for gag and red grouper, manage shallow-water grouper (SWG) to achieve optimum yield (OY), and improve the effectiveness of Federal management measures.

DATES: Written comments must be received on or before December 29, 2008.

ADDRESSES: You may submit comments on Amendment 30B, identified by ''0648–AV80'' by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*.
- Fax: 727–824–5308; Attention: Peter Hood.
- Mail: Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the e-Rulemaking Portal: *http://www.regulations.gov*, enter ''NOAA-NMFS–2008–0203'' in the keyword search and then select ''send a comment or submission.'' NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 30B, which includes an environmental impact statement, an initial regulatory flexibility analysis, and a regulatory impact review may be obtained from the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone 813–348–1630; fax 813–348–1711; e-mail *gulfcouncil@gulfcouncil.org*; or may be downloaded from the Council's website at *http://www.gulfcouncil.org/*.

FOR FURTHER INFORMATION CONTACT: Peter Hood, 727–824–5305.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any fishery management plan or amendment to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving a plan or amendment, publish an announcement in the **Federal Register** notifying the public that the plan or amendment is available for review and comment.

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and achieve, on a continuing basis, OY from federally managed fish stocks. To further this goal, the Magnuson-Stevens Act requires fishery managers to specify their strategy to rebuild overfished stocks to a sustainable level within a certain time frame, and to minimize bycatch and bycatch mortality to the extent practicable. The reauthorized Magnuson-Stevens Act as amended through January 12, 2007, requires the councils to establish ACLs for each stock or stock complex and AMs to ensure these ACLs are not exceeded. The actions proposed in Amendment 30B are intended to address these mandates and achieve OY from the SWG fishery.

Proposed Gag Provisions of Amendment 30B

A stock assessment conducted in 2006 determined gag to be undergoing overfishing. To end overfishing of gag, Amendment 30B proposes to lower the total allowable catch (TAC), but would allow increases every year for the first three years (2009–2011) in accordance with the projected rebuilding of the stock. Under Amendment 30B's proposed minimum stock size threshold definition, gag would not be considered overfished. To distribute the gag TAC between the recreational and commercial sectors, the Council proposes an interim allocation of 61:39, respectively.

Given the above allocation, the gag commercial quota in gutted weight would be 1.32 million lb (598,742 kg) in 2009, 1.41 million lb (639,565 kg) in 2010, and 1.49 million lb (675,853 kg) in 2011 and thereafter until the stock is reassessed. To ensure the commercial harvest remains within the prescribed quota, Amendment 30B proposes AMs that would give the Assistant Administrator for Fisheries, NOAA, (AA) the authority to close the fishery should the quota be met. If despite such a closure, gag commercial landings exceed the ACL, the amendment would allow the AA to maintain the quota in the following year at the level of the prior year's quota.

For the recreational fishery, harvest would be reduced an estimated 26 percent, which is greater than the minimum reduction needed to end overfishing. Amendment 30B would set the bag limit at 2 gag in a reduced 4–fish grouper aggregate bag limit and prohibit the recreational harvest of gag, as well as other SWG species, from February 1 to March 31. To ensure gag overfishing ends, AMs are proposed that would allow the AA to take action should the specified recreational ACL be exceeded. The following year's recreational SWG season would be reduced by the amount necessary to ensure gag recreational landings do not exceed the recreational target catch level in that following fishing year.

Proposed Red Grouper Provisions of Amendment 30B

The red grouper stock was assessed in 2007 and was found to have fully recovered from its previous condition of being overfished and undergoing overfishing. Amendment 30B would raise TAC from the current 6.56 million lb (2.97 million kg) to 7.57 million lb (3.43 million kg) gutted weight, the yield associated with the equilibrium OY level. To distribute the red grouper TAC between the recreational and commercial sectors, the Council proposes an interim allocation of 24:76, respectively.

Based on the above allocation, Amendment 30B would set the red grouper commercial quota at 5.75 million lb (2.61 million kg) gutted weight. Amendment 30B would also set ACLs and AMs for the commercial fishery. If red grouper landings reach or exceed the established quota, the AA would close the SWG fishery for the remainder of the year. In addition, should the commercial fishery exceed the ACL, the AA would be allowed to maintain the quota in the following year at the level of the prior year's quota. Amendment 30B also proposes to reduce the minimum size limit for red grouper in the commercial fishery from 20 inches to 18 inches total length to reduce discard mortality.

For the recreational red grouper fishery, Amendment 30B would increase the red grouper bag limit from

1 to 2 red grouper in a reduced 4–fish grouper aggregate bag limit and prohibit the recreational harvest of red grouper and other SWG species from February 1 to March 31. Overall, these measures should allow the recreational harvest of red grouper to increase by 17 percent. To prevent the possibility of red grouper overfishing, proposed AMs would give the AA the authority to shorten the following recreational fishing season should the ACL be exceeded. The application of the red grouper AMs would be the same as those described above for the gag recreational fishery.

Proposed SWG Provisions of Amendment 30B

The SWG fishery includes eight species: gag, red grouper, black grouper, scamp (until the commercial SWG quota is reached, at which time scamp in considered a deep-water grouper), yellowfin grouper, rock hind, red hind, and yellowmouth grouper. Amendment 30B would set the commercial SWG quota as the sum of the gag and red grouper quotas with an allowance for other SWG species. Should the gag, red grouper, or SWG quotas be met, the entire SWG commercial fishery would be closed. It is likely the gag quota would be met prior to the red grouper or SWG quotas; therefore, Amendment 30B would establish an incidental harvest trip limit of 200 lb (91 kg) gutted weight for either gag or red grouper once either species reaches 80 percent of its quota. This would allow the SWG fishery to remain open until one of the three quotas was met. Proposed ACLs and AMs for the commercial SWG fishery would be similar to those developed for gag and red grouper, except the commercial SWG fishery would be closed once the gag, red grouper, or commercial SWG quota is met. Should the commercial SWG ACLs be exceeded despite the closure, the subsequent year's quota would be equal to the previous years.

For the recreational fishery, Amendment 30B would limit the overall recreational harvest of SWG species by instituting a reduced aggregate grouper bag limit from 5 to 4 fish and a season closure from February 1 through March 31 for all SWG species.

Proposed Season and Area Closure Provisions of Amendment 30B

Amendment 30B proposes a new restricted fishing area called ''The Edges'' that would remain in place until terminated through a subsequent amendment. This proposed restricted area is located between the existing Madison-Swanson and Steamboat Lumps marine reserves, spans 37 nautical miles along the 40–fathom contour, and covers 390 nautical square miles. It would be closed to all fishing under the Council's jurisdiction from January 1 through April 30 each year. Amendment 30B also proposes to extend indefinitely the Madison-Swanson and Steamboat Lumps marine reserves that are set to expire June 16, 2010. Should ''The Edges'' restricted fishing area be implemented, the current commercial February 15 to March 15 closed season for gag, black grouper and red grouper would be repealed.

Proposed Federal Compliance Provisions of Amendment 30B

To improve the effectiveness of the Federal regulations when there are less restrictive regulations in state waters, Amendment 30B proposes to require all vessels with Federal commercial or for-hire reef fish permits comply with the more restrictive of state or Federal reef fish regulations when fishing in state waters.

Proposed Rule for Amendment 30B

A proposed rule that would implement measures outlined in Amendment 30B has been received from the Council. In accordance with the Magnuson-Stevens Act, NMFS is evaluating Amendment 30B to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

Comments received by December 29, 2008, whether specifically directed to the amendment or the proposed rule, will be considered by NMFS in its decision to approve, disapprove, or partially approve the amendment. Comments received after that date will not be considered by NMFS in this decision. All comments received by NMFS on the amendment or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: October 22, 2008.

Emily H. Menashes,

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

[FR Doc. E8–25711 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.0909251266–81274–01]

RIN 0648–XJ96

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2009 Summer Flounder, Scup, and Black Sea Bass Specifications; 2009 Research Set-Aside Projects

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

ACTION: Proposed specifications; request for comments.

SUMMARY: NMFS proposes specifications for the 2009 summer flounder, scup, and black sea bass fisheries and provides notice of three conditionally approved projects that will be requesting Exempted Fishing Permits (EFPs) as part of the Mid-Atlantic Fishery Management Council's (Council) Research Set-Aside (RSA) program. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) require NMFS to publish specifications for the upcoming fishing year for each of these species and to provide an opportunity for public comment. Furthermore, regulations under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) require a notice to be published to provide interested parties the opportunity to comment on applications for EFPs. The intent of this action is to establish harvest levels that assure that the target fishing mortality rates (F) or exploitation rates specified for these species in the FMP are not exceeded and to allow for rebuilding of the stocks as well as to provide notice of EFP requests, all in accordance with the Magnuson-Stevens Act.

DATES: Comments must be received on or before November 12, 2008.

ADDRESSES: You may submit comments, identified by RIN 0648–XJ96, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Mail and hand delivery: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope:

''Comments on 2009 Summer Flounder, Scup, and Black Sea Bass Specifications.''

• Fax: (978) 281–9135.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the specifications document, including the Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and other supporting documents for the specifications are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901–6790. These documents are also accessible via the Internet at *http://www.nero.noaa.gov*.

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 Council and the Atlantic States Marine Fisheries Commission (Commission), in consultation with the New England and South Atlantic Fishery Management Councils. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35°13.3′ N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, North Carolina) northward to the U.S./Canada border. Implementing regulations for these fisheries are found at 50 CFR part 648, subpart A (General Provisions), subpart G (summer flounder), subpart H (scup), and subpart I (black sea bass).

The summer flounder, scup, and black sea bass regulations outline the process for specifying the annual commercial quotas and recreational harvest limits for the summer flounder, scup, and black sea bass fisheries, as well as other management measures (e.g., mesh requirements, minimum commercial fish sizes, gear restrictions, possession restrictions, and area restrictions) for these fisheries. The measures are intended to achieve the annual targets set forth for each species in the FMP, specified either as an F or an exploitation rate (the proportion of fish available at the beginning of the year that are removed by fishing during the year). Once the catch limits are established, they are divided into quotas based on formulas contained within the FMP.

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), signed into law by President Bush on January 12, 2007, added new requirements to involve the Council's Scientific and Statistical Committee (SSC) in the specification-setting process. Specifically, section 302(g)(1)(B) of the MSRA states that an SSC for each Regional Fishery Management Council ''shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices.'' The Acceptable Biological Catch (ABC) is a level of a stock catch that accounts for the scientific uncertainty in estimate of that stock's defined overfishing level. This new requirement implemented by the MSRA was put into practice by the Council for the first time in the 2009 specification setting process. The SSC met on July 31, 2008.

The FMP's implementing regulations also require that a Monitoring Committee for each species review the best available scientific information and recommend catch limits and other management measures that will mitigate management uncertainty and/or implementation imprecision to ensure the target F or exploitation rate for each fishery is not exceeded. The Monitoring Committees met on August 1, 2008.

The Council and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board) consider the SSC and Monitoring Committees' recommendations and any public comment and make their own recommendations. While the Board action is final, the Council's recommendations must be reviewed by NMFS to assure that they comply with FMP objectives and applicable law. The Council and Board made their recommendations at a joint meeting held August 5–7, 2008.

Explanation of RSA

Background: In 2001, regulations were implemented under Framework Adjustment 1 to the FMP to allow up to 3 percent of the Total Allowable Landings (TAL) for each species to be set aside each year for scientific research purposes. For the 2009 fishing year, a Request for Proposals was published to solicit research proposals based upon the research priorities that were identified by the Council (73 FR 7528, February 8, 2008).

NMFS has conditionally approved three research projects for the harvest of the portion of the quota that has been recommended by the Council to be set aside for research purposes. In anticipation of receiving applications for EFPs to conduct this research, the Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that the activities authorized under the EFPs issued in response to the approved RSA projects would be consistent with the goals and objectives of the FMP. However, further review and consultation may be necessary before a final determination is made to issue any EFP.

For informational purposes, these proposed specifications include a statement indicating the amount of quota that has been preliminarily set aside for research purposes (a percentage of the TAL for each fishery, not to exceed 3 percent, as recommended by the Council and Board), and a brief description of the RSA projects, including exemptions requested, and the amount of RSA requested for each project. The RSA amounts may be adjusted, following consultation with RSA applicants, in the final rule establishing the 2009 specifications for the summer flounder, scup, and black sea bass fisheries. If the total amount of RSA is not awarded, NMFS will publish a document in the **Federal Register** to restore the unused amount to the applicable TAL.

For 2008, the conditionally approved projects may collectively be awarded the following amounts of RSA: 553,500 lb (251 mt) of summer flounder; 220,200 lb (100 mt) of scup; and 69,000 lb (31 mt) of black sea bass. The projects may also be collectively awarded up to 1.3 million lb (590 mt) of *Loligo* squid;

844,680 (383 mt) of Atlantic bluefish; and 33,069 lb (15 mt) of butterfish.

2009 RSA Proposal Summaries: Project number 1 would conduct a fishery-independent scup survey that would utilize unvented fish traps fished on hard bottom areas in southern New England waters to characterize the size composition of the scup population. Survey activities would be conducted June 15–October 15, 2009, at 10 rocky bottom study sites located offshore, where there is a minimal scup pot fishery and no active trawl fishery, and at two scup spawning ground sites. Up to two vessels would conduct the research survey. Sampling would occur off the coasts of Rhode Island and southern Massachusetts. Up to four vessels would harvest the RSA during the period January 1–December 31, 2009. The principal investigators have requested exemptions from trip limits, gear requirements (excluding marine mammal avoidance and/or release devices), and closed seasons for harvest of RSA species. The preliminary RSA awarded for this project is 2,000 lb (0.9 mt) of summer flounder; 51,172 lb (23 mt) of scup; and 28,000 lb (13 mt) of black sea bass.

Project number 2 would conduct a near-shore trawl survey in Mid-Atlantic waters between Gay Head, Massachusetts, and Cape Hatteras, North Carolina, including both Block Island and Rhode Island Sounds. A stratified random sampling of approximately 200 stations will occur in depths between 18–60 feet (8–18 m). The function of the survey would be to provide stock assessment data for summer flounder, scup, black sea bass, Loligo squid, butterfish, Atlantic bluefish, several species managed by the Commission such as weakfish and Atlantic croaker, and unmanaged forage species. The research aspects of the trawl survey will be conducted by one scientific research vessel. This vessel will operate under a Letter of Authorization (LOA) as provided for by the specific exemption for scientific research activities found at 50 CFR 600.745. Up to 35 vessels will harvest the RSA January 1–December 31, 2009, during commercial fishing operations, except that these vessels have requested exemptions for closed seasons and trip limits to harvest the RSA allocated to the project. The preliminary RSA awarded to this project is 367,768 lb (167 mt) of summer flounder; 169,028 lb (77 mt) of scup; 41,000 lb (19 mt) of black sea bass; 97,750 lb (44 mt) of Atlantic bluefish; and 276,827 lb (126 mt) of *Loligo* squid.

Project number 3 would conduct an evaluation of discard mortality for summer flounder in trawl fisheries. Combined sources of mortality and injury quantification that occur as part of trawling, tracking and tagging, and scuba diver observation will be utilized to provide an estimate of trawl-related mortality. Research sampling will be conducted adjacent to Little Egg Inlet off the New Jersey coast. Sampling would occur on the winter offshore fishing grounds south and east of Long Island, New York, between Veatch Canyon and Hudson Canyon during February-April 2009 and November-December 2009. Up to six vessels of opportunity will conduct the research activities and may simultaneously participate in harvesting RSA, if the season for summer flounder is closed or if more fish, above those needed for the research activities, are caught than are permitted by possession limits. The principal investigators have requested exemption from the commercial summer flounder minimum size so that fish smaller than 14 inches (35.5 cm) may be temporarily retained to assess viability and to affix tags and data transmitters. Up to 35 vessels will harvest the RSA January 1–December 31, 2009, during commercial fishing operations, except that these vessels have requested exemptions for closed seasons and trip limits to harvest the RSA allocated to the project. The preliminary RSA awarded to this project is 183,732 lb (83 mt) of summer flounder. Regulations under the Magnuson-Stevens Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

Explanation of Quota Adjustments Due to Quota Overages

This action proposes commercial quotas based on the proposed TALs and Total Allowable Catches (TACs) and the formulas for allocation contained in the FMP. In 2002, NMFS published final regulations to implement a regulatory amendment (67 FR 6877, February 14, 2002) that revised the way in which the commercial quotas for summer flounder, scup, and black sea bass are adjusted if landings in any fishing year exceed the quota allocated (thus resulting in a quota overage). If NMFS approves a different TAL or TAC at the final specifications stage (i.e., in the final rule), the commercial quotas will be recalculated based on the formulas in the FMP. Likewise, if new information indicates that overages have occurred and deductions are necessary, NMFS will publish notice of the adjusted quotas in the **Federal Register**. NMFS anticipates that the information necessary to determine whether overage deductions are necessary will be available by the time the final specifications are published. The commercial quotas contained in these proposed specifications for summer flounder, scup, and black sea bass are not adjusted for any overages that have occurred. The final specifications will contain quotas that have been fully adjusted consistent with the procedures described above.

Summer Flounder

The timeline for completion of the summer flounder rebuilding program was extended from January 1, 2010, to no later than January 1, 2013, by section 120(a) of the MSRA. The Southern Demersal Working Group (SDWG), a technical stock assessment group composed of personnel from the Northeast Fisheries Science Center (NEFSC), NMFS Northeast Regional Office, Council, Commission, state marine fisheries agencies, academia, and independently-hired scientists, conducted a benchmark stock assessment of summer flounder in 2008. The recommendations of the SDWG were externally peer reviewed by scientists provided by the Center for Independent Experts (CIE) through the NEFSC Stock Assessment Workshop (SAW)/Stock Assessment Review Committee (SARC) process. The 47th SARC, which peer reviewed the benchmark assessment conducted by the SDWG, upheld the recommendations of the SDWG described in the stock assessment, resulting in changes to the modeling approach used, adoption of revised F threshold and F management target values, and a change in assumed natural mortality. These changes resulted in modifications to the stock status determination criteria. Information regarding the results of the benchmark assessment, including summary information, reports provided by individual peer reviewers, and the detailed final assessment document can be found on the NEFSC SAW/SARC web page at: *http://www.nefsc.noaa.gov/nefsc/saw/*.

The 2008 SDWG benchmark assessment shows that summer flounder were not overfished and that overfishing did not occur in 2007, the year for which the most recent, complete fishery-dependent data are available. The fishing mortality rate in 2007 was estimated to be 0.288, below the benchmark assessment's overfishing threshold ($F_{MSY}=F_{THRESHOLD}=F_{35\ percent}$[A]

[A] The fishing mortality rate which reduces the spawning stock biomass per recruit (SSB/R) to 35 percent of the amount present in the absence of

=0.310) but above the assessment-recommended management target ($F_{TARGET}=F_{40\ percent}=0.255$). F_{MSY} is the fishing mortality rate that, if applied constantly, would result in maximum sustainable yield (MSY) from the summer flounder stock. When $F>F_{THRESHOLD}$, overfishing is considered to be occurring. Fishing year 2007 is the first year of the rebuilding program in which overfishing did not occur on summer flounder. Spawning stock biomass (SSB) was estimated to be 95.6 million lbs (43,363 mt) in 2007, about 72 percent of the $SSB_{35\ percent}$ (SSB_{MSY} target proxy reference point) = 132.4 million lbs (60,056 mt). The benchmark assessment shows that the summer flounder stock has not been overfished since 2001. The average recruitment from 1982 to 2007 is 41.6 million fish. The 2007 year class is considered slightly below average at approximately 40.0 million fish.

The SSC, using the updated assessment information, recommended to the Council that the 2009 TAL be set no higher than 19.02 million lb (8,627 mt). Their recommendation was based on utilizing the benchmark assessment-recommended F_{TARGET} and related assessment information and methodology to derive an ABC that accounts for scientific uncertainty within the assessment. The Monitoring Committee considered the SSC's ABC recommendation, the assessment results, and management uncertainty. The Monitoring Committee recommended that the TAL could be set within a range of 19.02–17.87 million lb (8,627–8,105 mt) to account for imprecision associated with implementation of the management program.

The Council and Board considered the SSC and Monitoring Committee recommendations before adopting a 2009 TAL of 18.45 million lb (8,368 mt) to recommend to NMFS. This TAL is the mid-point in the range recommended by the Monitoring Committee and is lower than the SSC's recommendation for ABC. This TAL has a 63–percent probability of not exceeding the F target in 2009 and a 97–percent probability of constraining fishing mortality below the overfishing threshold ($F_{MSY} = F_{35\ percent}$), and is thus expected to achieve the required stock rebuilding for summer flounder to exceed the B_{MSY} target by the January 1, 2013, deadline. This would be a 17–percent increase from the 2008 TAL of 15.77 million lb (7,153 mt). All other management measures were recommended to remain status quo.

The regulations state that the Council shall recommend, and NMFS shall implement, measures (including the TAL) necessary to achieve, with at least a 50–percent probability of success, a fishing mortality rate that produces the maximum yield per recruit (F_{MAX}). However, Framework Adjustment 7 to the FMP (Framework 7) was implemented October 1, 2007 (72 FR 55704), to ensure that the best available scientific information could be adopted without delay by the Council for use in managing summer flounder. As such, the SDWG benchmark assessment recommended $F_{MSY}=F_{35\ percent}$ is now the best available fishing mortality rate that produces the optimum yield per recruit and is the threshold value for assessing whether overfishing is occurring on summer flounder, replacing F_{MAX}. A 2000 Federal Court Order (*Natural Resources Defense Council* v. *Daley*, Civil No. 1:99 CV 00221 (JLG)) also requires the annual summer flounder TAL to have at least a 50–percent probability of success. As previously stated, the Council and Board's recommended TAL of 18.45 million lb (8,368 mt) has a 97–percent probability of constraining fishing mortality below the overfishing threshold of $F_{MSY}=F_{35\ percent}$ and a 63–percent probability of constraining fishing mortality below the assessment-recommended management target of $F_{40\ percent}$. This TAL also has a 83–percent probability of constraining fishing mortality below the fishing mortality level ($F_{REBUILD}=0.274$) that is expected to achieve the exact biomass target (BMSY) required under the rebuilding plan by January 1, 2013. In the past two years, TALs with a 75–percent probability of achieving $F_{REBUILD}$ have been implemented for the summer flounder fishery. NMFS is proposing to implement a TAL of 18.45 million lb (8,368 mt) for 2009, consistent with the Council's and Board's recommendation.

The FMP specifies that the TAL is to be allocated 60 percent to the commercial sector and 40 percent to the recreational sector; therefore, the initial TAL would be allocated 11.07 million lb (5,021 mt) to the commercial sector and 7.38 million lb (3,348 mt) to the recreational sector. The Council and Board also agreed to set aside up to 3 percent (553,500 lb (251 mt)) of the summer flounder TAL for research activities. After deducting the RSA, the TAL would be divided into a commercial quota of 10,737,900 lb (4,871 mt) and a recreational harvest limit of 7,158,600 lb (3,247 mt).

Table 1 presents the proposed allocations by state with and without the commercial portion of the RSA deduction. These state quota allocations are preliminary and are subject to reductions if there are overages of states quotas carried over from a previous fishing year (using the landings information and procedures described earlier). Any commercial quota adjustments to account for overages will be included in the final rule implementing these specifications.

TABLE 1—2009 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS

State	Percent Share	Commercial Quota		Commercial Quota less RSA[1]	
		lb	kg[2]	lb	kg[2]
ME	0.04756	5,265	2,388	5,107	2,317
NH	0.00046	51	23	49	22
MA	6.82046	755,025	342,479	732,374	332,205
RI	15.68298	1,736,106	787,498	1,684,023	763,873
CT	2.25708	249,859	113,336	242,363	109,936
NY	7.64699	846,522	383,982	821,126	372,463

fishing. More generally, FX percent is the fishing mortality rate that reduces the SSB/R to x percent of the level that would exist in the absence of fishing.

TABLE 1—2009 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS—Continued

State	Percent Share	Commercial Quota		Commercial Quota less RSA[1]	
		lb	kg[2]	lb	kg[2]
NJ	16.72499	1,851,456	839,821	1,795,913	814,626
DE	0.01779	1,969	893	1,910	866
MD	2.03910	225,728	102,390	218,957	99,319
VA	21.31676	2,359,765	1,070,390	2,288,972	1,038,278
NC	27.44584	3,038,254	1,378,152	2,947,107	1,336,808
Total[3]	100.00001	11,070,001	5,021,353	10,737,901	4,870,712

[1] Preliminary Research Set-Aside amount is 553,500 lb (251 mt).
[2] Kilograms are as converted from pounds and do not sum to the converted total due to rounding.
[3] Rounding of quotas results in totals exceeding 100 percent.

The Commission is expected to maintain the voluntary measures currently in place to reduce regulatory discards that occur as a result of landing limits established by the states. The Commission established a system whereby 15 percent of each state's quota would be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery has been closed. The intent of the incidental catch set-aside is to reduce discards by allowing fishermen to land summer flounder caught incidentally in other fisheries during the year, while also ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in these proposed specifications because these measures are not authorized by the FMP and NMFS does not have authority to implement them.

Scup

The scup stock is considered overfished when the 3-year average of scup SSB is less than the biomass threshold (2.77 kg/tow; the maximum NEFSC spring survey 3-year average of SSB). In 2005, the NEFSC 3-year SSB index value decreased to 0.69 kg/tow, indicating that the stock was again below the minimum biomass threshold and considered overfished. Fishing year 2009 is the second year of the scup rebuilding program implemented in Amendment 14 to the FMP (72 FR 40077, July 23, 2007). The Amendment 14 rebuilding plan applies a constant F of 0.10 in each year of the 7-year rebuilding period.

The 2007 NEFSC Spring SSB 3-year average (2006–2008) index value of 1.16 kg/tow remains below the minimum biomass threshold of 2.77 kg/tow. While this is a 52–percent increase from the 2006 value of 0.76 kg/tow, the scup stock is considered overfished. The SSC, Monitoring Committee, Council, and Board recommended a status quo initial TAL of 7.34 million lb (3,329 mt). Using the F=0.10 target exploitation rate specified in the Amendment 14 scup rebuilding plan would result in an initial TAL of 11.18 million lb (5,384 mt), a 52–percent increase from the 2008 TAL/status quo. The updated 3-year index value of 1.16 kg/tow is below the rebuilding plan projected value for 2006–2008 of 2.08 kg/tow, indicating rebuilding progress is currently behind the schedule established in Amendment 14. The SSC, Monitoring Committee, Council, and Board cited the need to ensure that rebuilding objectives are met in the early years of the program to avoid possible significant impacts in later years, as has occurred with a number of rebuilding efforts for other species that have fallen behind schedule. These groups also raised the issue of uncertainty surrounding the scup stock status, discard estimates, and survey inter-annual variation as a rationale for recommending status quo for 2009.

Scup discard estimates are deducted from both sectors' TACs to establish TALs for each sector, i.e., TAC minus discards equals TAL. The FMP specifies that the TAC associated with a given exploitation rate be allocated 78 percent to the commercial sector and 22 percent to the recreational sector. The commercial TAC, discards, and TAL (commercial quota) are then allocated on a percentage basis to three quota periods, as specified in the FMP: Winter I (January-April)--45.11 percent; Summer (May-October)--38.95 percent; and Winter II (November-December)--15.94 percent.

The discard estimates used in the 2009 TAC calculations were based on the average discards of 2006 and 2007 for the commercial and recreational fisheries. This discard estimate is 4.36 million lb (1,978 mt), resulting in a TAC of 11.70 million lb (5,339 mt). NMFS is proposing to implement the Council and Board recommendation for an initial TAL of 7.34 million lb (3,329 mt) and an 11.70 million-lb (5,339 mt) TAC.

The commercial TAC would be 9,126,000 lb (4,140 mt) and the recreational TAC would be 2,574,000 lb (1,168 mt). After deducting estimated discards (3.58 million lb (1,624 mt) for the commercial sector and 0.78 million lb (353 mt) for the recreational sector), the initial commercial quota would be 5.546 million lb (2,516 mt) and the recreational harvest limit would be 1.79 million lb (813 mt). The Council and Board agreed to set aside the maximum 3 percent (220,200 lb (100 mt)) of the TAL for research activities. Deducting this RSA would result in a commercial quota of 5,378,648 lb (2,006 mt) and a recreational harvest limit of 1,741,152 million lb (649 mt).

The TAC and TAL (commercial quota and recreational harvest limit) calculation methodology is the same as utilized in 2008 and previous years. However, it should be noted that because the discard estimates used for 2009 are different than those utilized in 2008, the final commercial quota and recreational harvest limits are not status quo; only the initial TAL of 7.354 million lb (3,329 mt) is the same as 2008.

The proposed 2009 specifications would maintain the status quo base scup possession limits, i.e., 30,000 lb (13,608 kg) for Winter I, to be reduced to 1,000 lb (454 kg) when 80 percent of the quota is projected to be reached, and 2,000 lb (907 kg) for Winter II.

Table 2 presents the 2009 commercial allocation recommended by the Council, with and without the preliminary RSA deduction. These 2009 allocations are preliminary and may be subject to downward adjustment in the final rule

implementing these specifications due to 2008 or other previously unaccounted for overages, based on the procedures for calculating overages described earlier.

TABLE 2—2009 PROPOSED INITIAL TAC, INITIAL COMMERCIAL SCUP QUOTA, AND POSSESSION LIMITS

Period	Percent	TAC in lb (mt)	Discards in lb (mt)	Commercial Quota in lb (mt)	Commercial Quota less RSA in lb (mt)	Possession Limits in lb (kg)
Winter I	45.11	4,116,739 (1,867)	1,614,938 (732)	2,501,801 (1,134)	2,426,308 (1,100)	30,000[1] (13,608)
Summer	38.95	3,554,577 (1,612)	1,394,410 (632)	2,160,167 (980)	2,094,983 (950)	n/a
Winter II	15.94	1,454,684 (660)	570,652 (259)	884,032 (401)	857,356 (389)	2,000 (907)
Total[2]	100.00	9,126,000 (3,139)	3,580,000 (1,623)	5,546,000 (2,516)	5,378,648 (2,440)	

[1]The Winter I landing limit would drop to 1,000 lb (454 kg) upon attainment of 80 percent of the seasonal allocation.
[2]Totals subject to rounding error.
n/a-Not applicable

The final rule to implement Framework 3 to the FMP (68 FR 62250, November 3, 2003) implemented a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be rolled over to the quota for the Winter II period. As shown in Table 3, the proposed specifications would maintain the status quo Winter II possession limit-to-rollover amount ratios (i.e., 1,500 lb (0.68 mt) per 500,000 lb (227 mt) of unused Winter I period quota).

TABLE 3—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD

Initial Winter II Possession Limit		Rollover from Winter I to Winter II		Increase in Initial Winter II Possession Limit		Final Winter II Possession Limit after Rollover from Winter I to Winter II	
lb	kg	lb	mt	lb	kg	lb	kg
2,000	907	0-499,999	0-227	0	0	2,000	907
2,000	907	500,000-999,999	227-454	1,500	680	3,500	1,588
2,000	907	1,000,000-1,499,999	454-680	3,000	1,361	5,000	2,268
2,000	907	1,500,000-1,999,999	680-907	4,500	2,041	6,500	2,948
2,000	907	2,000,000-2,500,000	907-1,134	6,000	2,722	8,000	3,629

Black Sea Bass

Amendment 12 to the FMP indicated that the black sea bass stock, which was determined by SARC 27 to be overfished in 1998, could be rebuilt to the target biomass within a 10-year period, i.e., by 2010. The current target exploitation rate is based on the current estimate of $F_{MAX}=F_{MSY}=F_{REBUILD}$, or 0.33 (25.6 percent). The northern stock of black sea bass was last assessed at the 43rd SAW in June 2006. The SARC 43 Panel did not consider the stock assessment to provide an adequate basis to evaluate stock status against the biological reference points, but did not recommend any other reference points to replace them.

The most recent NEFSC spring survey results indicate that the exploitable biomass of black sea bass decreased in 2007. The 2007 biomass index, i.e., the 3-year average exploitable biomass for 2005 through 2007, is estimated to be 0.29 kg/tow, below the threshold biomass value of 0.976 kg/tow. Based on these results, if the biological reference points in the FMP are applied, black sea bass once again would be considered to be overfished.

The SSC, Monitoring Committee, Council, and Board recommended a 2009 TAL of 2.30 million lb (1,043 mt) for 2009, as calculated using the methodology in the rebuilding plan. This would be a 45–percent decrease from the 2008 TAL of 4.22 million lb (1,914 mt).

NMFS proposes to implement a 2009 black sea bass TAL of 2.3 million lb (1,043 mt), consistent with the Council and Board recommendations. The FMP specifies that the TAL associated with a given exploitation rate be allocated 49 percent to the commercial sector and 51 percent to the recreational sector; therefore, the initial TAL would be allocated 1.127 million lb (511 mt) to the commercial sector and 1.173 million lb (532 mt) to the recreational sector. The Council and Board also agreed to set aside up to 3 percent (69,000 lb (31 mt)) of the black sea bass TAL for research activities. After deducting the RSA, the TAL would be divided into a commercial quota of 1,093,190 lb (456 mt) and a recreational harvest limit of 1,137,810 lb (516 mt), as specified in the FMP.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

These proposed specifications are exempt from review under Executive Order 12866.

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact these proposed specifications, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this proposed rule. A copy of this analysis is available from NMFS (see **ADDRESSES**). A summary of the analysis follows.

The total gross revenue for the individual vessels that would be directly regulated by this action is less than $4.0 million for commercial fishing and $6.5 million for recreational fishing activities. All vessels that would be impacted by this proposed rulemaking are therefore considered to be small entities and, thus, there would be no disproportionate impacts between large and small entities as a result of the proposed rule. The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. The Council estimates that the proposed 2009 specifications could affect 2,263 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2007 (the most recent year of complete permit data). However, the more immediate impact of this rule will likely be felt by the 891 vessels that actively participated in these fisheries (i.e., landed these species) in 2007.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action. In addition, NMFS is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with this proposed rule.

If the Council took no action regarding the 2009 specifications the following would occur: (1) No specifications for the 2009 summer flounder, scup, and black sea bass fisheries; (2) the indefinite management measures (minimum mesh sizes, minimum sizes, possession limits, permit and reporting requirements, etc.) would remain unchanged; (3) there would be no quota set-aside allocated to research in 2009; and (4) there would be no specific cap on the allowable annual landings in these fisheries (i.e., there would be no quotas). Implementation of the no action alternative would be inconsistent with the goals and objectives of the FMP, its implementing regulations, and the Magnuson-Stevens Act. Under the no action alternative, the fisheries would operate without an identified cap on allowable landings because the quotas implemented for 2008 expire on December 31, 2008, and there are no provisions to roll-over those quota provisions into 2009 if specifications are not published for the year. Therefore, the no action alternative is not considered to be a reasonable alternative to the preferred action.The Council analyzed three TAL alternatives for 2009. Of these, one alternative, labeled Alternative 2, contained the most restrictive TAL options (i.e., lowest catch levels). While this alternative would achieve the objectives of the proposed action for all three species, it has the highest potential economic impact on small entities in the form of potential foregone fishing opportunities. Alternative 2 was not preferred by the Council because other alternatives considered have lower impacts on small entities while achieving the stated objectives of this proposed rule.

The Council analyzed two TAL alternatives that would accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize significant economic impact of the proposed rule on small entities. Alternative 1 (Council's preferred) would implement the following TALs in 2009: Summer flounder, 18.45 million lb (8,369 mt); scup, 7.34 million lb (3,329 mt); and black sea bass, 2.30 million lb (1,043 mt). Alternative 3 (least restrictive/highest quota levels) would implement the following TALs in 2009: Summer flounder, 19.02 million lb (8,627 mt); scup, 11.18 million lb (5,071 mt); and black sea bass, 4.22 million lb (1,914 mt).

Council staff conducted preliminary analysis on the potential economic impact of changes in recreational harvest limits associated with the alternatives. For the purposes of the RFA, the only entities affected by the proposed changes to the recreational harvest limit are owners and operators of recreational party/charter (for hire) vessels. These analyses indicate that it is possible that adverse economic impacts could occur under Alternative 1 but would not be likely under Alternative 3. The methods utilized in the analysis compare 2007 recreational landings to the respective alternative's recreational harvest limit and make inferences on possible negative impacts to the demand for party/charter vessel trips and angler participation. While useful for a general statement on potential impacts, demand for party/charter trips has remained relatively stable for many years regardless of increases or decreases in the recreational harvest limit and ascertaining angler satisfaction relative to a total recreational harvest limit is subjective. More thorough analysis of recreational fisheries impacts will be conducted following the Council's recommendations for recreational management measures in December 2008. Once actual 2009 recreational management measures recommendations are known, more detailed analysis, including an IRFA, will be prepared by the Council.

To assess the impact of the alternatives on commercial fisheries, the Council conducted both threshold analysis and analysis of potential changes in ex-vessel gross revenue that would result from Alternatives 1 and 3. Some degree of caution should be utilized when interpreting the economic impact data as a host of variations could influence the outcomes of the analyses. Vessels have permits for multiple fisheries and may supplement income by landing other species; economic dependence on a particular species may be masked by vessels landing multiple species; ex-vessel value of the three species may change from the estimated values utilized in the analysis; revenues may increase or decrease as a result of changes to possession limits or seasons set by individual states; and reduction in commercial quota to account for previous years' overages may still occur in the specifications final rule.

Under Alternative 1 (Council's preferred), analysis indicates that 224 vessels out of the 891 (25 percent) that participated in 2007 summer flounder, scup, and black sea bass fisheries would be expected to incur revenue reductions of 5 percent or more. The reductions are attributable to the reduction in black sea bass TAL and affect vessels that landed solely black sea bass or black sea bass in combination with the other two species. The Alternative 1 IRFA analysis indicated that 647 of the 891 vessels (75 percent) that landed summer flounder and scup or some combination of both in 2007 would be expected to experience revenue increases in 2009 as

a result of the 16–percent increase in summer flounder and the 15–percent increase in scup allowable commercial landings in 2009.

Utilizing ex-vessel information from 2007, the Council estimated that Alternative 1 would increase cumulative summer flounder and scup vessel revenues by $3.32 and $0.57 million, respectively. Black sea bass vessel revenues are projected to decrease by $2.85 million compared to 2008. If these increases and decreases are distributed equally among the vessels that landed summer flounder, scup, and black sea bass in 2007, the resulting increase in revenue per vessel would be $4,770 for summer flounder and $1,360 for scup. Individual vessel revenue would decrease by $5,053 for vessels landing black sea bass.

Under Alternative 3 (least restrictive TALs), analysis indicates that 121 vessels out of the 891 (14 percent) that participated in 2007 summer flounder, scup, and black sea bass fisheries would be expected to incur revenue reductions of 5 percent or more. The reductions are again attributable to the reduction in black sea bass TAL. The Alternative 3 threshold analysis indicated that 770 of the 891 vessels (86 percent) of vessels would be expected to experience revenue increases in 2009 as a result of the 19–percent increase in summer flounder and the 77–percent increase in scup allowable commercial landings under the alternative.

The Council estimated that Alternative 3 would increase cumulative summer flounder and scup vessel revenues by $4.08 and $2.98 million, respectively. Black sea bass vessel revenues are projected to decrease by $0.06 million compared to 2008. If these increases and decreases are distributed equally among the vessels that landed summer flounder, scup, and black sea bass in 2007, the resulting increase in revenue per vessel would be $5,268 for summer flounder and $7,112 for scup. Individual vessel revenue would decrease by $153 for vessels landing black sea bass.

The Council selected Alternative 1 (preferred) over Alternative 3 (least restrictive) because, for summer flounder, Alterative 1 provides a higher probability of achieving the F_{TARGET} in 2009 (63 percent) and a higher likelihood of achieving the rebuilding target by January 1, 2013, than does Alternative 3, which provides a 50–percent probability of achieving the F_{TARGET}. For scup, Alternative 1 was preferred by the Council because it employs a more conservative TAL for 2009 as the rebuilding plan is slightly behind schedule in the first year of the 7-year rebuilding plan. The Council's previous experience with other species' rebuilding plans indicates that failing to set harvest levels below the maximum amount possible (i.e., the TAL in Alternative 3) in early years of rebuilding plans when progress is slow or behind schedule has resulted in the need for more restrictive measures in late years of rebuilding efforts. The Council recommended the Alternative 1 TAL for black sea bass to be consistent with the $F_{REBUILD}$ value prescribed by the rebuilding plan. The black sea bass TAL in Alternative 3 is status quo from 2008 and would be inconsistent with the goals and objectives of the black sea bass rebuilding plans as it would produce an F rate higher than $F_{REBUILD}$. As such, the IRFA provided by the Council indicates that the TALs of Alternative 1 satisfy the objectives of the applicable statutes and rebuilding programs and minimize the adverse impacts of the proposed rule on directly regulated small entities. NMFS agrees with the Council's IRFA analysis and rationale for recommending TAL Alternative 1. As such, NMFS is proposing to implement the TALs contained in Alternative 1 (Summer flounder, 18.45 million lb (8,369 mt); scup, 7.34 million lb (3,329 mt); and black sea bass, 2.30 million lb (1,043 mt)) for 2009.

Dated: October 22, 2008

Samuel D. Rauch III,

Deputy Assistant Administrator For RegulatoryPrograms, National Marine Fisheries Service.

[FR Doc. E8–25707 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 73, No. 209
Tuesday, October 28, 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

Forest Service

Superior National Forest, LaCroix and Kawishiwi Ranger Districts; Minnesota; Echo Trail Area Forest Management Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplement to the Final Environmental Impact Statement.

SUMMARY: The Superior National Forest will prepare a supplement to the Final Environmental Impact Statement (EIS) for the Echo Trail Area Forest Management Project. The supplement will address water quality and watershed health conditions potentially affected by the project. The project is located on the LaCroix Ranger District, Cook, Minnesota, and Kawishiwi Ranger District, Ely, Minnesota.

DATES: A 45-day comment period will be provided for the draft supplement to the Final Environmental Impact Statement. The draft supplement to the Final Environmental Impact Statement is expected during the fall 2008 or winter of 2008–2009 and the final Supplement to the Final Environmental Impact Statement is expected during the spring of 2009.

ADDRESSES: Send written comments to Nancy S. Larson, LaCroix District Ranger, Echo Trail SEIS, 320 Hwy 53 North, Cook, MN 55723. Send electronic comments to *comments-eastern-superior-la-_croix@fs.fed.us* and fax comments to (218) 666–0022.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action.

FOR FURTHER INFORMATION CONTACT: Carol Booth, Project Coordinator, 320 Hwy 53 North, Cook, MN 55723; telephone (218) 666–0020.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background

The supplement to the Final Environmental Impact Statement will address issues raised in the Memorandum Opinion and Order for *Sierra Club, et al.* v. *Kimbell* (Case No. 07–3160) issued September 15, 2008 by the United States District Court, District of Minnesota. The opinion vacated the Final Environmental Impact Statement (EEIS) and required that it be amended to further address water quality and watershed health. The original FEIS and Record of Decision (ROD) are available on the Superior National Forest Web site (*http://www.fs.fed.us/r9/superior/projects*) or by calling the Project Coordinator.

The Echo Trail Area Forest Management Project is intended to implement the 2004 Superior National Forest Land and Resource Management Plan by moving the project area toward desired conditions for vegetation and landscape ecosystems, including, for example, forest age class, vegetation composition, tree species and structure diversity. The proposed action and alternatives include a range of forest vegetation and transportation system management options to address significant issues, which include impacts to wildlife habitat, roadless areas and recreation in and outside the Boundary Waters Canoe Area Wilderness.

The purpose and need for action, proposed action, issues, alternatives, effects and nature of the decision are fully described in the original FETS and ROD.

Responsible Officials

Nancy S. Larson, LaCroix District Ranger, 320 Hwy 53 North, Cook, MN 55723, and Mark E. VanEvery, Kawishiwi District Ranger, 1393 Highway 169, Ely, MN 55731.

Scoping Process

Scoping for the Echo Trail Area Forest Management Project was conducted as described in section 1.10 of the Echo Trail Area Forest Management Project FEIS. Scoping need not be repeated for a supplement to the FEIS (see 40 CFR 1502.9(c)(4)). Comments on the draft supplement to the Final Environmental Impact Statement will be solicited as described below in Comment Requested.

Comment Requested

This notice of intent initiates the process which guides development of a Supplement to the Echo Trail Area Forest Management Project Final Environmental Impact Statement. Written comments will be solicited through notification of individuals, organizations and agencies on the mailing list for the original FEIS.

A draft supplement to the Final Environmental Impact Statement will be prepared for comment. The comment period on the draft supplement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the supplement to the FEIS.

Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative or judicial review.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to participate in subsequent administrative review or judicial review.

Date: October 21, 2008.

Nancy S. Larson,

LaCroix District Ranger.

Dated: October 21, 2008.

Mark E. Vanevery,

Kawishiwi District Ranger.

[FR Doc. E8–25594 Filed 10–27–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers To Be Used for Publication of Legal Notice of Appealable Decisions and Publication of Notice of Proposed Actions for Southern Region; Alabama, Kentucky, Georgia, Tennessee, Florida, Louisiana, Mississippi, Virginia, West Virginia, Arkansas, Oklahoma, North Carolina, South Carolina, Texas, Puerto Rico

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: Deciding Officers in the Southern Region will publish notice of decisions subject to administrative appeal under 36 CFR parts 215 and 217 in the legal notice section of the newspapers listed in the Supplementary Information section of this notice. As provided in 36 CFR 215.5 and 36 CFR 217.5(d), the public shall be advised through **Federal Register** notice, of the newspaper of record to be utilized for publishing legal notice of decisions. Newspaper publication of notice of decisions is in addition to direct notice of decisions to those who have requested it and to those who have participated in project planning. Responsible Officials in the Southern Region will also publish notice of proposed actions under 36 CFR part 215 in the newspapers that are listed in the Supplementary Information section of this notice. As provided in 36 CFR part 215.5, the public shall be advised, through **Federal Register** notice, of the newspaper of record to be utilized for publishing notices on proposed actions. Additionally, the Deciding Officers in the Southern Region will publish notice of the opportunity to object to a proposed authorized hazardous fuel reduction project under 36 CFR part 218.4 or developing, amending or revising land management plans under 36 CFR 219.9 in the legal notice section of the newspapers listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Use of these newspapers for purposes of publishing legal notice of decisions subject to appeal under 36 CFR parts 215 and 217, notices of proposed actions under 36 CFR part 215, and notices of the opportunity to object under 36 CFR part 218 and 36 CFR part 219 shall begin the first day after the date of this publication.

FOR FURTHER INFORMATION CONTACT: James W. Bennett, Regional Appeal Review Team Manager, Southern Region, Planning, 1720 Peachtree Road, NW., Atlanta, Georgia 30309, Phone: 404/347–2788.

SUPPLEMENTARY INFORMATION: Deciding Officers in the Southern Region will give legal notice of decisions subject to appeal under 36 CFR part 217, the Responsible Officials in the Southern Region will give notice of decisions subject to appeal under 36 CFR part 215 and opportunity to object to a proposed authorized hazardous fuel reduction project under 36 CFR part 218 or developing, amending or revising land management plans under 36 CFR 219.9 in the following newspapers which are listed by Forest Service administrative unit. Responsible Officials in the Southern Region will also give notice of proposed actions under 36 CFR part 215 in the following newspapers of record which are listed by Forest Service administrative unit. The timeframe for comment on a proposed action shall be based on the date of publication of the notice of the proposed action in the newspaper of record. The timeframe for appeal shall be based on the date of publication of the legal notice of the decision in the newspaper of record for 36 CFR parts 215 and 217. The timeframe for an objection shall be based on the date of publication of the legal notice of the opportunity to object for projects subject to 36 CFR part 218 or 36 CFR part 219.

Where more than one newspaper is listed for any unit, the first newspaper listed is the newspaper of record that will be utilized for publishing the legal notice of decisions and calculating timeframes. Secondary newspapers listed for a particular unit are those newspapers the Deciding Officer/Responsible Official expects to use for purposes of providing additional notice.

The following newspapers will be used to provide notice.

Southern Region

Regional Forester Decisions

Affecting National Forest System lands in more than one Administrative unit of the 15 in the Southern Region, Atlanta Journal-Constitution, published daily in Atlanta, GA. Affecting National Forest System lands in only one Administrative unit or only one Ranger District will appear in the newspaper of record elected by the National Forest, National Grassland, National Recreation Area, or Ranger District as listed below.

National Forests in Alabama, Alabama

Forest Supervisor Decisions

Affecting National Forest System lands in more than one Ranger District of the 6 in the National Forests in Alabama, Montgomery Advertiser, published daily in Montgomery, AL. Affecting National Forest System lands in only one Ranger District will appear in the newspaper of record elected by the Ranger District as listed below.

District Ranger Decisions

Bankhead Ranger District: *Northwest Alabamian*, published bi-weekly (Wednesday & Saturday) in Haleyville, AL.

Conecuh Ranger District: *The Andalusia Star News*, published daily (Tuesday through Saturday) in Andalusia, AL.

Oakmulgee Ranger District: *The Tuscaloosa News*, published daily in Tuscaloosa, AL.

Shoal Creek Ranger District: *The Anniston Star*, published daily in Anniston, AL.

Talladega Ranger District: *The Daily Home*, published daily in Talladega, AL. Tuskegee Ranger District: Tuskegee News, published weekly (Thursday) in Tuskegee, AL.

Chattahoochee-Oconee National Forest, Georgia

Forest Supervisor Decisions

The Times, published daily in Gainesville, GA.

District Ranger Decisions

Blue Ridge Ranger District: *The News Observer* (newspaper of record) published bi-weekly (Tuesday & Friday) in Blue Ridge, GA.

North Georgia News, (newspaper of record) published weekly (Wednesday) in Blairsville, GA.

The Dahlonega Nuggett, (secondary) published weekly (Wednesday) in Dahlonega, GA.

Towns County Herald, (secondary) published weekly (Thursday) in Hiawassee, GA.

Conasauga Ranger District: *Daily Citizen*, published daily in Dalton, GA.

Chattooga Ranger District: *The Northeast Georgian*, (newspaper of record) published bi-weekly (Tuesday & Friday) in Cornelia, GA.

Clayton Tribune, (newspaper of record) published weekly (Thursday) in Clayton, GA.

The Toccoa Record, (secondary) published weekly (Thursday) in Toccoa, GA.

White County News, (secondary) published weekly (Thursday) in Cleveland, GA.

Oconee Ranger District: *Eatonton Messenger*, published weekly (Thursday) in Eatonton, GA.

Cherokee National Forest, Tennessee

Forest Supervisor Decisions

Knoxville News Sentinel, published daily in Knoxville, TN.

District Ranger Decisions

Nolichucky-Unaka Ranger District: *Greeneville Sun*, published daily (except Sunday) in Greeneville, TN.

Ocoee-Hiwassee Ranger District: *Polk County News*, published weekly (Wednesday) in Benton, TN.

Tellico Ranger District: *Monroe County Advocate & Democrat*, published tri-weekly (Wednesday, Friday, and Sunday) in Sweetwater, TN.

Watauga Ranger District: *Johnson City Press*, published daily in Johnson City, TN.

Daniel Boone National Forest, Kentucky

Forest Supervisor Decisions

Lexington Herald-Leader, published daily in Lexington, KY.

District Ranger Decisions

Cumberland Ranger District: *Lexington Herald-Leader*, published daily in Lexington, KY.

London Ranger District: *The Sentinel-Echo*, published tn-weekly (Monday, Wednesday, and Friday) in London, KY.

Redbird Ranger District: *Manchester Enterprise*, published weekly (Thursday) in Manchester, KY.

Stearns Ranger District: *McCreary County Record*, published weekly (Tuesday) in Whitley City, KY.

El Yunque National Forest, Puerto Rico

Forest Supervisor Decisions

El Nuevo Dia, published daily in Spanish in San Juan, PR.

San Juan Star, published daily in English in San Juan, PR.

National Forests in Florida, Florida

Forest Supervisor Decisions

The Tallahassee Democrat, published daily in Tallahassee, FL

District Ranger Decisions

Apalachicola Ranger District: *Calhoun-Liberty Journal*, published weekly (Wednesday) in Bristol, FL.

Lake George Ranger District: *The Ocala Star Banner*, published daily in Ocala, FL.

Osceola Ranger District: *The Lake City Reporter*, published daily (Monday–Saturday) in Lake City, FL.

Seminole Ranger District: *The Daily Commercial*, published daily in Leesburg, FL.

Wakulla Ranger District: *The Tallahassee Democrat*, published daily in Tallahassee, FL.

Francis Marion & Sumter National Forests, South Carolina

Forest Supervisor Decisions

The State, published daily in Columbia, SC.

District Ranger Decisions

Andrew Pickens Ranger District: *The Daily Journal*, published daily (Tuesday through Saturday) in Seneca, SC.

Enoree Ranger District: *Newberry Observer*, published tn-weekly (Monday, Wednesday, and Friday) in Newberry, SC.

Long Cane Ranger District: *Index-Journal*, published daily in Greenwood, SC.

Wambaw Ranger District: *Post and Courier*, published daily in Charleston, SC.

Witherbee Ranger District: *Post and Courier*, published daily in Charleston, SC.

George Washington and Jefferson National Forests, Virginia and West Virginia

Forest Supervisor Decisions

Roanoke Times, published daily in Roanoke, VA.

District Ranger Decisions

Clinch Ranger District: *Coalfield Progress*, published bi-weekly (Tuesday and Thursday) in Norton, VA.

North River Ranger District: *Daily News Record*, published daily (except Sunday) in Harrisonburg, VA.

Glenwood-Pedlar Ranger District: *Roanoke Times*, published daily in Roanoke, VA.

James River Ranger District: *Virginian Review*, published daily (except Sunday) in Covington, VA.

Lee Ranger District: *Shenandoah Valley Herald*, published weekly (Wednesday) in Woodstock, VA.

Mount Rogers National Recreation Area: *Bristol Herald Courier*, published daily in Bristol, VA.

Eastern Divide Ranger District: *Roanoke Times*, published daily in Roanoke, VA.

Warm Springs Ranger District: *The Recorder*, published weekly (Thursday) in Monterey, VA.

Kisatchie National Forest, Louisiana

Forest Supervisor Decisions

The Town Talk, published daily in Alexandria, LA.

District Ranger Decisions

Calcasieu Ranger District: *The Town Talk*, (newspaper of record) published daily in Alexandria, LA.

The Leesville Daily Leader, (secondary) published daily in Leesville, LA.

Caney Ranger District: *Minden Press Herald*, (newspaper of record) published daily in Minden, LA.

Homer Guardian Journal, (secondary) published weekly (Wednesday) in Homer, LA.

Catahoula Ranger District: *The Town Talk*, published daily in Alexandria, LA.

Kisatchie Ranger District: *Natchitoches Times*, published daily (Tuesday thru Friday and on Sunday) in Natchitoches, LA.

Winn Ranger District: *Winn Parish Enterprise*, published weekly (Wednesday) in Winnfield, LA.

Land Between the Lakes National Recreation Area, Kentucky and Tennessee

Area Supervisor Decisions

The Paducah Sun, published daily in Paducah, KY.

National Forests in Mississippi, Mississippi

Forest Supervisor Decisions

Clarion-Ledger, published daily in Jackson, MS.

District Ranger Decisions

Bienville Ranger District: *Clarion-Ledger*, published daily in Jackson, MS.

Chickasawhay Ranger District: *Clarion-Ledger*, published daily in Jackson, MS.

Delta Ranger District: *Clarion-Ledger*, published daily in Jackson, MS.

De Soto Ranger District: *Clarion Ledger*, published daily in Jackson, MS.

Holly Springs Ranger District: *Clarion-Ledger*, published daily in Jackson, MS.

Homochitto Ranger District: *Clarion-Ledger*, published daily in Jackson, MS.

Tombigbee Ranger District: *Clarion-Ledger*, published daily in Jackson, MS.

National Forests in North Carolina, North Carolina

Forest Supervisor Decisions

The Asheville Citizen-Times, published daily in Asheville, NC.

District Ranger Decisions

Appalachian Ranger District: *The Asheville Citizen-Times*, published daily in Asheville, NC.

Cheoah Ranger District: *Graham Star*, published weekly (Thursday) in Robbinsville, NC.

Croatan Ranger District: *The Sun Journal*, published daily in New Bern, NC.

Grandfather Ranger District: *McDowell News*, published daily in Marion, NC.

Nantahala Ranger District: *The Franklin Press*, published bi-weekly (Tuesday and Friday) in Franklin, NC.

Pisgah Ranger District: *The Asheville Citizen-Times*, published daily in Asheville, NC.

Tusquitee Ranger District: *Cherokee Scout*, published weekly (Wednesday) in Murphy, NC.

Uwharrie Ranger District: *Montgomery Herald*, published weekly (Wednesday) in Troy, NC.

Ouachita National Forest, Arkansas and Oklahoma

Forest Supervisor Decisions

Arkansas Democrat-Gazette, published daily in Little Rock, AR.

District Ranger Decisions

Caddo-Womble Ranger District: *Arkansas Democrat-Gazette*, published daily in Little Rock, AR.

Jessieville-Winona-Fourche Ranger District: *Arkansas Democrat-Gazette*, published daily in Little Rock, AR.

Mena-Oden Ranger District: *Arkansas Democrat-Gazette*, published daily in Little Rock, AR.

Oklahoma Ranger District (Choctaw; Kiamichi; and Tiak) *Tulsa World*, published daily in Tulsa, OK.

Poteau-Cold Springs Ranger District: *Arkansas Democrat-Gazette*, published daily in Little Rock, AR.

Ozark-St. Francis National Forests, Arkansas

Forest Supervisor Decisions

The Courier, published daily (Tuesday through Sunday) in Russellville, AR.

District Ranger Decisions

Bayou Ranger District: *The Courier*, published daily (Tuesday through Sunday) in Russellville, AR.

Boston Mountain Ranger District: *Southwest Times Record*, published daily in Fort Smith, AR.

Buffalo Ranger District: *Newton County Times*, published weekly in Jasper, AR.

Magazine Ranger District: *Southwest Times Record*, published daily in Fort Smith, AR.

Pleasant Hill Ranger District: *Johnson County Graphic*, published weekly (Wednesday) in Clarksville, AR.

St. Francis National Forest: *The Daily World*, published daily (Sunday through Friday) in Helena, AR.

Sylamore Ranger District: *Stone County Leader*, published weekly (Wednesday) in Mountain View, AR.

National Forests and Grasslands in Texas, Texas

Forest Supervisor Decisions

The Lufkin Daily News, published daily in Lufkin, TX.

District Ranger Decisions

Angelina National Forest: *The Lufkin Daily News*, published daily in Lufkin, TX.

Caddo & LBJ National Grasslands: *Denton Record-Chronicle*, published daily in Denton, TX.

Davy Crockett National Forest: *The Lufkin Daily News*, published daily in Lufkin, TX.

Sabine National Forest: *The Lufkin Daily News*, published daily in Lufkin, TX.

Sam Houston National Forest: *The Courier*, published daily in Conroe, TX.

Dated: October 21, 2008.

James D. Fenwood,

Deputy Regional Forester.

[FR Doc. E8–25501 Filed 10–27–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

(A–533–820)

Certain Hot–Rolled Carbon Steel Flat Products from India: Notice of Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 28, 2008.

FOR FURTHER INFORMATION CONTACT: Joy Zhang at (202) 482–1168 or James Terpstra at (202) 482–3965, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On January 28, 2008, the Department of Commerce (''the Department'') published a notice of initiation of antidumping duty administrative review of certain hot–rolled carbon steel flat products from India for the period December 1, 2006, through November 30, 2007. **See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part**, 73 FR 4829 (January 28, 2008). On August 20, 2008, the Department extended the time period for issuing the preliminary results of review by 60 days. **See Certain Hot–Rolled Carbon Steel Flat Products from India: Notice of Intent to Rescind Antidumping Duty Administrative Review in Part and Notice of Extension of Time Limits for Preliminary Results of Antidumping Administrative Review**, 73 FR 49169 (August 20, 2008). The preliminary results are currently due no later than October 31, 2008.

Extension of Time Limit of Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue preliminary results within 245 days after the last day of the anniversary month of an order or finding for which a review is requested. Section 751(a)(3)(A) of the Act further states that if it is not practicable to complete the review within the time period specified, the administering authority may extend the 245-day period to issue its preliminary results to a maximum of up to 365 days after the last day of the anniversary month.

We determine that it is not practicable to complete this administrative review within the time limits mandated by section 751(a)(3)(A) of the Act because we require additional time to analyze the sales and cost data submitted by Essar and issue and review responses to supplemental questionnaires. Because it is not practicable to complete this review by October 31, 2008, we are extending the time period for issuing the preliminary results by an additional 42 days. The preliminary results are now due no later than December 12, 2008, in accordance with section 751(a)(3)(A) of the Act. The final results continue to be due 120 days after publication of the preliminary results.

This notice is issued and published in accordance with section 751(a)(3)(A) and 777(i) of the Act and 19 CFR 351.213(h)(2).

Dated: October 21, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–25727 Filed 10–27–08; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Judges Panel of the Malcolm Baldrige National Quality Award

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the Judges Panel of the Malcolm Baldrige National Quality Award will meet Monday, November 17, 2008, 8 a.m. to 5:30 p.m.; Tuesday, November 18, 2008, 8 a.m. to 5:30 p.m.; Wednesday, November 19, 2008, 8 a.m. to 5:30 p.m.; Thursday, November 20 2008, 9 a.m. to 5:30 p.m.; Friday, November 21, 2008, 8 a.m. to 5:30 p.m. The Judges Panel is composed of twelve members prominent in the fields of quality, innovation, and performance excellence and appointed by the Secretary of Commerce. The purpose of this meeting is to conduct final judging of the 2008 applicants. The review process involves examination of records and discussions of applicant data, and will be closed to the public in accordance with Section 552b(c)(4) of Title 5, United States Code.

DATES: The meeting will convene November 17, 2008 at 8 a.m. and adjourn at 5:30 p.m. on November 21, 2008. The entire meeting will be closed.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, Administration Building, Lecture Room E, Gaithersburg, Maryland 20899.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, Baldrige National Quality Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on March 4, 2008, that the meeting of the Judges Panel will be closed pursuant to Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app. 2, as amended by Section 5(c) of the Government in the Sunshine Act, Public Law 94–409. The meeting, which involves examination of Award applicant data from U.S. companies and other organizations and a discussion of this data as compared to the Award criteria in order to recommend Award recipients, may be closed to the public in accordance with Section 552b(c)(4) of Title 5, United States Code, because the meetings are likely to disclose trade secrets and commercial or financial information obtained from a person which is privileged or confidential.

Dated: October 22, 2008.

Patrick Gallagher,

Deputy Director.

[FR Doc. E8–25697 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Fire Protection Association (NFPA): Request for Comments on NFPA's Codes and Standards

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: Since 1896, the National Fire Protection Association (NFPA) has accomplished its mission by advocating scientifically based consensus codes and standards, research, and education for safety related issues. NFPA's *National Fire Codes*®, which holds over 270 documents, are administered by more than 225 Technical Committees comprised of approximately 7,000 volunteers and are adopted and used throughout the world. NFPA is a nonprofit membership organization with approximately 80,000 members from over 70 nations, all working together to fulfill the Association's mission.

The NFPA process provides ample opportunity for public participation in the development of its codes and standards. All NFPA codes and standards are revised and updated every three to five years in Revision Cycles that begin twice each year and that take approximately two years to complete. Each Revision Cycle proceeds according to a published schedule that includes final dates for all major events in the process. The process contains five basic steps that are followed both for developing new documents as well as revising existing documents. These steps are: Calling for Proposals; Publishing the Proposals in the Report on Proposals; Calling for Comments on the Committee's disposition of the Proposals and these Comments are published in the Report on Comments; having a Technical Report Session at the NFPA Annual Meeting; and finally, the Standards Council Consideration and Issuance of documents.

Note: Under new rules effective Fall 2005, anyone wishing to make Amending Motions on the Technical Committee Reports (ROP and ROC) must signal their intention by submitting a Notice of Intent to Make a Motion by the Deadline of October 23, 2009. Certified motions will be posted by November 20, 2009. Documents that receive notice of proper Amending Motions (Certified Amending Motions) will be presented for action at the annual June 2010 Association Technical Meeting. Documents that receive no motions will be forwarded directly to the Standards Council for action on issuance.

For more information on these new rules and for up-to-date information on schedules and deadlines for processing NFPA Documents, check the NFPA Web site at *http://www.nfpa.org* or contact NFPA Codes and Standards Administration.

The purpose of this notice is to request comments on the technical reports that will be published in the NFPA's 2009 Fall Revision Cycle. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

DATES: Sixty reports are published in the 2009 Fall Revision Cycle Report on Proposals and will be available on December 29, 2008. Comments received on or before March 6, 2009, will be considered by the respective NFPA Committees before final action is taken on the proposals.

ADDRESSES: The 2009 Fall Revision Cycle Report on Proposals is available and downloadable from NFPA's Web site—*http://www.nfpa.org* or by requesting a copy from the NFPA, Fulfillment Center, 11 Tracy Drive, Avon, Massachusetts 02322. Comments on the report should be submitted to Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–7471.

FOR FURTHER INFORMATION CONTACT: Christian Dubay, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–7471, (617) 770–3000.

SUPPLEMENTARY INFORMATION:

Background

The National Fire Protection Association (NFPA) develops building, fire, and electrical safety codes and standards. Federal agencies frequently use these codes and standards as the basis for developing Federal regulations concerning safety. Often, the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR Part 51.

Request for Comments

Interested persons may participate in these revisions by submitting written data, views, or arguments to Christian Dubay, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–7471. Commenters may use the forms provided for comments in the Reports on Proposals. Each person submitting a comment should include his or her name and address, identify the notice, and give reasons for any recommendations. Comments received on or before March 6, 2009, for the 2009 Fall Revision Cycle Report on Proposals will be considered by the NFPA before final action is taken on the proposals.

Copies of all written comments received and the disposition of those comments by the NFPA committees will be published as the 2009 Fall Revision Cycle Report on Comments by August 28, 2009. A copy of the Report on Comments will be sent automatically to each commenter.

2009 Fall Revision Cycle

*Report on Proposals**

NFPA 10	Standard for Portable Fire Extinguishers	P
NFPA 11	Standard for Low-, Medium-, and High-Expansion Foam	P
NFPA 13E	Recommended Practice for Fire Department Operations in Properties Protected by Sprinkler and Standpipe Systems.	P
NFPA 14	Standard for the Installation of Standpipes and Hose Systems	P
NFPA 18	Standard on Wetting Agents	P
NFPA 37	Standard for the Installation and Use of Stationary Combustion Engines and Gas Turbines	P
NFPA 45	Standard on Fire Protection for Laboratories Using Chemicals	P
NFPA 53	Recommended Practice on Materials, Equipment, and Systems Used in Oxygen-Enriched Atmospheres	P
NFPA 70B	Recommended Practice for Electrical Equipment Maintenance	P
NFPA 91	Standard for Exhaust Systems for Air Conveying of Vapors, Gases, Mists, and Noncombustible Particulate Solids.	P
NFPA 120	Standard for Fire Prevention and Control in Coal Mines	P
NFPA 122	Standard for Fire Prevention and Control in Metal/Nonmetal Mining and Metal Mineral Processing Facilities.	P
NFPA 204	Standard for Smoke and Heat Venting	P
NFPA 211	Standard for Chimneys, Fireplaces, Vents, and Solid Fuel-Burning Appliances	P
NFPA 214	Standard on Water-Cooling Towers	P
NFPA 255	Standard Method of Test of Surface Burning Characteristics of Building Materials	W
NFPA 276	Standard Method of Fire Tests for Determining the Heat Release Rate of Combustible Buildings Assemblies or Above Deck Roofing Components.	N
NFPA 326	Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair	P
NFPA 329	Recommended Practice for Handling Releases of Flammable and Combustible Liquids and Gases	P
NFPA 405	Standard for the Recurring Proficiency of Airport Fire Fighters	P
NFPA 408	Standard for Aircraft Hand Portable Fire Extinguishers	P
NFPA 409	Standard on Aircraft Hangars	P
NFPA 410	Standard on Aircraft Maintenance	P
NFPA 422	Guide for Aircraft Accident/Incident Response Assessment	P
NFPA 423	Standard for Construction and Protection of Aircraft Engine Test Facilities	P
NFPA 495	Explosive Materials Code	P
NFPA 498	Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives	R
NFPA 505	Fire Safety Standard for Powered Industrial Trucks Including Type Designations, Areas of Use, Conversions, Maintenance, and Operations.	P
NFPA 520	Standard on Subterranean Spaces	P
NFPA 551	Guide for the Evaluation of Fire Risk Assessments	P
NFPA 600	Standard on Industrial Fire Brigades	R
NFPA 601	Standard for Security Services in Fire Loss Prevention	R
NFPA 701	Standard Methods of Fire Tests for Flame Propagation of Textiles and Films	P
NFPA 750	Standard on Water Mist Fire Protection Systems	P
NFPA 804	Standard for Fire Protection for Advanced Light Water Reactor Electric Generating Plants	P
NFPA 805	Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants	P
NFPA 806	Performance Based Standard for Fire Protection for Advanced Nuclear Reactor Electric Generating Plants	N
NFPA 850	Recommended Practice for Fire Protection for Electric Generating Plants and High Voltage Direct Current Converter Stations.	P
NFPA 851	Recommended Practice for Fire Protection for Hydroelectric Generating Plants	P
NFPA 853	Standard for the Installation of Stationary Fuel Cell Power Systems	P
NFPA 900	Building Energy Code	P
NFPA 914	Code for Fire Protection of Historic Structures	C
NFPA 1003	Standard for Airport Fire Fighter Professional Qualifications	P
NFPA 1035	Standard for Professional Qualifications for Public Fire and Life Safety Educator	P
NFPA 1150	Standard on Foam Chemicals for Fires in Class A Fuels	P
NFPA 1201	Standard for Providing Emergency Services to the Public	C
NFPA 1250	Recommended Practice in Emergency Service Organization Risk Management	P
NFPA 1407	Standard for Fire Service Rapid Intervention Crews	N
NFPA 1410	Standard on Training for Initial Emergency Scene Operations	P
NFPA 1452	Guide for Training Fire Service Personnel to Conduct Dwelling Fire Safety Surveys	P
NFPA 1581	Standard on Fire Department Infection Control Program	P
NFPA 1600	Standard on Disaster/Emergency Management and Business Continuity Programs	C
NFPA 1620	Recommended Practice for Pre-Incident Planning	C
NFPA 1801	Standard on Thermal Imagers for the Fire Service	N
NFPA 1931	Standard for Manufacturer's Design of Fire Department Ground Ladders	P
NFPA 1932	Standard on Use, Maintenance, and Service Testing of In-Service Fire Department Ground Ladders	P
NFPA 1936	Standard on Powered Rescue Tools	P
NFPA 1952	Standard on Surface Water Operations Protective Clothing and Equipment	N

NFPA 1977	Standard on Protective Clothing and Equipment for Wildland Fire Fighting	C
NFPA 2010	Standard for Fixed Aerosol Fire-Extinguishing Systems	P

* P = Partial revision; W = Withdrawal; R = Reconfirmation; N = New; C = Complete Revision.

Dated: October 22, 2008.

Patrick Gallagher,

Deputy Director.

[FR Doc. E8–25695 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Fire Protection Association (NFPA): Proposes To Revise Codes and Standards

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Fire Protection Association (NFPA) proposes to revise some of its safety codes and standards and requests proposals from the public to amend existing or begin the process of developing new NFPA safety codes and standards. The purpose of this request is to increase public participation in the system used by NFPA to develop its codes and standards. The publication of this notice of request for proposals by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

The NFPA process provides ample opportunity for public participation in the development of its codes and standards. All NFPA codes and standards are revised and updated every three to five years in Revision Cycles that begin twice each year and that takes approximately two years to complete. Each Revision Cycle proceeds according to a published schedule that includes final dates for all major events in the process. The process contains five basic steps that are followed both for developing new documents as well as revising existing documents. These steps are: Calling for Proposals; Publishing the Proposals in the Report on Proposals; Calling for Comments on the Committee's disposition of the proposals and these Comments are published in the Report on Comments; having a Technical Report Session at the NFPA Annual Meeting; and finally, the Standards Council Consideration and Issuance of documents.

Note: Under new rules effective Fall 2005, anyone wishing to make Amending Motions on the Technical Committee Reports (ROP and ROC) must signal their intention by submitting a Notice of Intent to Make a Motion by the Deadline stated in the ROC. Certified motions will then be posted on the NFPA Web site. Documents that receive notice of proper Amending Motions (Certified Amending Motions) will be presented for action at the annual June Association Technical Meeting. Documents that receive no motions will be forwarded directly to the Standards Council for action on issuance.

For more information on these new rules and for up-to-date information on schedules and deadlines for processing NFPA Documents, check the NFPA Web site at *http://www.nfpa.org* or contact NFPA Codes and Standards Administration.

DATES: Interested persons may submit proposals on or before the dates listed with the standards.

ADDRESSES: Christian Dubay, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–7471.

FOR FURTHER INFORMATION CONTACT: Christian Dubay, Secretary, Standards Council, at above address, (617) 770–3000.

SUPPLEMENTARY INFORMATION:

Background

The National Fire Protection Association (NFPA) develops building, fire, and electrical safety codes and standards. Federal agencies frequently use these codes and standards as the basis for developing Federal regulations concerning safety. Often, the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR Part 51.

When a Technical Committee begins the development of a new or revised NFPA code or standard, it enters one of two Revision Cycles available each year. The Revision Cycle begins with the Call for Proposals, that is, a public notice asking for any interested persons to submit specific written proposals for developing or revising the Document. The Call for Proposals is published in a variety of publications. Interested parties have approximately twenty weeks to respond to the Call for Proposals.

Following the Call for Proposals period, the Technical Committee holds a meeting to consider and accept, reject or revise, in whole or in part, all the submitted Proposals. The committee may also develop its own Proposals. A document known as the Report on Proposals, or ROP, is prepared containing all the Public Proposals, the Technical Committee's action and each Proposal, as well as all Committee-generated Proposals. The ROP is then submitted for the approval of the Technical Committee by a formal written ballot. If the ROP does not receive approval by a two-thirds vote calculated in accordance with NFPA rules, the Report is returned to the committee for further consideration and is not published. If the necessary approval is received, the ROP is published in a compilation of Reports on Proposals issued by NFPA twice yearly for public review and comment, and the process continues to the next step.

The Reports on Proposals are sent automatically free of charge to all who submitted proposals and each respective committee member, as well as anyone else who requests a copy. All ROPs are also available for free downloading at *http://www.nfpa.org.*

Once the ROP becomes available, there is a 60-day comment period during which anyone may submit a Public Comment on the proposed changes in the ROP. The committee then reconvenes at the end of the comment period and acts on all Comments.

As before, a two-thirds approval vote by written ballot of the eligible members of the committee is required for approval of actions on the Comments. All of this information is compiled into a second Report, called the Report on Comments (ROC), which, like the ROP, is published and made available for public review for a seven-week period.

The process of public input and review does not end with the publication of the ROP and ROC. Following the completion of the Proposal and Comment periods, there is yet a further opportunity for debate and discussion through the Technical Report Sessions that take place at the NFPA Annual Meeting.

The Technical Report Session provides an opportunity for the final Technical Committee Report (i.e., the ROP and ROC) on each proposed new or revised code or standard to be presented to the NFPA membership for the debate and consideration of motions to amend the Report. Before making an

allowable motion at a Technical Report Session, the intended maker of the motion must file, in advance of the session, and within the published deadline, a Notice of Intent to Make a Motion. A Motions Committee appointed by the Standards Council then reviews all notices and certifies all amending motions that are proper. Only these Certified Amending Motions, together with certain allowable Follow-Up Motions (that is, motions that have become necessary as a result of previous successful amending motions) will be allowed at the Technical Report Session.

For more information on dates/locations of NFPA Technical Committee meetings and NFPA Annual Technical Report Sessions, check the NFPA Web site at: *http://www.nfpa.org/itemDetail.asp?categoryID=822&itemID=22818.*

The specific rules for the types of motions that can be made and who can make them are set forth in NFPA's Regulation Governing Committee Projects which should always be consulted by those wishing to bring an issue before the membership at a Technical Report Session.

Interested persons may submit proposals, supported by written data, views, or arguments to Christian Dubay, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–7471. Proposals should be submitted on forms available from the NFPA Codes and Standards Administration Office or on NFPA's Web site at *http://www.nfpa.org.*

Each person must include his or her name and address, identify the document and give reasons for the proposal. Proposals received before or by 5 p.m. local time on the closing date indicated would be acted on by the Committee. The NFPA will consider any proposal that it receives on or before the date listed with the codes or standard.

Document—Edition	Document title	Proposal closing date
NFPA 2—P*	Hydrogen Technologies Code	1/2/2009
NFPA 12—2008	Standard on Carbon Dioxide Extinguishing Systems	5/29/2009
NFPA 17—2009	Standard for Dry Chemical Extinguishing Systems	5/23/2011
NFPA 17A—2009	Standard for Wet Chemical Extinguishing Systems	5/23/2011
NFPA 18A—2007	Standard on Water Additives for Fire Control and Vapor Mitigation	12/1/2008
NFPA 25—2008	Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems	12/1/2008
NFPA 30—2008	Flammable and Combustible Liquids Code	12/1/2008
NFPA 30B—2007	Code for the Manufacture and Storage of Aerosol Products	12/1/2008
NFPA 40—2007	Standard for the Storage and Handling of Cellulose Nitrate Film	12/1/2008
NFPA 58—2008	Liquefied Petroleum Gas Code	12/1/2008
NFPA 59—2008	Utility LP-Gas Plant Code	11/24/2009
NFPA 70—2008	National Electrical Code®	11/7/2008
NFPA 73—2006	Electrical Inspection Code for Existing Dwellings	12/1/2008
NFPA 85—2007	Boiler and Combustion Systems Hazards Code	5/8/2009
NFPA 86—2007	Standard for Ovens and Furnaces	12/1/2008
NFPA 87—P*	Recommended Practice for Fluid Heaters	1/2/2009
NFPA 88A—2007	Standard for Parking Structures	12/1/2008
NFPA 96—2008	Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations	12/1/2008
NFPA 160—2006	Standard for the Use of Flame Effects Before an Audience	12/1/2008
NFPA 251—2006	Standard Methods of Tests of Fire Resistance of Building Construction and Materials	5/29/2009
NFPA 253—2006	Standard Method of Test for Critical Radiant Flux of Floor Covering Systems Using a Radiant Heat Energy Source.	5/29/2009
NFPA 262—2007	Standard Method of Test for Flame Travel and Smoke of Wires and Cables for Use in Air-Handling Spaces.	5/29/2009
NFPA 265—2007	Standard Methods of Fire Tests for Evaluating Room Fire Growth Contribution of Textile Coverings on Full Height Panels and Walls.	5/29/2009
NFPA 285—2006	Standard Fire Test Method for Evaluation of Fire Propagation Characteristics of Exterior Non-Load-Bearing Wall Assemblies Containing Combustible Components.	5/29/2009
NFPA 286—2006	Standard Methods of Fire Tests for Evaluating Contribution of Wall and Ceiling Interior Finish to Room Fire Growth.	5/29/2009
NFPA 303—2006	Fire Protection Standard for Marinas and Boatyards	12/1/2008
NFPA 307—2006	Standard for the Construction and Fire Protection of Marine Terminals, Piers, and Wharves	12/1/2008
NFPA 312—2006	Standard for Fire Protection of Vessels During Construction, Conversion, Repair, and Lay-Up	12/1/2008
NFPA 385—2007	Standard for Tank Vehicles for Flammable and Combustible Liquids	5/28/2010
NFPA 502—2008	Standard for Road Tunnels, Bridges, and Other Limited Access Highways	12/1/2008
NFPA 556—P*	Guide on Methods for Evaluating Fire Hazard to Occupants of Passenger Road Vehicles	12/1/2008
NFPA 654—2006	Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids.	12/1/2008
NFPA 780—2008	Standard for the Installation of Lightning Protection Systems	12/1/2008
NFPA 1000—2006	Standard for Fire Service Professional Qualifications Accreditation and Certification Systems	12/1/2008
NFPA 1071—2006	Standard for Emergency Vehicle Technician Professional Qualifications	11/1/2008
NFPA 1124—2006	Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles.	12/1/2008
NFPA 1126—2006	Standard for the Use of Pyrotechnics Before a Proximate Audience	12/1/2008
NFPA 1145—2006	Guide for the Use of Class A Foams in Manual Structural Fire Fighting	12/1/2008
NFPA 1991—2005	Standard on Vapor-Protective Ensembles for Hazardous Materials Emergencies	12/1/2008
NFPA 1992—2005	Standard on Liquid Splash-Protective Ensembles and Clothing for Hazardous Materials Emergencies.	12/1/2008
NFPA 1994—2007	Standard on Protective Ensembles for First Responders to CBRN Terrorism Incidents	12/1/2008
NFPA 2001—2008	Standard on Clean Agent Fire Extinguishing Systems	5/29/2009

*P = Proposed NEW drafts are available from NFPA's Web site—*http://www.nfpa.org* or may be obtained from NFPA's Codes and Standards Administration, 1 Batterymarch Park, Quincy, Massachusetts 02269–7471.

Dated: October 22, 2008.

Patrick Gallagher,

Deputy Director.

[FR Doc. E8–25698 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Diving Operations, Recreational Fishing, Research, Conservation, and Education Seats for the Flower Garden Banks National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice to extend the application deadline and request for applications. Notice of opening of an additional Advisory Council seat.

SUMMARY: The Flower Garden Banks National Marine Sanctuary (FGBNMS or Sanctuary) is seeking applicants for the of Diving Operations, Recreational Fishing, Research, Conservation and Education seats on its Sanctuary Advisory Council (Council). Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. The Applicant chosen as a member should expect to serve a 3-year term, pursuant to the Council's Charter.

DATES: Applications are due by November 7, 2008.

ADDRESSES: Application kits may be obtained from Jennifer Morgan at NOAA-Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Bldg. 216, Galveston, TX 77551 or downloaded from the sanctuary Web site *http://flowergarden.noaa.gov.* Completed applications should be sent to the same mailing address.

FOR FURTHER INFORMATION CONTACT: Jennifer Morgan, NOAA-Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Bldg. 216, Galveston, TX 77551, 409–621–5151 ext. 103, *Jennifer.Morgan@noaa.gov.*

SUPPLEMENTARY INFORMATION: Located in the northwestern Gulf of Mexico, the Flower Garden Banks National Marine Sanctuary includes three separate areas, known as East Flower Garden, West Flower Garden, and Stetson Banks. The Sanctuary was designated on January 17, 1992. Stetson Bank was added to the Sanctuary in 1996. The Sanctuary Advisory Council will consist of no more than 11 members; 8 non-governmental voting members and 3 governmental non-voting members. The Council may serve as a forum for consultation and deliberation among its members and as a source of advice to the Sanctuary manager regarding the management of the Flower Garden Banks National Marine Sanctuary.

Authority: 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Oceanic and Atmospheric Administration.

[FR Doc. E8–25708 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL48

Fisheries of the Exclusive Economic Zone Off Alaska; Recordkeeping and Reporting Requirements; Public Workshops

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

ACTION: Notice of workshops.

SUMMARY: NMFS, Alaska Region, and the U.S. Coast Guard, North Pacific Fisheries Training Center, will present workshops on eLandings, a consolidated electronic means of reporting production of commercial groundfish to multiple management agencies for Federal and State fisheries off the coast of Alaska, and 2009 recordkeeping and reporting requirements for the Alaska groundfish fisheries and Individual Fishing Quota (IFQ) fisheries.

DATES: The workshops will be held on November 20 and 21, 2008. See **SUPPLEMENTARY INFORMATION** for the times.

ADDRESSES: The workshops will be held in Seattle, WA. See **SUPPLEMENTARY INFORMATION** for the addresses.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7462.

SUPPLEMENTARY INFORMATION: The workshops will include discussion of eLandings and 2009 recordkeeping and reporting requirements for Alaska groundfish fisheries and IFQ fisheries and instructions for completing and submitting required reports and logbooks. The workshops are scheduled as follows: 1. November 20, 2008, 9 a.m. to 5 p.m., Pacific Standard Time (PST), at the Silver Cloud Inn — Lake Union, Capital Hill Room, 1150 Fairview Ave N, Seattle, WA. NMFS will provide a demonstration of the new version of eLandings for at–sea catcher processors and training on how to submit daily production reports and fish tickets. 2. November 21, 2008, 10 a.m. to 11 a.m., PST, at Pacific Marine Fish Expo, Qwest Field Event Center, Room C2, 800 Occidental Ave S, Seattle, WA. NMFS and Coast Guard will discuss recordkeeping and reporting requirements and instructions for completing and submitting required reports and logbooks. Suggestions and recommendations on scheduling these workshops or on holding workshops at other times and places are welcome.

Special Accommodations

These workshops will be physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Jennifer Hogan, 907–586–7462, at least 10 working days prior to the meeting date.

Dated: October 22, 2008.

Emily H. Menashes,

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

[FR Doc. E8–25706 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XK51

Fisheries of the South Atlantic and Gulf of Mexico; Southeastern Data, Assessment, and Review (SEDAR)

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

ACTION: Notice of change of dates for SEDAR Procedural Workshop on Catchability.

SUMMARY: The dates for the SEDAR Catchability Procedural Workshop, originally scheduled for November 17—20, 2008, have been changed to February 9–12, 2009. See **SUPPLEMENTARY INFORMATION.**

DATES: The rescheduled Workshop will take place February 9, 2008, from 1

p.m.— 8 p.m.; February 10–11, 2008, from 8 a.m.— 8 p.m.; and February 12, 2008, from 8 a.m.—2 p.m.

ADDRESSES: The SEDAR Catchability Procedural Workshop will be held at the Doubletree Atlanta Buckhead, 3342 Peachtree Road, NE, Atlanta, GA 30326; telephone: (800) 222–8733.

FOR FURTHER INFORMATION CONTACT: Julie Neer, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; (843) 571–4366.

SUPPLEMENTARY INFORMATION: The original notice published in the **Federal Register** on September 15, 2008 (73 FR 53195). This notice announces a change of dates and time for that meeting. All other previously-published information remains unchanged.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **FOR FURTHER INFORMATION CONTACT**) at least 10 business days prior to each workshop.

Dated: October 23, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–25607 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XL51

Mid-Atlantic 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 Mid-Atlantic Fishery Management Council's (Council) Summer Flounder Monitoring Committee, Scup Monitoring Committee, Black Sea Bass Monitoring Committee, and the Mid-Atlantic Fishery Council's and the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Advisors will hold public meetings.

DATES: The meetings will be held on Tuesday, November 18, 2008, beginning at 10 a.m. with the Monitoring Committees. The Advisory Panels will begin meeting at 1 p.m. See **SUPPLEMENTARY INFORMATION** for meeting agenda.

ADDRESSES: The meetings will be held at the Hilton Philadelphia Airport Hotel, 4509 Island Ave., Philadelphia, PA 19153; telephone: (215) 365–4150.

Council address: Mid-Atlantic Fishery Management Council, Room 2115, 300 S. New Street, 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, extension 19.

SUPPLEMENTARY INFORMATION: The purpose of these meetings is to recommend the 2009 recreational management measures for the summer flounder, scup, and black sea bass fisheries.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically 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 the emergency.

Special Accommodations

The meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Bryan, (302) 674–2331 extension 18, at the Council Office at least 5 days prior to the meeting date.

Dated: October 23, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–25699 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XL50

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Habitat/MPA/Ecosystem Committee, in November, 2008, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Friday, November 14, 2008, at 9:30 a.m.

ADDRESSES: This meeting will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200; fax: (508) 339–1040.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will continue development of analytical aspects of Phase II of the Omnibus Habitat Amendment 2. The Committee will also review preliminary vulnerability assessment for determining adverse effects on essential fish habitat caused by fishing. The Committee may also consider other topics at their discretion.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically 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 the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: October 23, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–25647 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Announcement of Notice To Re-Solicit Proposals for the National Coastal and Estuarine Research and Technology Program (NCERT)

AGENCY: Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of National Coastal and Estuarine Research and Technology Program: Request for Resubmissions.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) publishes this notice to re-solicit proposals for the National Coastal and Estuarine Research and Technology Program (NCERT). This notice provides further information regarding the Summary Description, Program Priorities, Funding Availability, and the Review and Selection Process for the program. Any proposals that were submitted to the initial solicitation must be re-submitted by the new deadline to be considered for an award. New proposals are also eligible for funding.

DATES: Applications must be received by 5 p.m. Eastern Time on December 8, 2008. Applications received after the deadline will be returned to the sender without further consideration. No facsimile or electronic mail applications will be accepted.

ADDRESSES FOR SUBMITTING PROPOSALS: Applications must be submitted through *http://www.grants.gov,* unless an applicant does not have Internet access. In that case, hard copies with original signatures may be sent to Marie Bundy, 1305 East-West Highway, N/ORM5, SSMC4 10542, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Marie Bundy, 1305 East-West Highway, N/ORM5, SSMC4 10542, Silver Spring, MD 20910; or by Phone at (301) 713–3155 ext. 101, or fax at (301) 713–4012, or via E-mail at *marie.bundy@noaa.gov.*

SUPPLEMENTARY INFORMATION: *CFDA:* Funding Opportunity Number: NOS-OCRM–2009–2001493, Catalog of Federal Domestic Assistance (CFDA) Number: 11.419, Coastal Zone Management Administration Awards.

NOAA publishes this notice to re-solicit proposals for the National Coastal and Estuarine Research and Technology Program (NCERT). The program originally solicited applications in the **Federal Register** on July 11, 2008 (73 FR 40052). However, the program has amended the Summary Description, Program Priorities, Funding Availability, and the Review and Selection Process to provide more detailed information concerning the objectives of the program, the amount of funding that has been identified, and the review process. This amendment may impact the contents of proposals submitted by applicants in response to the July 11, 2008 solicitation; therefore NCERT is returning all proposals and providing applicants the opportunity to amend their proposals in light of the information provided in this notice. All other requirements and information as published in the July 11, 2008 **Federal Register** notice remain unchanged.

Applicants should read carefully the information provided below before submitting their proposal to ensure that the proposal addresses the objectives and requirements of the program.

National Coastal and Estuarine Research and Technology Program (NCERT) Summary Description: The purpose of this federal funding opportunity is to establish a National Coastal and Estuarine Research and Technology (NCERT) Program that operates in partnership with the National Estuarine Research Reserve System. Through a cooperative agreement with NOAA's Estuarine Reserves Division (ERD), a National Program will be established to support collaborative research and partnerships with and among the NERRS. The intent is that the NCERT Program will facilitate the transformation of the best available science into practical innovative tools that coastal managers can use to detect, prevent, and reverse the impacts of coastal pollution and habitat degradation. Additionally, this National Program will provide coastal and estuarine managers with a better understanding of what tools are available, how well they work, and how best to apply them. This solicitation is not intended to provide directed funding for individual research projects or short term activities focused on solving local coastal and estuarine problems.

Program Priorities: Critical issues identified as program priorities for a successful NCERT Program include:

- The ability to foster targeted, multidisciplinary, collaborative research to understand the impacts of human activities on coasts and estuaries and develop, demonstrate and apply tools and technologies that can be used to detect, prevent, or reverse impacts;
- An explicit plan to use the system of 27 National Estuarine Research Reserves as living laboratories for research and development of science-based solutions to coastal pollution and habitat degradation;
- A plan to develop, demonstrate, and deliver effective and affordable technological solutions to address coastal management challenges;
- The capacity to catalyze collaboration across geographic and organizational boundaries, bringing local, State, and Federal government, academia, cooperative institutes, and the private sector together to work on solutions to coastal and estuarine environmental problems;
- The capacity to evaluate the barriers to the development and use of coastal and estuarine environmental technologies, and to identify ways to eliminate or overcome these barriers; and
- An integrated programmatic focus on estuarine and coastal management issues and priorities such as: Land use, habitat restoration and change, estuarine contamination, storm water management and contamination.

Funding Availability: Funding is contingent upon the availability of Federal appropriations. NOAA's Estuarine Reserves Division anticipates up to $5,232,000 will be available annually, for five years, to fund a National Coastal and Estuarine Research and Technology Program under this competition. Therefore, total funding over the five-year period is anticipated to be up to $26,160,000, depending on the availability of Federal funds.

Applicants are hereby given notice that funds have not yet been appropriated for this program. 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. 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 program or to obligate any available funds. If one incurs any costs prior to receiving an award agreement signed by an authorized NOAA official, one would do so solely at one's own risk of these costs not being included under the award. Recipients and subrecipients are subject to all Federal laws and agency policies, regulations and procedures applicable to Federal financial assistance awards. Statutory Authority: Section 310 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1456c. Catalog of Federal Domestic Assistance (CFDA) Number: 11.419, Coastal Zone Management Administration Awards. *Application Deadline: December 8, 2008.*

No facsimile or electronic mail applications will be accepted. Address for Submitting Proposals: Applications must be submitted through *http://www.grants.gov,* unless an applicant does not have Internet access. In that case, hard copies with original signatures may be sent to: Marie Bundy, 1305 East-West Highway, N/ORM5, SSMC4 10542, Silver Spring, MD 20910. Facsimile transmissions and electronic mail submission of full proposals will not be accepted.

Review and Selection Process: Once a full application has been received by NOAA, an initial administrative review will be conducted to determine completeness of the application. All proposals will be evaluated and scored individually in accordance with the assigned weights of the evaluation criteria by three merit reviewers and/or a panel of reviewers.

The selecting official will not score proposals as part of the merit review nor participate in discussion of the merits of the proposal.

Recommendations for funding will then be forwarded to the selecting official, the Chief of the Estuarine Reserves Division, for the final funding decision. In making the final selections, the Chief will award in rank order unless the proposal is justified to be selected out of rank order based on the selection factors listed in section V.C ''Selection Criteria'' of the original Federal Funding Opportunity.

Investigators may be asked to modify objectives, work plans or budgets based on funds available, and provide supplemental information required by the agency prior to the award being made. Declined applications will be held in the OCRM/ERD for the required 3 years in accordance with the current retention requirements, and then destroyed.

Agency Contacts: Technical Information: Marie Bundy, OCRM/ERD Research Coordinator, *Marie.Bundy@noaa.gov,* 301–713–3155. Business Management Information: Marie Bundy, OCRM/ERD Research Coordinator, *Marie.Bundy@noaa.gov,* 301–713–3155.

Eligibility: Eligible applicants are non-Federal institutions of higher education, other non-profits, commercial organizations, and state and local governments that possess the statutory authority to receive financial assistance. Please note that: (1) The Office of Ocean and Coastal Resource Management, Estuarine Reserves Division (OCRM/ERD) will not fund any Federal Full Time Employee (FTE) salaries, but will fund travel, equipment, supplies, and contractual personnel costs associated with the proposed work. (2) Researchers must be employees of an eligible entity listed above; and proposals must be submitted through that entity. Non-Federal researchers should comply with their institutional requirements for proposal submission. (3) OCRM/ERD will accept proposals that include foreign researchers as collaborators with a researcher who has met the above stated eligibility requirements.

Cost Sharing Requirements: None.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

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, 424C, 424D, and SF–LLL has been approved by OMB under the respective control numbers 4040–0004, 0348–0044, 4040–0007, 0348–0041, 4040–0009, and 0348–0046. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

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 an 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 comment 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.

FOR FURTHER INFORMATION CONTACT: Marie Bundy at (301) 713–3155 of NOAA's National Ocean Service, Estuarine Reserves Division, 1305 East-West Highway, N/ORM5, 10th floor, Silver Spring, MD 20910.

Dated: October 21, 2008.

Donna Wieting,

Deputy Director, Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration.

[FR Doc. E8–25578 Filed 10–27–08; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; Vista Leak Detection, Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Vista Leak Detection, Inc., a revocable, nonassignable, exclusive license to practice in the field of use of tank leak detection for industrial markets in the United States and certain foreign countries, for the Government-owned invention described in U.S. Patent No. 7,143,634 and 7,143,635 and any continuations, divisionals or re-issues thereof.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than November 12, 2008.

ADDRESSES: Written objections are to be filed with the NAVFACESC, EV423, 1100 23rd Avenue, Port Hueneme, CA 93043–4370.

FOR FURTHER INFORMATION CONTACT: Kurt Buehler, Head, Technology Transfer Office, NAVFACESC, EV423, 1100 23rd Avenue, Port Hueneme, CA 93043–4370, telephone: 805–982–4897. Due to U.S. Postal delays, please fax: 805–982–4832, e-mail: *kurt.buehler@navy.mil* or use courier delivery to expedite response.

(Authority: 35 U.S.C. 207, 37 CFR Part 404.)

Dated: October 21, 2008.

T.M. Cruz,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–25669 Filed 10–27–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Meeting of the Ocean Research and Resources Advisory Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Ocean Research and Resources Advisory Panel (ORRAP) will hold its third regularly scheduled meeting of the year. The meeting will be open to the public.

DATES: The meeting will be held on Thursday, December 4, 2008, from 9 a.m. to 3 p.m., and Friday, December 5, 2008, from 9 a.m. to 3 p.m. Members of the public should submit their comments one week in advance of the meeting to the Point of Contact.

ADDRESSES: The meeting will be held in the offices of the Consortium of Ocean Leadership, 1201 New York Avenue, NW., 4th Floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dr. Charles L. Vincent, Office of Naval Research, 875 North Randolph Street, Suite 1425, Arlington, VA 22203–1995, telephone: 703–696–4118.

SUPPLEMENTARY INFORMATION: This notice of open meeting is provided in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The meeting will include discussions on ocean research to applications, ocean observing, professional certification programs, and other current issues in the ocean science and resource management communities.

Dated: October 21, 2008.

T.M. Cruz,

Lieutenant Commander, Judge Advocate Generals Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–25666 Filed 10–27–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Meeting of the Ocean Research and Resources Advisory Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Ocean Research and Resources Advisory Panel (ORRAP) will meet to finalize the content of the ORRAP administration transition document. The meeting will be open to the public.

DATES: The meeting will be held on Thursday, November 6, 2008, from 1 p.m. to 3 p.m. Members of the public should submit their comments one week in advance of the meeting to the Point of Contact.

ADDRESSES: The meeting will be held in the offices of the Consortium of Ocean Leadership, 1201 New York Avenue, NW., 4th Floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dr. Charles L. Vincent, Office of Naval Research, 875 North Randolph Street Suite 1425, Arlington, VA 22203–1995, telephone: 703–696–4118.

SUPPLEMENTARY INFORMATION: This notice of open meeting is provided in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The meeting will include discussions on ocean research to applications, ocean observing, professional certification programs, and other current issues in the ocean science and resource management communities.

Dated: October 21, 2008.

T.M. Cruz,

Lieutenant Commander, Judge Advocate Generals Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–25672 Filed 10–27–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–483–000]

Atlas Pipeline Mid-Continent WestTex, LLC; Pioneer Natural Resources (USA), Inc.; Notice of Application

October 21, 2008.

Take notice that on September 30, 2008, Atlas Pipeline Mid-Continent WestTex, LLC (Atlas/WestTex), 100 West 7th Street, Suite 2300, Tulsa, Oklahoma 74119, and Pioneer Natural Resources (USA), Inc. (Pioneer), 1400 Williams Square West, 5205 North O'Connor Boulevard, Irving, TX 75039, filed a joint application in Docket No. CP08–483–000, pursuant to section 7(b) of the Natural Gas Act (NGA), requesting permission and approval to abandon in place and convert to low pressure gathering approximately 3.4 miles of 12¾-inch diameter pipeline and the approximately 7.5 miles of 10¾-inch diameter pipeline located in Reagan and Upton Counties, Texas (Midkiff Line). Atlas/WestTex and Pioneer indicate that they plan to replace the Midkiff Line with a new pipeline 3-mile and request the Commission determine that the replacement line is exempt from NGA jurisdiction. Since Atlas/WestTex and Pioneer will not operate any facilities subject to the Commission's jurisdiction, they request the Commission rescind the Limited Jurisdiction Certificate issued in Docket No. CP06–385–000, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions regarding this Application should be directed to James F. Bowe, Jr., Dewey & LeBoeuf LLP, 1101 New York Avenue, NW., Washington, DC 20005, phone (202) 346–7999, fax (202) 346–8102, e-mail: *jbowe@dl.com*.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: November 4, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25618 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2413–109]

Georgia Power Company; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

October 21, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No:* 2413–109.

c. *Date Filed:* August 14, 2008.

d. *Applicant:* Georgia Power Company.

e. *Name of Project:* Wallace Dam Project.

f. *Location:* The proposal would be located at The Ritz-Carlton and Gabby Restaurant facilities, 6 miles south of the Georgia Highway 44 bridge as it crosses Richland Creek, on the Richland Creek section of Lake Oconee, in Greene County, Georgia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a-825r.

h. *Applicant Contact:* Mr. Lee Glenn, Lake Resources Manager, 125 Wallace Dam Road NE, Eatonton, GA 31024, (706) 485–8704.

i. *FERC Contact:* Rebecca Martin at 202–502–6012, or e-mail *rebecca.martin@ferc.gov.*

j. *Deadline for filing comments and or motions:* November 21, 2008.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–2413–109) on any comments or motions filed.

The Commission's Rules of Practice require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Georgia Power Company filed an application seeking Commission approval to permit Linger Longer Development Company, in conjunction with The Ritz-Carlton and Gabby Restaurant facilities, to construct an additional 10-slip group dock and re-locate an existing 4-slip dock on Lake Oconee. The docks are to be used by guests of The Ritz-Carlton and Gabby Restaurant. The expansion of current dock facilities would include relocating 900.68 square feet of decking, constructing 1,238.78 square feet of decking, and constructing 162.35 square feet of boardwalk. The proposed impacted shoreline is estimated at 322.66 linear feet.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO

INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25623 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–4–000]

Sabine Pipe Line LLC; Notice of Request Under Blanket Authorization

October 22, 2008.

Take notice that on October 8, 2008, Sabine Pipe Line LLC (Sabine), 2400 Fournace Place, Bellaire, Texas 77401, filed in Docket No. CP09–4–000, a prior notice request pursuant to sections 157.205, 157.208, and 157.212 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act for authorization to construct, own, and operate certain facilities located at a proposed point of interconnection between Sabine and Kinder Morgan Louisiana Pipeline Company LLC (KMLP) in Calcasieu Parish, Louisiana, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Specifically, Sabine proposes to design, construct, own, and operate all of the facilities necessary to receive up to 200 MMcf/d of revaporized liquefied natural gas (LNG) from the Cheniere Sabine Pass LNG import terminal by way of a 20-inch pipeline owned and operated by KMLP. Sabine states that these facilities proposed include a 16-inch valve, 16-inch flanges, 16-inch pipe and related fittings, miscellaneous bolts, gaskets, over-pressure protection valve(s)/device(s), electronic flow measurement instrumentation, and all necessary and related telemetry devices. Sabine estimates the cost of construction to be $293,000, with all such costs to be reimbursed by KMLP.

Any questions regarding the application should be directed to Jeffrey L. Kirk, Chevron Pipe Line, 4800 Fournace Place, Bellaire, Texas 77401, at (713) 432–6753.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25684 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings, #1

October 21, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–7–000.

Applicants: Bank of America Corporation, Bank of America, N.A., Merrill Lynch & Co., Inc., Merrill Lynch Commodities, Inc.

Description: Application of Bank of America Corp, Bank of America, N.A. *et al.* for authorization to sell securities and request for expedited treatment.

Filed Date: 10/17/2008.

Accession Number: 20081020–0219.

Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER96–1361–013; ER99–2781–011; ER98–4138–009; ER00–1770–019; ER02–453–010; ER98–3096–015; ER07–903–002; ER05–1054–003; ER01–202–008; ER04–472–007.

Applicants: Atlantic City Electric Company, Delmarva Power & Light Company, Potomac Electric Power Company, Conectiv Energy Supply, Inc., Conectiv Atlantic Generation, LLC, Conectiv Delmarva Generation, LLC, Conectiv Bethlehem LLC, Pepco Energy Services, Inc., Bethlehem Renewable Energy, LLC, Eastern Landfill Gas, LLC, Potomac Power Resources, LLC, Fauquier Landfill Gas, LLC.

Description: Atlantic City Electric Co *et al.* amends the Market Based Rate Tariffs submitted with their 4/8/08 filing and amends Appendix B–2 to the Revised Updated Market Power Study to conform to Order 697–A etc.

Filed Date: 10/14/2008.

Accession Number: 20081016–0217.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 4, 2008.

Docket Numbers: ER99–2156–016; ER96–719–023; ER97–2801–024; ER07–1236–003.

Applicants: Cordova Energy Company LLC, MidAmerican Energy Company, PacifiCorp, Yuma Cogeneration Associates.

Description: Cordova Energy Co LLC *et al.* submits a notice of change in status.

Filed Date: 10/15/2008.

Accession Number: 20081017–0001.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER06–1291–002; ER07–565–001; ER07–566–001; ER07–412–002.

Applicants: MT. Tom Generating Company LLC, FirstLight Hydro Generating Company, FirstLight Power Resources Management, LLC, ECP Energy I, LLC.

Description: Mt Tom Generation Co, LLC *et al.* (FirstLight Sellers) submits revised market-based rate tariff to replace the tariffs that were filed on 6/30/08 in connection with their Order 697 Updated Market Power Analysis.

Filed Date: 10/14/2008.

Accession Number: 20081016–0218.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 4, 2008.

Docket Numbers: ER07–521–005.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator, Inc submits compliance filing in response to FERC's 4/16/08 Order.
Filed Date: 10/16/2008.
Accession Number: 20081017–0102.
Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER08–931–002.
Applicants: Walnut Creek Energy, LLC.
Description: Walnut Creek Energy, LLC submits Original Sheet 1 *et al.* to FERC Electric Tariff, First Revised Volume 1 to specify that Walnut Creek is a Category 2 seller etc.
Filed Date: 10/15/2008.
Accession Number: 20081017–0041.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER08–1333–001.
Applicants: Invenergy Cannon Falls LLC.
Description: Invenergy Cannon Falls, LLC submits supplemental testimony of Kris Zadlo providing information requested in FERC's 9/26/08 deficiency letter and amends its 7/31/08 filing to include additional information.
Filed Date: 10/15/2008.
Accession Number: 20081017–0049.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER08–1396–001.
Applicants: Westar Energy, Inc.
Description: Westar Energy submits a compliance filing of the Alternate Pro Forma Sheet 30 to their pro forma Formula Rate Agreement for Full Requirements Electric Service with the City of Wathena, KS.
Filed Date: 10/15/2008.
Accession Number: 20081021–0225.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER08–1405–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc submits an amendment to its 8/14/08 filing of proposed revisions to its Open Access Transmission, Energy & Operating Reserve Markets Tariff.
Filed Date: 10/17/2008.
Accession Number: 20081020–0227.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER08–1455–001.
Applicants: Northeast Utilities Service Company.
Description: Northeast Utilities Service Co *et al.* submits a Substitute Original Service Agreement IA–NU–13 between Connecticut Light and Power Company and Watertown Renewable Power, LLC.
Filed Date: 10/17/2008.
Accession Number: 20081020–0226.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER08–1520–001.
Applicants: E. ON U.S. LLC.
Description: E. ON U.S. LLC *et al.* submits an errata to its 9/10/08 filing of proposed revisions to the Louisville Gas and Electric Company and Kentucky Utilities Company joint Open Access Transmission Tariff.
Filed Date: 10/17/2008.
Accession Number: 20081020–0225.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–18–001.
Applicants: PJM Transmission Owners.
Description: The PJM Transmission Owners submits a Substitute First Revised Sheet 24 Superseding Original Sheet 24 to Consolidated Transmission Owners Agreement Rate Schedule FERC 42, correcting typographical errors.
Filed Date: 10/16/2008.
Accession Number: 20081017–0101.
Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER09–54–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator Inc submits a Large Interconnection Agreement with Wisconsin Electric Power Company.
Filed Date: 10/09/2008.
Accession Number: 20081010–0145.
Comment Date: 5 p.m. Eastern Time on Thursday, October 30, 2008.

Docket Numbers: ER09–68–000.
Applicants: Brookfield Energy Marketing Inc.
Description: Brookfield Energy Marketing submits a Notice of Cancellation of FERC Electric Tariff, Original Volume No. 1.
Filed Date: 10/14/2008.
Accession Number: 20081016–0051.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 4, 2008.

Docket Numbers: ER09–69–000.
Applicants: Xcel Energy Services Inc.
Description: Xcel Energy Services, Inc on behalf of Public Service Company of Colorado submits the Renewable Energy Certificate Rider entered into with Black Hills/Colorado electric Utility Company, LP.
Filed Date: 10/14/2008.
Accession Number: 20081016–0052.
Comment Date: 5 p.m. Eastern Time on Tuesday, November 4, 2008.

Docket Numbers: ER09–71–000.
Applicants: Otay Mesa Energy Center, LLC.
Description: Otay Mesa Energy Center, LLC submits an application for market based rate authorization.
Filed Date: 10/17/2008.
Accession Number: 20081021–0104.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–75–000.
Applicants: Pioneer Transmission, LLC.
Description: Pioneer Transmission LLC submits a request for acceptance of a formula rate and rate incentives for its investment in a major 765 kV transmission project that it intends to build in Indiana etc.
Filed Date: 10/15/2008.
Accession Number: 20081016–0243.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER09–76–000.
Applicants: Entergy Services, Inc.
Description: Entergy Services, Inc submits an amended Interconnection and Operating Agreement between Bayou Cove Peaking Power, LLC and Entergy Gulf States Louisiana, LLC.
Filed Date: 10/15/2008.
Accession Number: 20081016–0236.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER09–77–000.
Applicants: Entergy Services, Inc.
Description: Entergy submits an amended Interconnection and Operating Agreement between Hot Spring Power Company, LLC and Entergy Arkansas, Inc.
Filed Date: 10/15/2008.
Accession Number: 20081016–0237.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER09–78–000.
Applicants: Entergy Services, Inc.
Description: Entergy submits an amended Interconnection and Operating Agreement between Acadia Power Partners, LLC and Entergy Gulf States Louisiana, L.L.C.
Filed Date: 10/15/2008.
Accession Number: 20081016–0238.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER09–79–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits partially executed Meter Agent Services Agreement with Smoky Hills Wind Project II, LLC as the Market Participant and Westar Energy, Inc as the Meter Agent.
Filed Date: 10/15/2008.
Accession Number: 20081016–0240.
Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER09–80–000.
Applicants: New York Independent System Operator, Inc, New York State Electric & Gas Corporation.
Description: New York Independent System Operator Inc *et al.* submits an executed amended and restated large generator interconnection agreement among the NYISO, NYSEG, and the Developer, Noble Wethersfield Windpark, LLC etc.
Filed Date: 10/15/2008.
Accession Number: 20081016–0239.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: ER09–82–000.
Applicants: Redbud Energy, LP.
Description: Oklahoma Gas and Electric Company on behalf of Redbud Energy, LP submits a Notice of Cancellation of Redbud's market-based rate tariff, FERC Electric Tariff, First Revised Volume 1, effective as of 6/5/08.
Filed Date: 10/16/2008.
Accession Number: 20081017–0103.
Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER09–83–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits its Adjacent Balancing Authority Coordination Agreement with Muscatine Power and Water, which reflects emergency energy provisions found in similar agreements etc.
Filed Date: 10/16/2008.
Accession Number: 20081017–0104.
Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER09–84–000.
Applicants: American Electric Power Service Corporation.
Description: American Electric Power Service Corporation *et al.* submits revisions to the Interconnection Agreement between West Penn and Mon Power and themselves, as agent for Ohio Power Company etc.
Filed Date: 10/16/2008.
Accession Number: 20081017–0105.
Comment Date: 5 p.m. Eastern Time on Thursday, November 6, 2008.

Docket Numbers: ER09–85–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits Amended and Restated Interconnection and Operating Agreement, First revised Service Agreement 1567 under FERC Electric Tariff, Third Revised Volume 1 with Uilk Wind Farm LLC *et al.*
Filed Date: 10/17/2008.
Accession Number: 20081020–0074.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–88–000.
Applicants: Southern Company Services, Inc.
Description: Southern Company Services, Inc. submits a proposed amendment to its market-based rate tariff.
Filed Date: 10/17/2008.
Accession Number: 20081020–0221.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–89–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits revised pages to its OATT to implement a rate change for Oklahoma Gas and Electric Company under ER09–89.
Filed Date: 10/17/2008.
Accession Number: 20081020–0228.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Docket Numbers: ER09–90–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits revised pages to its OATT to implement a rate change for Public Service Company of Oklahoma and Southwestern Electric Power Company.
Filed Date: 10/17/2008.
Accession Number: 20081020–0220.
Comment Date: 5 p.m. Eastern Time on Friday, November 7, 2008.

Take notice that the Commission received the following electric securities filings:
Docket Numbers: ES09–3–000.
Applicants: MDU Resources Group, Inc.
Description: MDU Resources Group Inc seeks authorization to issue an additional 1,918,222 shares of MDU Resources Common Stock in connection with MDU Resources' 401(ks) Retirement Plan.
Filed Date: 10/15/2008.
Accession Number: 20081017–0051.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Take notice that the Commission received the following open access transmission tariff filings:
Docket Numbers: OA08–34–001.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico submits revised Attachment K to their Open Access Transmission Tariff.
Filed Date: 10/15/2008.
Accession Number: 20081017–0043.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Docket Numbers: OA08–36–001.
Applicants: Cleco Power LLC.
Description: Order No. 890 Rollover Compliance Filing.
Filed Date: 10/20/2008.
Accession Number: 20081020–5042.
Comment Date: 5 p.m. Eastern Time on Monday, November 10, 2008.

Docket Numbers: OA08–47–001; OA08–48–001.
Applicants: Tucson Electric Power Company, UNS Electric, Inc.
Description: Tucson Electric Power Company and UNS Electric, Inc. submit revised Attachment K to their respective Open Access Tariffs, and requests that tariff sheets be accepted for filing, effective 12/7/07.
Filed Date: 10/15/2008.
Accession Number: 20081017–0042.
Comment Date: 5 p.m. Eastern Time on Wednesday, November 5, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the

Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25604 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 22, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP91–203–076, RP92–132–064.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Company submits a report regarding the status of Tennessee's discussions with its customers etc re over-collections pursuant to the 5/15/95 Settlement.

Filed Date: 10/01/2008.

Accession Number: 20081021–0059.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 28, 2008.

Docket Numbers: RP96–200–198.

Applicants: CenterPoint Energy Gas Transmission Company.

Description: CenterPoint Energy Gas Transmission Company submits a notice of the termination of negotiated rate agreement with Anadarko Energy Services Company, effective 10/31/08.

Filed Date: 10/21/2008.

Accession Number: 20081022–0323.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Docket Numbers: RP96–272–083.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Company submits 13 Revised Sheet 66B.01 *et al.* to FERC Gas Tariff, Fifth Revised Volume 1 and a non-conforming and negotiated rate service agreement with Chevron USA, Inc.

Filed Date: 10/17/2008.

Accession Number: 20081021–0058.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 29, 2008.

Docket Numbers: RP99–176–169.

Applicants: Natural Gas Pipeline Co of America LLC.

Description: Natural Gas Pipeline Company of America LLC. submits First Revised Sheet 34C to FERC Gas Tariff, Seventh Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/21/2008.

Accession Number: 20081022–0324.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Docket Numbers: RP01–205–019.

Applicants: Southern Natural Gas Company.

Description: Southern Natural Gas Company submits Eighth Revised Sheet 23A to FERC Gas Tariff, Seventh Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/20/2008.

Accession Number: 20081021–0328.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Docket Numbers: RP07–690–004.

Applicants: Southern Natural Gas Company.

Description: Southern Natural Gas Company submits Sixth Revised Sheet 123 to FERC Gas Tariff, Seventh Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/20/2008.

Accession Number: 20081021–0327.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Docket Numbers: RP09–26–000.

Applicants: Williston Basin Interstate Pipeline Company.

Description: Williston Basin Interstate Pipeline Company submits Fifteenth Revised Sheet 374 *et al.* to FERC Gas Tariff, Second Revised Volume 1, to be effective 10/20/08.

Filed Date: 10/20/2008.

Accession Number: 20081021–0127.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Docket Numbers: RP09–27–000.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corporation submits First Revised Sheet 455 *et al.* to FERC Gas Tariff, Fourth Revised Volume 1, to effective 10/21/08.

Filed Date: 10/21/2008.

Accession Number: 20081022–0322.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Docket Numbers: RP09–28–000.

Applicants: Northern Natural Gas Company.

Description: Petition of Northern Natural Gas Company for limited waiver of tariff provisions.

Filed Date: 10/21/2008.

Accession Number: 20081022–0321.

Comment Date: 5 p.m. Eastern Time on Monday, November 3, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–25605 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–256–000]

Algonquin Gas Transmission, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed J–2 Loop Project and Route Modification and Request for Comments on Environmental Issues

October 21, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the J–2 Loop [1] Project, involving construction and operation of natural gas facilities by Algonquin Gas Transmission, LLC (Algonquin) in Middlesex County, Massachusetts. The EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the shortened scoping period for the proposed route modification filed on October 10, 2008, that will be used to gather environmental input from the public and interested agencies on the project. The route modification was filed in response to stakeholder concerns regarding the proposed crossing location of the Boston and Maine Railroad and is referred to as the Pearl Street Deviation. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on November 4, 2008. Details on how to submit comments are provided in the Public Participation section of this notice.

On July 3, 2008, the Commission issued a Notice of Intent (NOI) which announced FERC's initiation of preparing the EA for the J–2 Loop Project. The NOI provided information about the proposed Project, the FERC's environmental review process, and requested comments on the scope of issues to be addressed in the EA. The comment period for the NOI closed on August 2, 2008.

If you are a landowner receiving this notice, you may be contacted by an Algonquin representative about the acquisition of an easement to construct, operate, and maintain the proposed project facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, Algonquin could initiate condemnation proceedings in accordance with Massachusetts state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility on My Land? What Do I Need to Know?'' addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Algonquin seeks authorization to construct about 2.3 miles of 14-inch-diameter pipeline and associated facilities within the cities of Medford and Somerville, Massachusetts. The project would commence at an existing meter station adjacent to the Mystic Valley Parkway in Medford and travel in a general southeast direction within road rights-of-way to its terminus at an interconnection with NSTAR Gas Company's (NSTAR) system adjacent to the McGrath Highway/railroad track overpass in Somerville. A meter station and pig [2] launcher facility would be constructed at the existing meter station in Medford and a valve and pig receiver would be constructed at the interconnect with NSTAR.

The Pearl Street Deviation involves crossing the Boston & Maine Railroad near milepost 2.0. The Pearl Street Deviation would locate the pipeline in Skilton Avenue and Pearl Street before rejoining the original route on Medford Street. The proposed reroute was developed in consultation with the Massachusetts Bay Transportation Authority (MBTA) to avoid conflicts with a proposed passenger station on the MBTA's Green Line Extension Project.

Appendix A presents a detailed map identifying the pipeline location, including the Pearl Street Deviation, associated with this project.[3]

Land Requirements for Construction

Algonquin would temporarily disturb about 37 acres to construct the new pipeline and about 0.6 acres for aboveground facilities. During operation of the project, Algonquin would affect about 0.33 acres for pipeline maintenance and about 0.04 acres for aboveground facilities.

The majority of the J–2 Loop Project would be constructed within existing roadways, roadside shoulders, and paved parking areas.

The EA Process

We [4] are preparing this EA to comply with the National Environmental Policy Act of 1969 (NEPA) which requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, we are requesting public comments on the scope of the issues to be addressed in the EA. All comments received will be considered during the preparation of the EA.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under the following general headings:

- Geology and soils.
- Cultural resources.
- Land use and visual quality.
- Air quality and noise.
- Alternatives.
- Reliability and safety.

We note that the proposed pipeline would be within high-density multi-family residential areas and would require special construction procedures.

Our independent analysis of the issues will be addressed in the EA. Depending on the comments received during the scoping process, the EA may be published for distribution and mailed to Federal, State, and local agencies; public interest groups; interested individuals; affected landowners; newspapers and libraries in the project area; and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will

[1] A loop is a segment of pipeline installed parallel to an existing pipeline and connected to the pipeline system at both ends, allowing more gas to be moved through the pipeline system or function as a backup system.

[2] A pipeline ''pig'' is a device designed to internally clean or inspect the pipeline. A pig launcher/receiver is an aboveground facility where pigs are inserted or retrieved from the pipeline.

[3] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available on the Commission's Internet Web site (*http://www.ferc.gov*) at the ''eLibrary'' link or from the Commission's Public Reference Room at (202) 502–8371. For instructions on connecting to eLibrary, refer to the ''Additional Information'' section at the end of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to Algonquin.

[4] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

consider all comments on the EA before we make our recommendations to the Commission.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. We are specifically requesting comments on the relocated facility locations. Your input will help identify the issues that need to be evaluated in the EA. By becoming a commenter, your concerns will be addressed in the EA and considered by the Commission. Your comments should focus on the potential environmental effects of the proposal, reasonable alternatives (including alternative locations and routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE.; Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas Branch 1;
- Reference Docket No. CP08–256–000;
- Mail your comments so that they will be received in Washington, DC on or before November 4, 2008.

The Commission encourages electronic filing of comments. See Title 18 of the Code of Federal Regulations, Part 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at *http://www.ferc.gov* under the link to ''Documents and Filings'' and ''eFiling.'' eFiling is a file attachment process and requires that you prepare your submission in the same manner as you would if filing on paper, and save it to a file on your computer hard drive. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister.'' You will be asked to select the type of filing you are making. This filing is considered a ''Comment on Filing.'' In addition, there is a ''Quick Comment'' option available, which is an easy method for interested persons to submit text only comments on a project. The Quick-Comment User Guide can be viewed at *http://www.ferc.gov/docs-filing/efiling/quick-comment-guide.pdf*. Quick Comment does not require a FERC eRegistration account; however, you will be asked to provide a valid email address. All comments submitted under either eFiling or the Quick Comment option are placed in the public record for the specified docket.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor, you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix B).[5] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities. We encourage government representatives to notify their constituents of this proposed project and encourage them to comment on their areas of concern. If you do not return the form included as appendix C, you will be removed from the Commission's environmental mailing list.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs at 1–866–208 FERC (3372) or on the FERC Internet Web site (*http://www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (i.e., CP08–256), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at 1–866–208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov*. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission such as orders, notices, and rule makings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm*.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25624 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

[5] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–465–000]

ANR Pipeline Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Wisconsin 2009 Expansion Project and Request for Comments on Environmental Issues

October 21, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of ANR Pipeline Company's (ANR's) Wisconsin 2009 Expansion Project (Project) involving installation of 8.9 miles of 30-inch-diameter looping pipeline and appurtenant facilities in Rock, Wood, Marathon, and Columbia Counties, Wisconsin.

This notice announces the opening of the scoping process we will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine which issues need to be evaluated in the EA. Please note that the scoping period will close on November 25, 2008.

This notice is being sent to affected landowners; federal, state, and local government representatives and agencies; environmental and public interest groups; Native American tribes; other interested parties in this proceeding; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice ANR provided to landowners. This fact sheet addresses a number of typically asked questions, including how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

To accommodate the growing demand for natural gas on its system ANR is proposing to construct its Project facilities in order to provide about 97,880,000 dekatherms per day of incremental firm capacity. ANR proposes to undertake the following construction-related activities in Wisconsin:

- Construct about 8.9 miles of 30-inch-diameter pipeline loop (Janesville Loop) in Rock County;
- Relocate an existing pig receiver and appurtenances to the existing Janesville Compressor Station at milepost 8.9 of the Janesville Loop in Rock County;
- Install a new control valve at the existing Marshfield Compressor Station in Wood County;
- Install a new control valve at the existing Fairwater Meter Station in Columbia County; and
- Perform upgrades to the existing Marshfield, North Wausau, and Randolph Meter Stations in Wood, Marathon, and Columbia Counties, respectively.

The location of the project facilities is shown in Appendix 1.[1]

Nonjurisdictional Facilities

There are no non-jurisdictional facilities associated with this project.

Land Requirements for Construction

Construction of the proposed Janesville Loop facilities would require a construction right-of-way (ROW) varying in width from 75 feet to 125 feet totaling about 130.3 acres of land, of which a 50-foot-wide strip totaling about 53.4 acres would remain as permanent ROW. Following construction about, 76.9 acres of land would be allowed to revert to its former use.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

In the EA we[2] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils
- Land use
- Water resources, fisheries, and wetlands
- Cultural resources
- Vegetation and wildlife
- Air quality and noise
- Endangered and threatened species
- Hazardous waste
- Public safety

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

Currently Identified Environmental Issues

We have already identified issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by ANR. This preliminary list of issues may be changed based on your comments and our analysis.

- The project may impact residential areas.
- The project may impact forested wetlands.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Wisconsin 2009 Expansion Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before November 25, 2008.

For your convenience, there are three methods in which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP08–465–000 with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. eFiling involves

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

[2] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 3, PJ11.3.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners whose property may be used temporarily for project purposes, who have existing easements from the pipeline, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities. By this notice we are also asking governmental agencies, especially those in Appendix 2, to express their interest in becoming cooperating agencies for the preparation of the EA.

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (Appendix 3). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding.

If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214). Only intervenors have the right to seek rehearing of the Commission's decision.

The Notice of Application for this proposed project issued on August 29, 2008 identified the date for the filing of interventions as September 19, 2008. However, affected landowners and parties with environmental concerns may be granted late intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm*.

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25616 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–418–000]

Southeast Gas Storage, LLC; Notice of Availability of Environmental Assessment

October 21, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the natural gas pipeline facilities proposed by Southeast Gas Storage, LLC (Southeast) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act (NEPA) of 1969. The staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of constructing and operating:

- 4.6 miles of new 24-inch-diameter lateral pipeline, designated the Line 547M–100 pipeline, replacing the existing 6-inch-diameter Line 547E–100 Pipeline. The Line 547M–100 Pipeline would extend from the Tennessee Gas Pipeline Company (TGP's) tie-ins to Southwest's proposed New Hamilton Compressor Station;
- removal of 11,600 feet of the existing 6-inch-diameter Line 547E–100 Pipeline;
- the new electric driven 24,000-horsepower New Hamilton Compressor Station;
- 2.8 miles of 24-inch-diameter gathering pipelines from the proposed compressor station to seven well pads;
- 5,500 feet of 4.5-inch-diameter salt water disposal piping;
- 15 new horizontal withdrawal/injection wells and associated well pads;
- 4 existing active wells to be converted to observation wells;
- 9 plugged and abandoned wells to be converted to observation wells;
- 2 existing active wells to be plugged and abandoned;
- 2 existing active wells to convert to injection/withdrawal wells;
- 1 plugged and abandoned well to be re-plugged and abandoned;
- 1 new salt water disposal well and associated well pad;
- 1 plugged and abandoned stratigraphic test well drilled under a Commission exemption to be converted to an observation well;

• A new electrical substation; and
• The New Hamilton Meter Station and interconnect.

The purpose of this project is to provide 24.7 billion cubic feet of working gas capacity to customers in the region by converting a nearly depleted oil and gas reservoir into a high-deliverability natural gas storage facility located approximately 3.5 miles northwest of Caledonia in Monroe and Lowndes Counties, Mississippi.

The EA has been placed in the public files of the FERC. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Copies of the EA have been mailed to Federal, State, and local agencies, interested individuals, affected landowners, newspapers, libraries, and parties to this proceeding. Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below.

You can make a difference by providing us with your specific comments or concerns about the Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before November 21, 2008.

For your convenience, there are three methods in which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP08–418–000 with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister''. You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 2, PJ11.2.

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact *FERC Online Support at FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25615 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–476–000]

Transcontinental Gas Pipe Line Corporation; Notice of Intent To Prepare an Environmental Assessment for the Proposed Mobile Bay South Expansion Project and Request for Comments on Environmental Issues

October 21, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the construction and operation of facilities proposed by Transcontinental Gas Pipe Line Corporation (Transco) in Choctaw County, Alabama.

This notice announces the opening of the scoping process we will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine which issues need to be evaluated in the EA. Please note that the scoping period will close on November 20, 2008.

This notice is being sent to affected landowners; federal, state, and local government representatives and agencies; environmental and public interest groups; Native American tribes; other interested parties in this proceeding; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail

to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Transco provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

The proposed Mobile Bay South Expansion Project would involve the construction and operation of Compressor Station 85, a new 9,470 horsepower (hp) compressor station to be located at the interconnection of the Mobile Bay Lateral and Transco's main line in Choctaw County, Alabama. Specifically, the Project will include all necessary piping, auxiliary systems, and appurtenant facilities, including:

- Two 4,735 hp Caterpillar 3636; internal combustion engine-driven compressor units;
- Approximately 2,400 feet of 30-inch diameter piping extending from Transco's mainline to the compressor station and from the compressor station to the Mobile Bay Lateral; and
- Station yard piping and appurtenances.

Construction of the project facilities would enable Transco to provide firm transportation service from Compressor Station 85 and interconnects with party pipelines at Station 85 southward to delivery points located on the Mobile Bay Lateral.

The location of the project facilities is shown in Appendix 1.[1]

Nonjurisdictional Facilities

Non-jurisdictional facilities associated with this project would include electrical service provided to the compressor station from the local utility, Black Warrior Electrical Membership Cooperative. A water pipeline would also be constructed by North Choctaw Water to supply water to the station.

Land Requirements for Construction

Transco would purchase a 126.8-acre parcel of land to site the facilities. Construction of the proposed facilities would require about 32.9 acres of land including aboveground facilities, outlet pipeline, and access roads. Following construction, about 10 acres would be used for operation of the project's facilities. The remaining 22.9 acres of land would be restored within the existing compressor station property or allowed to revert to former use along the pipeline right-of-way.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

In the EA we[2] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils.
- Land use.
- Water resources, fisheries, and wetlands.
- Cultural resources.
- Vegetation and wildlife.
- Air quality and noise.
- Endangered and threatened species.
- Hazardous waste.
- Public safety.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Transco. This preliminary list of issues may be changed based on your comments and our analysis.

- Cultural resources may be affected by the project.
- The project may have air emissions and noise impacts.
- The new compressor station may have visual impacts on the surrounding area.
- The federally listed gopher tortoise habitat may be affected.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Mobile Bay South Expansion Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before November 20, 2008.

For your convenience, there are three methods in which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP08–476–000 with your submission. The docket number can be found on the front of this notice. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings. A Quick*

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than Appendix 1 (maps), are available on the Commission's website at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

[2] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 2, PJ11.2.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities. By this notice we are also asking governmental agencies, especially those in Appendix 2, to express their interest in becoming cooperating agencies for the preparation of the EA.

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (Appendix 3). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding.

If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214). Only intervenors have the right to seek rehearing of the Commission's decision.

The Notice of Application for this proposed project issued on September 29, 2008 identified the date for the filing of interventions as October 20, 2008. However, affected landowners and parties with environmental concerns may be granted late intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208-FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202)502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25617 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ08–5–001]

United States Department of Energy, Bonneville Power Administration, Transmission Service Terms and Conditions; Notice of Filing

October 21, 2008.

Take notice that on October 15, 2008, Bonneville Power Administration filed certain attachments to Attachment K to its Open Access Transmission Tariff in response to the Commission's July 17, 2008 Order and request for declaratory order accepting their proposed Attachment K as revised and finding that the Commission's standards for reciprocity, pursuant to 18 CFR 35.28(e) and 18 CFR 385.207.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 14, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25622 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–88–000]

California Independent System Operator Corporation; Notice of Institution of Proceeding and Refund Effective Date

October 21, 2008.

On October 16, 2008, the Commission issued an order that instituted a proceeding in Docket No. EL08–88–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2005), to consider the justness and reasonableness of revisions to the Exceptional Dispatch provisions of the California Independent System Operator Corporation's Market Redesign Technology Upgrade (MRTU) Tariff. *California Independent System Operator Corporation*, 125 FERC ¶ 61,055 (2008).

The refund effective date in Docket No. EL08–88–000, established pursuant to section 206(b) of the FPA, shall be the earlier of MRTU implementation or five months from the date of publication of this notice in the **Federal Register**.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25620 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL08–88–000, ER08–1178–000]

California Independent System Operator Corporation; Notice of Technical Conference

October 21, 2008.

On June 27, 2008, the California Independent System Operator Corporation (CAISO) filed an amendment to its Market Redesign and Technology (MRTU) Tariff pursuant to section 205 of the Federal Power Act (FPA) and section 35.13 of the Commission's regulations.[1] In its filing, the CAISO proposed market power mitigation measures to apply to Exceptional Dispatch instructions issued in circumstances where resources could exercise local market power. The CAISO also proposed modifications to the MRTU Tariff to clarify a number of Exceptional Dispatch provisions. On October 16, 2008, under section 205 of the FPA, the Commission issued an order[2] accepting and suspending the proposed revisions, subject to refund, pending the Commission's decision in a section 206 investigation. In that order, the Commission established a section 206 investigation and directed Staff to convene a technical conference to further explore the CAISO's Exceptional Dispatch mechanism and proposed mitigation plan.

Take notice that the Federal Energy Regulatory Commission will hold a technical conference on November 6, 2008, from 9 a.m. to 5 p.m. and November 7, 2008, 9 a.m. to 12 p.m. (Eastern Time) in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The conference will be open for the public to attend and advance registration is not required. The agenda for this conference will be published at a later time.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or (202)–208–1659 (TTY), or send a FAX to (202)–208–2106 with the required accommodations.

For more information about this conference, please contact: Sarah McKinley, (202) 502–8368, *sarah.mckinley@ferc.gov,* for logistical issues, and Sarah Crawford, (202) 502–8241, *sarah.crawford@ferc.gov,* or Saeed Farrokhpay, (916) 294–0322, *saeed.farrokhpay@ferc.gov,* for technical concerns.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25621 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

[1] Docket No. ER08–1178–000.

[2] *Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,055 (2008).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP08–600–000]

Colorado Interstate Gas Company; Notice of Technical Conference

October 22, 2008.

Take notice that the Commission will convene a technical conference in the above-referenced proceedings on Tuesday, November 18, 2008, at 10 a.m. (EDT), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's September 30, 2008, Order[1] in Docket No. RP08–600–000 directed that a technical conference be held to address the issues raised by Colorado Interstate Gas Company's (CIG) August 29, 2008, tariff filing to provide the first annual update to the cost/revenue true-up accepted in Docket No. RP07–666–000.

Commission Staff and interested persons will have the opportunity to discuss all of the issues raised by CIG's filing including, but not limited to, technical, engineering and operational issues, and issues related to the interpretation of tariff provisions governing CIG's fuel tracking mechanism, and specifically, its cost/revenue true-up.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

All interested persons are permitted to attend. For further information please contact Timothy Duggan at (202) 502–8326 or e-mail *Timothy.Duggan@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25681 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

[1] *Colorado Interstate Gas Co.*, 124 FERC ¶ 61,311 (2008).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IS08–405–000]

Dixie Pipeline Company; Notice of Extension of Time for Technical Conference

October 22, 2008.

On October 21, 2008, Dixie Pipeline Company (Dixie) and the protesting parties [1] in the above-captioned proceeding (Joint Movants) filed a Joint Motion to Extend Date for Technical Conference.

In the order issued August 22, 2008,[2] the Commission established a technical conference in this proceeding. By notice issued October 3, 2008, the technical conference was scheduled for 9 a.m. on Thursday, October 23, 2008, at the Commission's offices.

Joint Movants state that the parties are working toward a settlement of the issues in this proceeding and that they believe an extension of time for the technical conference will benefit the ongoing discussions. Joint Movants ask the Commission to extend the date of the technical conference by at least one month.

Take notice that the Commission will convene the technical conference in this proceeding on Thursday, November 20, 2008, at 9 a.m. (EST), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or (202) 208–1659 (TTY), or send a FAX to (202) 208–2106 with the required accommodations.

All parties and staff are permitted to attend. For further information, please contact Jenifer Lucas at (202) 502–8362 or *Jenifer.Lucas@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25682 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

[1] The protesting parties include Dow Hydrocarbon and Resources LLC; CITGO Petroleum Corporation; ConocoPhillips Company; Targa Midstream Services Limited Partnership and Targa Louisiana; and Crosstex NGL Marketing, L.P. and Crosstex Processing Services, LLC. Joint Movants state that the following intervenors and/or commenters do not oppose the motion: National Propane Gas Association, FerrellGas, L.P., BP Products North America Inc., and the South Carolina Department of Labor, Licensing and Regulation, Liquefied Petroleum Gas Board. Dixie further states that it informed an additional intervenor, Petrologistics Olefins LLC, of the instant motion, but as of the time it filed the motion, Dixie had not received a response.

[2] *Dixie Pipeline Co.*, 124 FERC ¶ 61,175 (2008).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of FERC Staff Attendance at Southwest Power Pool Board of Directors/Members Committee Meeting and Southwest Power Pool Regional State Committee Annual Meeting

October 22, 2008.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool (SPP) Regional State Committee, and of the SPP Members Committee and SPP Board of Directors, as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

SPP Regional State Committee Annual Meeting: October 27, 2008 (1 p.m.–5 p.m.), Marriott Tulsa Southern Hills, 1902 East 71st Street, Tulsa, OK 74136, 918–493–7000.

SPP Board of Directors and Annual Meeting of Members: October 28, 2008 (8:30 a.m.–3 p.m.), Marriott Tulsa Southern Hills, 1902 East 71st Street, Tulsa, OK 74136, 918–493–7000.

The discussions may address matters at issue in the following proceedings:

Docket No. ER06–451, Southwest Power Pool, Inc.
Docket Nos. ER07–319 and EL07–73, Southwest Power Pool, Inc.
Docket No. ER07–371, Southwest Power Pool, Inc.
Docket No. ER07–1255, Southwest Power Pool, Inc.
Docket No. ER08–340, Southwest Power Pool, Inc.
Docket No. ER08–923, Southwest Power Pool, Inc.
Docket No. ER08–1212, Southwest Power Pool, Inc.
Docket No. ER08–1307, Southwest Power Pool, Inc.
Docket No. ER08–1308, Southwest Power Pool, Inc.
Docket No. ER08–1357, Southwest Power Pool, Inc.
Docket No. ER08–1358, Southwest Power Pool, Inc.
Docket No. ER08–1371, Southwest Power Pool, Inc.
Docket No. ER08–1379, Southwest Power Pool, Inc.
Docket No. ER08–1419, Southwest Power Pool, Inc.
Docket No. ER08–1465, Southwest Power Pool, Inc.
Docket No. ER08–1516, Southwest Power Pool, Inc.
Docket No. ER08–1543, Southwest Power Pool, Inc.
Docket No. ER08–1549, Southwest Power Pool, Inc.
Docket No. ER08–1563, Southwest Power Pool, Inc.
Docket No. ER08–1585, Southwest Power Pool, Inc.
Docket No. ER08–1601, Southwest Power Pool, Inc.
Docket No. ER08–1604, Southwest Power Pool, Inc.
Docket No. EL08–80–000, Oklahoma Corporation Commission
Docket No. ER09–7, Southwest Power Pool, Inc.
Docket No. ER09–35, Tallgrass Transmission LLC
Docket No. ER09–36, Prairie Wind Transmission LLC
Docket No. OA08–5, Southwest Power Pool, Inc.
Docket No. OA08–60, Southwest Power Pool, Inc.
Docket No. OA08–61, Southwest Power Pool, Inc.
Docket No. OA08–104, Southwest Power Pool, Inc.
Docket No. RT04–1–23, Southwest Power Pool, Inc.

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25683 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–9–000]

MMP DeSoto Pipeline, L.P.; Notice of Petition for Declaratory Order

October 20, 2008.

Take notice that on October 14, 2008, MMP DeSoto Pipeline, L.P. (DeSoto), 10077 Grogans Mill Road, Suite 200, The Woodlands, Texas 77380 in Docket No. CP09–9–000, filed a Petition for Declaratory Order, requesting that the Commission declare that DeSoto's East Texas System performs a gathering function and is not subject to the Commission's jurisdiction under the Natural Gas Act (NGA).

Any person desiring to intervene or to protest this filing in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date indicated below. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time November 14, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25619 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR09–1–000]

MMP Desoto Pipeline, L.P.; Notice of Rate Election

October 21, 2008.

Take notice that on October 14, 2008, MMP Desoto Pipeline, L.P., (Desoto) filed a Notice of Rate Election pursuant to section 284.123(b)(1)(ii) of the Commission's regulations. DeSoto proposes to utilize its presently effective Texas Railroad Commission city-gate transportation rate for interruptible transportation service on its Central and North System pursuant to Section 311 of the Natural Gas Act. The interruptible transportation rate for both systems is 20.5 cents/MMBtu plus 0.5 percent fuel reimbursement.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 4, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–25614 Filed 10–27–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Southwestern Power Administration

Integrated System Rate Schedule Changes

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of Proposed Changes to Southwestern Power Administration Rate Schedules and Opportunity for Public Review and Comment.

SUMMARY: Due to the omission of the P–06A Rate Schedule from the Notice of Proposed Changes to Southwestern Power Administration Rate Schedules and Opportunity for Public Review and Comment published on October 20, 2008 (73 FR 62269), this notice is a resubmission to include both the P–06A and the NFTS–06A Rate Schedule proposals for review and comment.

The Administrator, Southwestern Power Administration (Southwestern), has determined that revisions to the Real Power Losses provisions within existing rate schedules P–06 and NFTS–06 are required. Since the proposed rate schedule revisions are limited only to Real Power Losses, the net result of the 2006 Integrated System Power Repayment Studies, which was the basis for the existing rate schedules, will not be altered.

Southwestern held several meetings during FY 2008 with customers to discuss the proposed rate schedule revisions and provide opportunity for input in the development of the final rate schedules. As a result of these informal meetings, it was determined that the revised rate schedule provisions can provide cost-savings and operational benefits to Southwestern's transmission customers and are consistent with Federal Energy Regulatory Commission (FERC) Order No. 888.

DATES: The consultation and comment period will begin on the date of publication of this **Federal Register** notice and will end November 28, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. James K. McDonald, Assistant Administrator, Office of Corporate Operations, Southwestern Power Administration, U.S. Department of Energy, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6690, *jim.mcdonald@swpa.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Department of Energy (DOE) was created by an Act of the U.S. Congress, Department of Energy Organization Act, Public Law 95–91, dated August 4, 1977. Southwestern's power marketing activities were transferred from the

Department of Interior to the DOE, effective October 1, 1977. Guidelines for preparation of power repayment studies are included in DOE Order No. RA 6120.2 entitled Power Marketing Administration Financial Reporting. Procedures for Public Participation in Power and Transmission Rate Adjustments of the Power Marketing Administrations are found at Title 10, part 903, Subpart A of the Code of Federal Regulations (10 CFR 903). Procedures for the confirmation and approval of rates for the Federal Power Marketing Administrations are found at Title 18, part 300, Subpart L of the Code of Federal Regulations (18 CFR 300).

Southwestern markets power from 24 multi-purpose reservoir projects, with hydroelectric power facilities constructed and operated by the U.S. Army Corps of Engineers. These projects are located in the states of Arkansas, Missouri, Oklahoma, and Texas. Southwestern's marketing area includes these states plus Kansas and Louisiana. The costs associated with the hydropower facilities of 22 of the 24 projects are repaid via revenues received under the Integrated System rates, as are Southwestern's transmission facilities that consist of 1,380 miles of high-voltage transmission lines, 24 substations, and 46 microwave and VHF radio sites. Costs associated with the Robert D. Willis and Sam Rayburn Dams, two projects that are isolated hydraulically, electrically, and financially from the Integrated System are repaid by separate rate schedules.

Current and Proposed Real Power Losses Provisions

The current P–06 and NFTS–06 rate schedules determine the annual rate for real power losses based upon the average of Southwestern's actual costs for the purchase of energy to replace real power losses during the previous Fiscal Year (October through September), as reflected in Southwestern's financial records. Customers have the option to either purchase losses from Southwestern or elect, on an annual basis, to self-provide their respective loss energy subject to certain conditions. Customers who purchase loss energy from Southwestern are assessed a monthly charge equal to the product of Southwestern's then-effective rate for Real Power Losses and a quantity of energy equal to four (4) percent of the total non-Federal energy transmitted by Southwestern on behalf of each such customer during that month.

Beginning January 1, 2009, Southwestern is proposing to implement revised real power loss provisions, as specified in Southwestern's proposed P–06A and NFTS–06A rate schedules, which will require that all real power losses associated with deliveries of non-Federal energy transmitted by Southwestern must be scheduled and delivered (self-supplied) to Southwestern by customers during the second month after such real power losses were incurred by Southwestern. Southwestern will determine the amount of real power losses associated with non-Federal energy transmitted on behalf of each customer in the same manner specified in the previous P–06 and NFTS–06 rate schedules and provide a written schedule setting forth the delivery rate and total quantity of real power loss energy to be delivered back to Southwestern. Should a customer fail to return the total quantity of real power loss energy to Southwestern, according to the schedule provided during the month in which such loss energy is due, the customer will be invoiced and obligated to purchase, at the rate stipulated in the P–06A and NFTS–06A rate schedules, the quantity of loss energy the customer failed to return to Southwestern.

P–06 and NFTS–06 Rate Schedule Revisions

In developing the revised real power losses rate schedule provisions, the titles of the P–06 and NFTS–06 rate schedules were changed to P–06A and NFTS–06A respectively to reflect the fact that revisions have been made. In addition to replacing the section entitled ''Rates for Real Power Losses'' within each rate schedule, minor corrections and modifications were incorporated to clarify and update any sections of the rate schedules containing references to real power losses. Redlined versions of rate schedules P–06 and NFTS–06, which show revisions proposed by rate schedules P–06A and NFTS–06A, will be made available upon request. To request a copy, please contact Scott Carpenter (*scott.carpenter@swpa.gov*) at 918–595–6694 or Stephanie Bradley (*stephanie.bradley@swpa.gov*) at 918–595–6676. Southwestern will implement the revised P–06A and NFTS–06A rate schedule language and provisions upon the Deputy Secretary's interim approval.

The Administrator has determined that written comments will provide adequate opportunity for public participation in the rate schedule revision process. Therefore, an opportunity is presented for interested parties to submit written comments on the proposed rate schedule changes. Written comments are due on or before November 28, 2008. Written comments should be submitted to Mr. James K. McDonald, Assistant Administrator, Office of Corporate Operations, Southwestern Power Administration, U.S. Department of Energy, One West Third Street, Tulsa, Oklahoma 74103, (918) 595–6690, *jim.mcdonald@swpa.gov.*

Following review and consideration of written comments, the Administrator will finalize and submit the proposed rate schedules to the Deputy Secretary of Energy for confirmation and approval on an interim basis, and subsequently to the FERC for confirmation and approval on a final basis. The FERC will allow the public an opportunity to provide written comments on the proposed rate schedule change before making a final decision.

Dated: October 21, 2008.

Jon C. Worthington,

Administrator.

United States Department of Energy
Southwestern Power Administration

Rate Schedule NFTS–06A[1] Wholesale Rates for Non-Federal Transmission/ Interconnection Facilities Service

Effective

During the period January 1, 2009, through September 30, 2010, in accordance with Federal Energy Regulatory Commission order issued _____, Docket No. _____.

Available

In the region where Southwestern Power Administration (Southwestern) owns and operates high-voltage transmission lines and related facilities, and/or has contractual rights to such transmission facilities owned by others (System of Southwestern).

Applicable

To Customers which have executed Service Agreements with Southwestern for the transmission of non-Federal power and energy over the System of Southwestern or for its use for interconnections. Southwestern will provide services over those portions of the System of Southwestern in which the Administrator, Southwestern, in his or her sole judgment, has determined that uncommitted transmission and transformation capacities in the System of Southwestern are and will be available in excess of the capacities required to market Federal power and energy pursuant to Section 5 of the Flood Control Act of 1944 (58 Stat. 887,890; 16 U.S.C. 825s).

Character and Conditions of Service

Service will be provided as 3-phase, alternating current, at approximately 60 Hertz, and at the voltage level of the point(s) specified by Service Agreement or Transmission Service Transaction.

[1] Supersedes Rate Schedule NFTS–06.

Definitions of Terms

A *Customer* is the entity which is utilizing and/or purchasing services from Southwestern pursuant to this rate schedule.

A ''*Service Agreement*'' is a contract executed between a Customer and Southwestern for the transmission of non-Federal power and energy over the System of Southwestern or for interconnections. Service Agreements include:

''*Firm Transmission Service Agreements*'' that provide for reserved transmission capacity on a firm basis, for a particular point-to-point delivery path.

''*Non-Firm Transmission Service Agreements*'' that provide for the Customer to request transmission service on a non-firm basis.

''*Network Transmission Service Agreements*'' that provide for the Customer to request firm transmission service for the delivery of capacity and energy from the Customer's network resources to the Customer's network load, for a period of one year or more.

''*Interconnection Agreements*'' that provide for the use of the System of Southwestern and recognize the exchange of mutual benefits for such use or provide for application of a charge for Interconnection Facilities Service.

A ''*Service Request*'' is made under a Transmission Service Agreement through the Southwest Power Pool, Inc. (SPP) Open Access Same-Time Information System (OASIS) for reservation of transmission capacity over a particular point-to-point delivery path for a particular period. When a Service Request is approved by SPP, it becomes a ''*Transmission Service Transaction*.'' The Customer must submit hourly schedules for actual service in addition to the Service Request.

''*Firm Point-to-Point Transmission Service*'' is transmission service reserved on a firm basis between specific points of receipt and delivery pursuant to either a Firm Transmission Agreement or to a Transmission Service Transaction. ''*Non-Firm Point-to-Point Transmission Service*'' is transmission service reserved on a non-firm basis for specific points of receipt and delivery pursuant to a Transmission Service Transaction. ''*Network Integration Transmission Service*'' is transmission service provided under Part III of Southwestern's Open Access Transmission Service Tariff which provides the Customer with firm transmission service for the delivery of capacity and energy from the Customer's resources to the Customer's load.

''*Secondary Transmission Service*'' is associated with Firm Point-to-Point Transmission Service and Network Integration Transmission Service. For Firm Point-to-Point Transmission Service, it consists of transmission service provided on an as-available, non-firm basis, scheduled within the limits of a particular capacity reservation for transmission service, and scheduled from points of receipt, or to points of delivery, other than those designated in a Long-Term Firm Transmission Agreement or a Transmission Service Transaction for Firm Point-to-Point Transmission Service. For Network Integration Transmission Service, Secondary Transmission Service consists of transmission service provided on an as-available, non-firm basis, from resources other than the Network Resources designated in a Network Transmission Service Agreement, to meet the Customer's Network Load. The charges for Secondary Transmission Service, other than Ancillary Services, are included in the applicable capacity charges for Firm Point-to-Point Transmission Service and Network Integration Transmission Service.

The ''*Demand Period*'' used to determine a maximum integrated rate of delivery for the purposes of power accounting is the 60-minute period which begins with the change of hour. The term ''*Peak Demand*'' means the highest rate of delivery, in kilowatts, for any Demand Period during a particular month, at any particular point of delivery or interconnection.

For the purposes of this rate schedule, the term ''*Point of Delivery*'' is used to mean either a single physical point to which electric power and energy are delivered from the System of Southwestern, or a specified set of delivery points which together form a single, electrically integrated load. Peak Demand for such set of points is computed as the coincidental highest rate of delivery among the specified points rather than as the sum of peak demands for each individual physical point.

''*Ancillary Services*'' are those services necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the System of Southwestern in accordance with good utility practice. Ancillary Services include:

''*Scheduling, System Control, and Dispatch Service*'' is provided by Southwestern as Control Area operator and is in regard to interchange and load-match scheduling and related system control and dispatch functions.

''*Reactive Supply and Voltage Control from Generation Sources Service*'' is provided at transmission facilities in the System of Southwestern to produce or absorb reactive power and to maintain transmission voltages within specific limits.

''*Regulation and Frequency Response Service*'' is the continuous balancing of generation and interchange resources accomplished by raising or lowering the output of on-line generation as necessary to follow the moment-by-moment changes in load and to maintain frequency within a Control Area.

''*Spinning Operating Reserve Service*'' maintains generating units on-line, but loaded at less than maximum output, which may be used to service load immediately when disturbance conditions are experienced due to a sudden loss of generation or load.

''*Supplemental Operating Reserve Service*'' provides an additional amount of operating reserve sufficient to reduce Area Control Error to zero within 10 minutes following loss of generating capacity which would result from the most severe single contingency.

''*Energy Imbalance Service*'' corrects for differences over a period of time between schedules and actual hourly deliveries of energy to a load.

''*Interconnection Facilities Service*'' provides for the use of the System of Southwestern to deliver energy and/or provide system support at an interconnection.

Rates for Firm Point-to-Point Transmission Service

CAPACITY CHARGES FOR FIRM TRANSMISSION SERVICE

	10/1/2006–9/30/2008	10/1/2008–9/30/2010
Monthly	$0.90 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a longer term agreement.	$0.95 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a longer term agreement.
Weekly	$0.225 per kilowatt of transmission capacity reserved in increments of one week of service.	$0.238 per kilowatt of transmission capacity reserved in increments of one week of service.
Daily	$0.0409 per kilowatt of transmission capacity reserved in increments of one day of service.	$0.0432 per kilowatt of transmission capacity reserved in increments of one day of service.

Service Associated With Capacity Charges for Firm Point-to-Point Transmission Service

The capacity charge for firm transmission service includes Secondary Transmission Service, but does not include charges for Ancillary Services associated with actual schedules.

Application of Capacity Charges for Firm Point-to-Point Transmission Service

Capacity charges for firm transmission service are applied to quantities reserved by contract under a Firm Transmission Agreement or in accordance with a Transmission Service Transaction.

Customers, unless otherwise specified by contract, will be charged on the greatest of (1) the Peak Demand at any particular point of delivery during a particular month, rounded up to the nearest whole megawatt, or (2) the highest Peak Demand recorded at such point of delivery during any of the previous 11

months, rounded up to the nearest whole megawatt, or (3) the capacity reserved by contract; which amount shall be considered such Customer's reserved capacity. Secondary Transmission Service for such Customers shall be limited during any month to the most recent Peak Demand on which a particular Customer is billed or to the capacity reserved by contract, whichever is greater.

Rates for Non-Firm Point-to-Point Transmission Service

Capacity Charges for Non-Firm Transmission Service

Monthly: 80 percent of the firm monthly charge of transmission capacity reserved in increments of one month of service.

Weekly: 80 percent of the firm monthly charge divided by 4 of transmission capacity reserved in increments of one week of service.

Daily: 80 percent of the firm monthly charge divided by 22 of transmission capacity reserved in increments of one day of service.

Hourly: 80 percent of the firm monthly charge divided by 352 of transmission capacity reserved in increments of one hour of service.

Application of Charges for Non-Firm Point-to-Point Transmission Service

Capacity charges for Non-Firm Transmission Service are applied to quantities reserved under a Transmission Service Transaction, and do not include charges for Ancillary Services.

Rates for Network Integration Transmission Service

10/1/2006–9/30/2008	10/1/2008–9/30/2010
Annual Revenue Requirement for Network Integration Service	
$9,155,900	$9,431,500.
Monthly Revenue Requirement for Network Integration Service	
$762,992	$785,958.
Net Capacity Available for Network Integration Service	
845,000 kilowatts	828,000 kilowatts.
Capacity Charge for Network Integration Transmission Service	
$0.90 per kilowatt of Network Load ($762,992/845,000 kilowatts)	$0.95 per kilowatt of Network Load ($785,958/828,000 kilowatts).

Application of Charge for Network Integration Transmission Service

Network Integration Transmission Service is available only for deliveries of non-Federal power and energy, and is applied to the Customer utilizing such service exclusive of any deliveries of Federal power and energy. The capacity on which charges for any particular Customer utilizing this service is determined on the greatest of (1) the Peak Demand at any particular point of delivery during a particular month, rounded up to the nearest whole megawatt, or (2) the highest Peak Demand recorded at such point of delivery during any of the previous 11 months, rounded up to the nearest whole megawatt.

For those Customers taking Network Integration Transmission Service who are also taking delivery of Federal Power and Energy, the Peak Demand shall be determined by subtracting the energy scheduled for delivery of Federal Power and Energy for any hour from the metered demand for such hour.

Secondary transmission Service for such Customers shall be limited during any month to the most recent Peak Demand on which a particular Customer is billed. Charges for Ancillary Services shall also be assessed.

Real Power Losses

Customers are required to self-provide all Real Power Losses for non-Federal energy transmitted by Southwestern on behalf of such Customers under the provisions detailed below.

Real Power Losses are computed as four (4) percent of the total amount of non-Federal energy transmitted by Southwestern. The Customer's Monthly Real Power Losses are computed each month on a megawatthour basis as follows:

$ML = .04 \times NFE$

with the factors defined as follows:

ML = The total monthly loss energy, rounded to the nearest megawatthour, to be scheduled by a Customer for receipt by Southwestern for Real Power Losses associated with non-Federal energy transmitted on behalf of such Customer; and

NFE = The amount of non-Federal energy that was transmitted by Southwestern on behalf of a Customer during a particular month.

The Customer must schedule or cause to be scheduled to Southwestern, Real Power Losses for which it is responsible subject to the following conditions:

(1) The Customer shall schedule and deliver real power losses back to Southwestern during the second month after they were incurred by Southwestern in the transmission of the Customer's non-Federal power and energy over the System of Southwestern.

(2) On or before the twentieth day of each month, Southwestern shall determine the amount of non-Federal loss energy it provided on behalf of the Customer during the previous month and provide a written schedule to the Customer setting forth hour-by-hour the quantities of non-Federal energy to be delivered to Southwestern as losses during the next month.

(3) Real Power Losses not delivered to Southwestern by the Customer, according to the schedule provided, during the month in which such losses are due shall be billed by Southwestern to the Customer to adjust the end-of-month loss energy balance to 0 megawatthours and the Customer shall be obliged to purchase such energy at the following rates:

Months associated with charge	Rate per kilowatthour
March, April, May, October, November, December	$0.15
January, February, June, July, August, September ...	0.30

(6) Real Power Losses delivered to Southwestern by the Customer in excess of the losses due during the month shall be purchased by Southwestern from the Customer at a rate per megawatthour equal to Southwestern's rate per megawatthour for Supplemental Peaking Energy, as set forth in Southwestern's then-effective Rate Schedule for hydro peaking power to adjust such hourly end-of-month loss energy balance to 0 megawatthours.

Monthly Capacity Charges for Transformation Service

A charge of $0.30 per kilowatt will be assessed for capacity used to deliver energy at any point of delivery at which Southwestern provides transformation for deliveries at voltages of 69 kilovolts or less from higher voltage facilities.

Application of Capacity Charges for Transformation Service

For any particular month, charges for transformation service will be assessed on the greater of (1) that month's actual Peak Demand, or (2) the highest Peak Demand recorded during the previous 11 months. For the purpose of this rate schedule, the Peak Demand will be based on all deliveries, of both Federal and non-Federal energy, from the System of Southwestern, at such point during such month.

Rates for Ancillary Services

CAPACITY CHARGES FOR ANCILLARY SERVICES ASSOCIATED WITH TRANSMISSION SERVICES

	10/1/2006–9/30/2008	10/1/2008–9/30/2010
(a) Scheduling, System Control, and Dispatch Service		
.		
Monthly	$0.06 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.	$0.06 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.
Weekly	$0.015 per kilowatt of transmission capacity reserved in increments of one week of service.	$0.015 per kilowatt of transmission capacity reserved in increments of one week of service.
Daily	$0.0027 per kilowatt of transmission capacity reserved in increments of one day of service.	$0.0027 per kilowatt of transmission capacity reserved in increments of one day of service.
Hourly	$0.00017 per kilowatt of energy delivered as non-firm transmission service.	$0.00017 per kilowatt of energy delivered as non-firm transmission service.
(b) Reactive Supply and Voltage Control From Generation Sources Service		
Monthly	$0.03 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.	$0.04 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.
Weekly	$0.008 per kilowatt of transmission capacity reserved in increments of one week of service.	$0.010 per kilowatt of transmission capacity reserved in increments of one week of service.
Daily	$0.0014 per kilowatt of transmission capacity reserved in increments of one day of service.	$0.0018 per kilowatt of transmission capacity reserved in increments of one day of service.
Hourly	$0.00009 per kilowatt of energy delivered as non-firm transmission service.	$0.00011 per kilowatt of energy delivered as non-firm transmission service.
(c) Regulation and Frequency Response Service		
Monthly	$0.08 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.	$0.09 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.
Weekly	$0.020 per kilowatt of transmission capacity reserved in increments of one week of service.	$0.023 per kilowatt of transmission capacity reserved in increments of one week of service.
Daily	$0.0036 per kilowatt of transmission capacity reserved in increments of one day of service.	$0.0041 per kilowatt of transmission capacity reserved in increments of one day of service.
Hourly	$0.00023 per kilowatt of energy delivered as non-firm transmission service.	$0.00026 per kilowatt of energy delivered as non-firm transmission service.
(d) Spinning Operating Reserve Service		
Monthly	$0.0079 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.	$0.0092 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.
Weekly	$0.00198 per kilowatt of transmission capacity reserved in increments of one week of service.	$0.0023 per kilowatt of transmission capacity reserved in increments of one week of service.
Daily	$0.00036 per kilowatt of transmission capacity reserved in increments of one day of service.	$0.00042 per kilowatt of transmission capacity reserved in increments of one day of service.
Hourly:	$0.00002 per kilowatt of energy delivered as non-firm transmission service.	$0.00003 per kilowatt of energy delivered as non-firm transmission service.
(e) Supplemental Operating Reserve Service		
Monthly	$0.0079 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.	$0.0092 per kilowatt of transmission capacity reserved in increments of one month of service or invoiced in accordance with a Long-Term Firm Transmission Agreement or Network Transmission Service Agreement.
Weekly	$0.00198 per kilowatt of transmission capacity reserved in increments of one week of service.	$0.0023 per kilowatt of transmission capacity reserved in increments of one week of service.
Daily	$0.00036 per kilowatt of transmission capacity reserved in increments of one day of service.	$0.00042 per kilowatt of transmission capacity reserved in increments of one day of service.
Hourly	$0.00002 per kilowatt of energy delivered as non-firm transmission service.	$0.00003 per kilowatt of energy delivered as non-firm transmission service.

(f) Energy Imbalance Service: $0.0 per kilowatt for all periods of reservation.

Availability of Ancillary Services

Ancillary Services (a) and (b) are available for all transmission services in and from the System of Southwestern and shall be provided by Southwestern. Ancillary Services (c) and (f) listed above are available only for deliveries of power and energy serving load within Southwestern's Control Area and shall be provided by Southwestern, unless, subject to Southwestern's approval, they are provided by others. Ancillary Services (d) and (e) are available only for deliveries of power and energy generated by resources located within Southwestern's Control Area and shall be provided by Southwestern, unless, subject to Southwestern's approval, they are provided by others.

Application of Ancillary Services Charges

Charges for all Ancillary Services are applied to the reserved or network transmission service taken by the Customer in accordance with the rates listed above when such services are provided by Southwestern.

The charges for Ancillary Services are considered to include Ancillary Services for any Secondary Transmission Service, except in cases where Ancillary Services (c) through (f) are applicable to a Secondary Transmission Service transaction, but are not applicable to the firm capacity reservation under which Secondary Transmission Service is provided. When charges for Ancillary Services are applicable to Secondary Transmission Service, the charge for the Ancillary Service shall be the hourly rate applied to all energy transmitted utilizing the Secondary Transmission Service.

Provision of Ancillary Services by Others

Customers for which Ancillary Services (c) through (f) are made available as specified above must inform Southwestern by written notice of the Ancillary Services which they do *not* intend to take and purchase from Southwestern, and their election to provide all or part of such Ancillary Services from their own resources or a third party.

Subject to Southwestern's approval of the ability of such resources or third parties to meet Southwestern's technical requirements for provision of such Ancillary Services, the customer may change the Ancillary Services which it takes from Southwestern and/or from other sources at the beginning of any month upon the greater of 60 days written notice or upon the completion of any necessary equipment modifications necessary to accommodate such change. Such notice requirements also apply to requests for Southwestern to provide Ancillary Services when such services are available as specified above.

Limitations on Energy Imbalance Service

Energy Imbalance Service is authorized for use only within a bandwidth of ± 1.5 percent of the actual requirements of the load at a particular point of delivery, for any hour, compared to the resources scheduled to meet such load during such hour. Deviations which are greater than ± 1.5 percent, but which are less than ± 2,000 kilowatts, are considered to be within the authorized bandwidth. Deviations outside the authorized bandwidth are subject to a Capacity Overrun Penalty.

Energy delivered or received within the authorized bandwidth for this service is accounted for as an inadvertent flow and will be netted against flows in the future. The inadvertent flow in any given hour will only be offset with the flows in the corresponding hour of a day in the same category. The two categories of days are weekdays and weekend days/North American Electric Reliability Council holidays. This process will result in a separate inadvertent accumulation for each hour of the two categories of days. The hourly accumulations in the current month will be added to the hourly inadvertent balances from the previous month, resulting in a month-end balance for each hour.

The Customer is required to adjust the scheduling of resources in such a way as to reduce the accumulation towards zero. It is recognized that the inadvertent hourly flows can be both negative and positive, and that offsetting flows should deter a significant accumulation of inadvertent. In the event any hourly month-end balance exceeds 12 MWHs, the excess will be subject to the *Application of Capacity Overrun Penalty* or the *Unauthorized Use of Energy Imbalance Service by Overscheduling of Resources* provisions, depending on the direction of the accumulation.

Application of Capacity Overrun Penalty

Customers, who receive deliveries within Southwestern's Control Area, are obligated to provide resources sufficient to meet their loads. Such obligation is not related to the amount of transmission capacity that such Customers may have reserved for transmission service to a particular load. Customers whose resources are scheduled by Southwestern are not subject to this provision. In the event that a Customer under schedules its resources to meet its load, resulting in a difference between resources and actual metered load (adjusted for transformer losses as applicable) outside the authorized bandwidth for Energy Imbalance Service for any hour, then such Customer is subject to the following penalty:

Capacity Overrun Penalty

For each hour during which energy flows outside the authorized bandwidth, the Customer will be obliged to purchase such energy at the following rates:

Months associated with charge	Rate per kilowatt
March, April, May, October, November, December	$0.15
January, February, June, July, August, September ...	0.30

Unauthorized Use of Energy Imbalance Service by Overscheduling of Resources

In the event that a Customer schedules greater resources than are needed to meet its load, such that energy flows at rates beyond the authorized bandwidth for the use of Energy Imbalance Service, Southwestern retains such energy at no cost to Southwestern and with no obligation to return such energy. Customers whose resources are scheduled by Southwestern are not subject to this provision.

Application of Charge for Interconnection Facilities Service

Any Customer that requests an interconnection from Southwestern which, in Southwestern's sole judgment and at its sole option, does not provide commensurate benefits or compensation to Southwestern for the use of its facilities shall be assessed a capacity charge for Interconnection Facilities Service. For any month, charges for Interconnection Facilities Service shall be assessed on the greater of (1) that month's actual Peak Demand, or (2) the highest Peak Demand recorded during the previous eleven months, as metered at the interconnection. The use of Interconnection Facilities Service will be subject to power factor provisions as specified in this rate schedule. The interconnection customer shall also schedule and deliver Real Power Losses pursuant to the provisions of this Rate Schedule based on metered flow through the interconnection where Interconnection Facilities Services is assessed.

Rate for Interconnection Facilities Service

The monthly capacity charge for Interconnection Facilities Service:

10/1/2006–9/30/2008	10/1/2008–9/30/2010
$0.90 per kilowatt	$0.95 per kilowatt.

Requirements Related to Power Factor

Any Customer served from facilities owned by or available by contract to Southwestern will be required to maintain a power factor of not less than 95 percent and will be subject to the following provisions.

Determination of Power Factor

The power factor will be determined for all Demand Periods and shall be calculated under the formula:

$$PF = kWh \div \sqrt{\left(kWh^2 + rkVAh^2\right)},$$

with the factors defined as follows:

PF = the power factor for any Demand Period of the month.

kWh = the total quantity of energy which is delivered during such Demand Period to the point of delivery or interconnection.

rkVAh = the total quantity of reactive kilovolt-ampere-hours (kvars) delivered during such Demand Period to the point of delivery or interconnection.

Power Factor Penalty and Assessment

The Customer shall be assessed a penalty for all Demand Periods of a month where the power factor is less than 95 percent lagging. For any Demand Period during a particular month such penalty shall be in accordance with the following formula:

$C = D \times (.95 - LPF) \times \$0.10$

with the factors defined as follows:

C = The charge in dollars to be assessed for

any particular Demand Period of such month that the Determination of Power Factor ''PF'' is calculated to be less than 95 percent lagging.

D = The Customer's demand in kilowatts at the point of delivery for such Demand Period in which a low power factor was calculated.

LPF = The lagging power factor, if any, determined by the formula ''PF'' for such Demand Period.

If C is negative, then C = zero (0).

Application of Power Factor Penalty

The Power Factor Penalty is applicable to radial interconnections with the System of Southwestern. The total Power Factor Penalty for any month shall be the sum of all charges ''C'' for all Demand Periods of such month. No penalty is assessed for leading power factor. Southwestern, in its sole judgment and at its sole option, may determine whether power factor calculations should be applied to a single physical point of delivery or to multiple physical points of delivery where a Customer has a single, electrically integrated load served through multiple points or interconnections. The general criteria for such decision shall be that, given the configuration of the Customer's and Southwestern's systems, Southwestern will determine, in its sole judgment and at its sole option, whether the power factor calculation more accurately assesses the detrimental impact on Southwestern's system when the above formula is calculated for a single physical point of delivery or for a combination of physical points or for an interconnection as specified by an Interconnection Agreement.

Southwestern, at its sole option, may reduce or waive power factor penalties when, in Southwestern's sole judgment, low power factor conditions were not detrimental to the System of Southwestern due to particular loading and voltage conditions at the time the power factor dropped below 95 percent lagging.

United States Department of Energy
Southwestern Power Administration

Rate Schedule P–06A [1] Wholesale Rates for Hydro Peaking Power

Effective

During the period January 1, 2009, through September 30, 2010, in accordance with Rate Order No. SWPA–59 issued by the Deputy Secretary of Energy on _____.

Available

In the marketing area of Southwestern Power Administration (Southwestern), described generally as the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas.

Applicable

To wholesale Customers which have contractual rights from Southwestern to purchase Hydro Peaking Power and associated energy (Peaking Energy and Supplemental Peaking Energy).

Character and Conditions of Service

Three-phase, alternating current, delivered at approximately 60 Hertz, at the nominal voltage(s), at the points of delivery, and in such quantities as are specified by contract.

Definitions of Terms

''*Customer*'' is the entity which is utilizing and/or purchasing hydroelectric power and associated energy and services from Southwestern pursuant to this rate schedule.

The ''*Demand Period*'' used to determine maximum integrated rates of delivery for the purpose of power accounting is the 60-minute period which begins with the change of hour. The term ''*peak demand*'' means the highest rate of delivery, in kilowatts, for any Demand Period during a particular month, at any particular point of delivery.

For the purposes of this Rate Schedule, the term ''*point of delivery*'' is used to mean either a single physical point at which electric power and energy are delivered from the System of Southwestern (defined below), or a specified set of delivery points which together form a single, electrically integrated load. ''Peak demand'' for such set of delivery points is computed as the coincidental highest rate of delivery among the specified points rather than as the sum of peak demands for each individual physical point of delivery.

The term ''*Peaking Contract Demand*'' means the maximum rate in kilowatts at which Southwestern is, by contract, obligated to deliver Peaking Energy during any Demand Period. Unless otherwise provided by contract, the ''*Peaking Billing Demand*'' for any month shall be equal to the ''Peaking Contract Demand.''

The term ''*Uncontrollable Force*,'' as used herein, shall mean any force which is not within the control of the party affected, including, but not limited to failure of water supply, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, or restraint by court of general jurisdiction, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid.

The term ''*System of Southwestern*'' means the high-voltage transmission lines and related facilities Southwestern owns and operates, and/or has contractual rights to such transmission facilities owned by others.

''*Ancillary Services*'' are those services necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the System of Southwestern in accordance with good utility practice. Definitions of the Ancillary Services are as follows:

''*Scheduling, System Control, and Dispatch Service*'' is provided by Southwestern as Control Area operator and is in regard to interchange and load-match scheduling and related system control and dispatch functions.

''*Reactive Supply and Voltage Control from Generation Sources Service*'' is provided at transmission facilities in the System of Southwestern to produce or absorb reactive power and to maintain transmission voltages within specific limits.

''*Regulation and Frequency Response Service*'' is the continuous balancing of generation and interchange resources accomplished by raising or lowering the output of on-line generation as necessary to follow the moment-by-moment changes in load and to maintain frequency within a Control Area.

''*Spinning Operating Reserve Service*'' maintains generating units on-line, but loaded at less than maximum output, which may be used to service load immediately when disturbance conditions are experienced due to a sudden loss of generation or load.

''*Supplemental Operating Reserve Service*'' provides an additional amount of operating reserve sufficient to reduce Area Control Error to zero within 10 minutes following loss of generating capacity which would result from the most severe single contingency.

''*Energy Imbalance Service*'' corrects for differences over a period of time between schedules and actual hourly deliveries of energy to a load. Energy delivered or received within the authorized bandwidth (defined below) for this service is accounted for as an inadvertent flow and is returned to the providing party by the receiving party in accordance with standard utility practice.

Energy Associated With Hydro Peaking Power

Peaking Energy

1,200 kilowatthours of Peaking Energy per kilowatt of Peaking Contract Demand will be furnished during each contract year.

Supplemental Peaking Energy

Supplemental Peaking Energy (in addition to Peaking Energy) will be furnished if and when determined by Southwestern to be available, and at rates of delivery which do not exceed the Customer's Peaking Contract Demand.

Monthly Rates for Peaking Contract Demand

CAPACITY CHARGE FOR HYDRO PEAKING POWER

10/1/2006–9/30/2007	10/1/2007–9/30/2008	10/1/2008–9/30/2010
$3.03 per kilowatt of Peaking Billing Demand	$3.18 per kilowatt of Peaking Billing Demand	$3.51 per kilowatt of Peaking Billing Demand.

[1] Supersedes Rate Schedule P–06.

Services Associated With Capacity Charge for Hydro Peaking Power

The capacity charge for Hydro Peaking Power includes such transmission services as are necessary to integrate Southwestern's resources in order to reliably deliver Hydro Peaking Power and associated energy to Customers. This capacity charge also includes two ancillary services charges, Scheduling, System Control and Dispatch Service and Reactive Supply and Voltage Control from Generation Sources Service.

Secondary Transmission Service Under Capacity Associated With Hydro Peaking Power

Customers may utilize the capacity associated with Peaking Contract Demand for the transmission of non-Federal energy, on a non-firm, as-available basis, at no additional charge for such transmission service or associated Ancillary Services, under the following terms and conditions:

(1) The sum of the capacity, for any hour, which is used for Peaking Energy, Supplemental Peaking Energy, and Secondary Transmission Service, may not exceed the Peaking Contract Demand;

(2) The non-Federal energy transmitted under such secondary service is delivered to the Customer's point of delivery for Hydro Peaking Power;

(3) The Customer commits to provide Real Power Losses associated with such deliveries of non-Federal energy; and

(4) Southwestern determines that sufficient transfer capability exists between the point of receipt into the System of Southwestern of such non-Federal energy and the Customer's point of delivery for Hydro Peaking Power for the time period that such secondary transmission service is requested.

Rates for Energy Associated With Hydro Peaking Power

10/1/2006–9/30/2007	10/1/2007–9/30/2008	10/1/2008–9/30/2010
(a) Peaking Energy Charge		
$0.0082 per kilowatthour of Peaking Energy delivered; plus (c).	$0.0082 per kilowatthour of Peaking Energy delivered; plus (c).	$0.0082 per kilowatthour of Peaking Energy delivered; plus (c).
(b) Supplemental Energy Charge		
$0.0055 per kilowatthour of Peaking Energy	$0.0082 per kilowatthour of Peaking Energy	$0.0082 per kilowatthour of Peaking Energy.

(c) A purchased power adder of $0.0067 per kilowatthour of Peaking Energy delivered, as adjusted by the Administrator, Southwestern, in accordance with the procedure within this rate schedule. This adder does not apply to:

Supplemental Peaking Energy, or

Sales to any Customer which, by contract, has assumed the obligation to supply energy to fulfill the minimum of 1,200 kilowatthours of Peaking Energy per kilowatt of Peaking Contract Demand during a contract year (Contract Support Arrangements).

Monthly Rates for Transformation Service

Capacity Charges for Transformation Service: A charge of $0.30 per kilowatt will be assessed for capacity used to deliver energy at any point of delivery at which Southwestern provides transformation service for deliveries at voltages of 69 kilovolts or less from higher voltage facilities.

Application of Capacity Charges for Transformation Service

For any particular month, charges for transformation service will be assessed on the greater of (1) that month's actual peak demand, or (2) the highest peak demand recorded during the previous 11 months, at any point of delivery. For the purpose of this Rate Schedule, the peak demand will be based on all deliveries, of both Federal and non-Federal energy, from the System of Southwestern, at such point during such month.

Rates for Ancillary Services

Capacity Charges for Ancillary Services

	10/1/2006–9/30/2008	10/1/2008–9/30/2010
(a) Regulation and Frequency Response Service		
Monthly rate	$0.08 per kilowatt of Peaking Billing Demand	$0.09 per kilowatt of Peaking Billing Demand.
(b) Spinning Operating Reserve Service		
Monthly rate	$0.0079 per kilowatt of Peaking Billing Demand	$0.0092 per kilowatt of Peaking Billing Demand.
Daily rate	$0.00036 per kilowatt for non-Federal generation inside Southwestern's control area.	$0.00042 per kilowatt for non-Federal generation inside Southwestern's control area.
(c) Supplemental Operating Reserve Service		
Monthly rate	$0.0079 per kilowatt of Peaking Billing Demand	$0.0092 per kilowatt of Peaking Billing Demand.
Daily rate	$0.00036 per kilowatt for non-Federal generation inside Southwestern's control area.	$0.00042 per kilowatt for non-Federal generation inside Southwestern's control area.

(d) *Energy Imbalance Service:* $0.0 per kilowatt for all reservation periods.

Availability of Ancillary Services

Ancillary Services (a) and (d) listed above are available only for deliveries of power and energy to load centers within Southwestern's Control Area. Ancillary Services (b) and (c) listed above are available only for deliveries of non-Federal power and energy generated by resources located within Southwestern's

Control Area and for deliveries of all Hydro Peaking Power and associated energy from and within Southwestern's Control Area. Where available, such Ancillary Services must be taken from Southwestern; unless, subject to Southwestern's approval, they are provided by others.

Application of Ancillary Services Charges

For any month, the charges for Ancillary Services (a), (b), (c) and (d) listed above for deliveries of Hydro Peaking Power shall be based on the Peaking Billing Demand.

The daily charge for Ancillary Services (b) and (c) for non-Federal generation inside Southwestern's Control Area shall be applied to the greater of Southwestern's previous day's estimate of the peak, or the actual peak, in kilowatts, of the internal non-Federal generation.

Provision of Ancillary Services by Others

Customers for which Ancillary Services (a), (b), (c) and (d) are made available as specified above, must inform Southwestern by written notice of the Ancillary Services which they do not intend to take and purchase from Southwestern, and of their election to provide all or part of such Ancillary Services from their own resources or from a third party.

Subject to Southwestern's approval of the ability of such resources or third parties to meet Southwestern's technical requirements for provision of such Ancillary Services, the Customer may change the Ancillary Services which it takes from Southwestern and/or from other sources at the beginning of any month upon the greater of 60 days notice or upon completion of any necessary equipment modifications necessary to accommodate such change.

Limitations on Energy Imbalance Service

Energy Imbalance Service primarily applies to deliveries of power and energy which are required to satisfy a Customer's load. As Hydro Peaking Power and associated energy are limited by contract, the Energy Imbalance Service bandwidth specified in Southwestern's Open Access Transmission Service tariff does not apply to deliveries of Hydro Peaking Power, and therefore Energy Imbalance Service is not charged on such deliveries. Customers who consume a capacity of Hydro Peaking Power greater than their Peaking Contract Demand may be subject to a Capacity Overrun Penalty.

Application of Capacity Overrun Penalty

Customers which have loads within Southwestern's Control Area are obligated by contract to provide resources, over and above the Hydro Peaking Power and associated energy purchased from Southwestern, sufficient to meet their loads. A Capacity Overrun Penalty shall be applied only when the formulas provided in Customers' contracts indicate an overrun on Hydro Peaking Power, and investigation determines that all resources, both firm and non-firm, which were available at the time of the apparent overrun were insufficient to meet the Customer's load.

Capacity Overrun Penalty

For each hour during which Hydro Peaking Power was provided at a rate greater than that to which the Customer is entitled, the Customer will be charged a capacity overrun penalty at the following rates:

Months associated with charge	Rate per kilowatt
March, April, May, October, November, December	$0.15
January, February, June, July, August, September ...	0.30

Application of Energy Overrun Penalty

By contract, the Customer is subject to limitations on the maximum amounts of Peaking Energy which may be scheduled during any month or during any four consecutive months. When the Customer schedules an amount in excess of such maximum amounts for any month, or schedules more than 1,200 hours of Peaking Energy per kilowatt of Peaking Contract Demand in any contract year, such Customer is subject to the Energy Overrun Penalty.

Energy Overrun Penalty

For each kilowatthour of overrun: $0.0902 per kilowatthour.

Real Power Losses

Customers are required to self-provide all Real Power Losses for non-Federal energy transmitted by Southwestern on behalf of such Customers under the provisions detailed below.

Real Power Losses are computed as four (4) percent of the total amount of non-Federal energy transmitted by Southwestern. The Customer's Monthly Real Power Losses are computed each month on a megawatthour basis as follows:

$ML = .04 \times NFE$

with the factors defined as follows:

ML = The total monthly loss energy, rounded to the nearest megawatthour, to be scheduled by a Customer for receipt by Southwestern for Real Power Losses associated with non-Federal energy transmitted on behalf of such Customer; and

NFE = The amount of non-Federal energy that was transmitted by Southwestern on behalf of a Customer during a particular month.

The Customer must schedule or cause to be scheduled to Southwestern, Real Power Losses for which it is responsible subject to the following conditions:

(1) The Customer shall schedule and deliver real power losses back to Southwestern during the second month after they were incurred by Southwestern in the transmission of the Customer's non-Federal power and energy over the System of Southwestern.

(2) On or before the twentieth day of each month, Southwestern shall determine the amount of non-Federal loss energy it provided on behalf of the Customer during the previous month and provide a written schedule to the Customer setting forth hour-by-hour the quantities of non-Federal energy to be delivered to Southwestern as losses during the next month.

(4) Real Power Losses not delivered to Southwestern by the Customer, according to the schedule provided, during the month in which such losses are due shall be billed by Southwestern to the Customer to adjust the end-of-month loss energy balance to 0 megawatthours and the Customer shall be obliged to purchase such energy at the following rates:

Months associated with charge	Rate per kilowatthour
March, April, May, October, November, December	$0.15
January, February, June, July, August, September ...	0.30

(5) Real Power Losses delivered to Southwestern by the Customer in excess of the losses due during the month shall be purchased by Southwestern from the Customer at a rate per megawatthour equal to Southwestern's rate per megawatthour for Supplemental Peaking Energy, as set forth in Southwestern's then-effective Rate Schedule for hydro peaking power to adjust such hourly end-of-month loss energy balance to 0 megawatthours.

Requirements Related to Power Factor

Any Customer served from facilities owned by or available by contract to Southwestern will be required to maintain a power factor of not less than 95 percent and will be subject to the following provisions.

Determination of Power Factor

The power factor will be determined for all Demand Periods and shall be calculated under the formula:

$$PF = (kWh) \div \sqrt{\left(kWh^2 + rkVAh^2\right)},$$

with the factors defined as follows:

PF = the power factor for any Demand Period of the month.

kWh = the total quantity of energy which is delivered during such Demand Period to the point of delivery or interconnection.

rkVAh = the total quantity of reactive kilovolt-ampere-hours (kvars) delivered during such Demand Period to the point of delivery or interconnection.

Power Factor Penalty and Assessment

The Customer shall be assessed a penalty for all Demand Periods of a month where the power factor is less than 95 percent lagging. For any Demand Period during a particular month such penalty shall be in accordance with the following formula:

$C = D \times (.95–LPF) \times \$0.10$

with the factors defined as follows:

C = The charge in dollars to be assessed for any particular Demand Period of such month that the Determination of Power Factor ''PF'' is calculated to be less than 95 percent lagging.

D = The Customer's demand in kilowatts at the point of delivery for such Demand Period in which a low power factor was calculated.

LPF = The lagging power factor, if any, determined by the formula ''PF'' for such Demand Period.

If C is negative, then C = zero (0).

Application of Power Factor Penalty

The Power Factor Penalty is applicable to radial interconnections with the System of Southwestern. The total Power Factor Penalty for any month shall be the sum of all charges ''C'' for all Demand Periods of such month. No penalty is assessed for leading power factor. Southwestern, in its sole judgment and at its sole option, may determine whether power factor calculations should be applied to a single physical point of delivery or to multiple physical points of delivery where a Customer has a single, electrically integrated load served through multiple points or interconnections. The general criteria for such decision shall be that, given the configuration of the Customer's and Southwestern's systems, Southwestern will determine, in its sole judgment and at its sole option, whether the power factor calculation more accurately assesses the detrimental impact on Southwestern's system when the above formula is calculated for a single physical point of delivery or for a combination of physical points or for an interconnection as specified by an Interconnection Agreement.

Southwestern, at its sole option, may reduce or waive power factor penalties when, in Southwestern's sole judgment, low power factor conditions were not detrimental to the System of Southwestern due to particular loading and voltage conditions at the time the power factor dropped below 95 percent lagging.

Adjustment for Reduction in Service

If, during any month, the quantity of Peaking Contract Demand of Southwestern's 1200 hour peaking power sales customers that is scheduled by the customer for delivery is reduced by Southwestern for a period or periods of not less than two consecutive hours by reason of an outage caused by either an Uncontrollable Force or by the installation, maintenance, replacement or malfunction of generation, transmission and/or related facilities on the System of Southwestern, or insufficient pool levels, the Customer's capacity charges for such month will be reduced for each such reduction in service by an amount computed under the formula:

$R = (C \times K \times H) + S$

with the factors defined as follows:

R = the dollar amount of reduction in the monthly total capacity charges for a particular reduction of not less than two consecutive hours during any month, except that the total amount of any such reduction shall not exceed the product of the Customer's capacity charges associated with Hydro Peaking Power times the Peaking Billing Demand.

C = the Customer's capacity charges associated with Hydro Peaking Power for the Peaking Billing Demand for such month.

K = the reduction in kilowatts in Peaking Billing Demand for a particular event.

H = the number of hours duration of such particular reduction.

S = the number of hours that Peaking Energy is scheduled during such month, but not less than 60 hours times the Peaking Contract Demand.

Such reduction in charges shall fulfill Southwestern's obligation to deliver Peaking Power and Peaking Energy.

Procedure for Determining Southwestern's Net Purchased Power Adder Adjustment

Not more than twice annually, the Purchased Power Adder of $.0067 (6.7 mills) per kilowatthour of Peaking Energy, as noted in this Rate Schedule, may be adjusted by the Administrator, Southwestern, by an amount up to a total of ±$.0067 (6.7 mills) per kilowatthour per year, as calculated by the following formula:

ADJ = (PURCH − EST + DIF) + SALES

with the factors defined as follows:

ADJ = the dollar amount of the total adjustment, plus or minus, to be applied to the Net Purchased Power Adder, rounded to the nearest $.0001 per kilowatthour, provided that the total ADJ to be applied in any year shall not vary from the then-effective ADJ by more than $.0067 per kilowatthour;

PURCH = the actual total dollar cost of Southwestern's System Direct Purchases as accounted for in the financial records of the Southwestern Federal Power System for the period;

EST = the estimated total dollar cost ($15,064,500 per year) of Southwestern's System Direct Purchases used as the basis for the Purchased Power Adder of $.0067 per kilowatthour of Peaking Energy;

DIF = the accumulated remainder of the difference in the actual and estimated total dollar cost of Southwestern's System Direct Purchases since the effective date of the currently approved Purchased Power Adder set forth in this rate schedule, which remainder is not projected for recovery through the ADJ in any previous periods;

SALES = the annual Total Peaking Energy sales projected to be delivered (2,241,300,000 KWh per year) from the System of Southwestern, which total was used as the basis for the $.0067 per kilowatthour Purchased Power Adder.

[FR Doc. E8–25690 Filed 10–27–08; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OEI–2008–0225; FRL–8735–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Tribal Capacity: Determining the Capability To Participate in the National Environmental Information Exchange Network; EPA ICR No. 2299.01, OMB Control No. 2025—New

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request for a new collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 28, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OEI–2008–0225, to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *alvarez.karl@epa.gov,* by mail to: EPA Docket Center, Environmental Protection Agency, Tribal Capacity: Determining the capability to participate in the National Environmental Information Exchange Network Program, Environmental Protection Agency, MC 2823T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or by hand delivery: EPA Docket Center, EPA West Bldg., Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information; and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Karl Alvarez of OEI/OIC/IESD/IEPB at the Environmental Protection Agency, 1200 Pennsylvania Ave., NW. (MC 2823–T), Washington, DC 20460; telephone number: (202) 566–0989; fax number: (202) 566–1684; e-mail address: *alvarez.karl@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 12, 2008 (73 FR 26983), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OEI–2008–0225, which is available for online viewing at *www.regulations.gov,* or in-person viewing at the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Tribal Capacity: Determining the Capability to Participate in the National Environmental Information Exchange Network Program Docket is (202) 566–0989.

Use EPA's electronic docket and comment system at *www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: Tribal Capacity: Determining the Capability to Participate in the National Environmental Information Exchange Network Program.

ICR numbers: EPA ICR No. 2299.01, OMB Control No. 2025—new.

ICR Status: This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Environmental Information Exchange Network (Exchange Network) is an Internet-based approach for exchanging environmental data among partners (*e.g.*, EPA, states, tribes and territories). Built on the principles of applying data standards; providing secure, real-time access; and electronically collecting and storing accurate information, the Exchange Network enables participants to control and manage their own data while making it available to partners via requests over a secure Internet connection. By facilitating the efficient exchange of environmental information among interested parties at all levels of government, the Exchange Network has begun to transform the way information is shared.

While some Indian Tribes have been active partners in the Exchange Network, overall tribal participation is limited. EPA has issued grants that fund infrastructure and other support needed to share data on the network to just over 50 tribes or less than 10 percent of the more than 500 federally recognized tribes. Of these, eight have exchanged data over the network and another five are developing the infrastructure required to do so.

To expand tribal participation in the Exchange Network, EPA has been working with the National Congress of American Indians (NCAI) under a series of cooperative agreements. NCAI is planning to conduct a baseline assessment survey to obtain data to help identify barriers and other factors that are limiting tribal participation in the Network. The survey will focus on gathering information related to collection and dissemination of environmental data; information technology infrastructure, capacity, and needs; and awareness of the Exchange Network. The survey will be distributed to all federally recognized tribes that are members of NCAI. Response to the survey is voluntary. NCAI will use the findings of this survey to design programs to broaden tribal participation.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 30 minutes per response.

- Estimated total number of potential respondents: 250
- Frequency of response: Once.
- Estimated total average number of responses for each respondent: One.
- Estimated total annual burden hours: 125 hours.
- Estimated annual capital and operations and maintenance costs: $0.

Dated: October 22, 2008.

Deborah Williams,

Acting Director, Collection Strategies Division.

[FR Doc. E8–25677 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2002–0094; FRL–8735–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Reporting Requirements Under EPA's Climate Leaders Partnership (Renewal); EPA ICR No. 2100.03, OMB Control No. 2060–0532

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before November 28, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2002–0094, to (1) EPA online using *www.regulations.gov* (preferred method), by e-mail to *a-and-r-docket@epamail.epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, MC 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manuel J. Oliva, Climate Protection Partnerships Division, Office of Atmospheric Programs, 6202J, Environmental Protection Agency, 1200

Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9094; fax number: (202) 565–2134; e-mail address *oliva.manuel@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 *FR* 31087), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2002–0094, which is available for online viewing at *www.regulations.gov,* or in-person viewing at the Air and Radiation Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: Reporting Requirements under EPA's Climate Leaders Partnership (Renewal).

ICR numbers: EPA ICR No. 2100.03, OMB Control No. 2060–0532.

ICR Status: This ICR is scheduled to expire on October 31, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

Abstract: In an effort to aid implementation of U.S. commitments in the United Nations Framework Convention on Climate Change, the President announced a Climate Change Strategy on February 14, 2002, wherein he set a national U.S. greenhouse gas (GHG) intensity goal of 18 percent by 2012. Part of that strategy challenges companies to set GHG reduction goals by working with EPA through the voluntary Climate Leaders program. EPA has developed this renewal ICR to ensure that the program remains credible by obtaining continued authorization to collect information from Climate Leaders Partners to ensure the partners are meeting their GHG goals over time. Companies that join Climate Leaders voluntarily agree to the following: Completing and submitting a Partnership Agreement; negotiating a corporate GHG reduction goal; submitting a GHG inventory management plan; participating in an onsite review of the inventory management plan, and reporting to EPA, on an annual basis, the company's GHG emissions inventory, and progress toward their GHG reduction goal via Climate Leaders Annual GHG Inventory Summary and Goal Tracking Form. The information contained in the inventories of the companies that join Climate Leaders may be considered Confidential Business Information (CBI) and is maintained as such. EPA uses the data obtained from the companies to assess the success of the program in achieving its GHG reduction goals. Responses to the information collection are voluntary.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to equal 19,636 hours and to average 87 hours per respondent. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Climate Leaders Partner Corporations.

Estimated Number of Respondents: 225.

Frequency of Response: Annually, on occasion, one-time.

Estimated Total Annual Hour Burden: 19,636.

Estimated Total Annual Cost: $1,847,826, which includes $0 annualized capital/startup costs; $105 annualized Operating and Maintenance (O&M) costs and $1,847,721 annualized labor costs.

Changes in the Estimates: There is an increase of 7,681 hours in the total estimated burden compared with that identified in the ICR currently approved by OMB. Although the reporting requirements of the Climate Leader Partnership have been streamlined to reduce the individual burden for each reporter, the increase in overall costs are due to the continued growth in the number of companies participating in the Partnership. EPA has collaborated with partners to develop these revised reporting requirements, which are better suited for establishing and tracking progress of corporate GHG reduction goals. This change is result of a more interactive program approach between EPA and Climate Leaders Partners and a larger number of partners in the program since the currently approved ICR.

Dated: October 23, 2008.

Deborah Williams,

Acting Director, Collection Strategies Division.

[FR Doc. E8–25679 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8734–8]

EPA Office of Children's Health Protection and Environmental Education Staff Office; Request for Nominations of Candidates for the National Environmental Education Advisory Council

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) Office of Children's Health Protection and Environmental Education Staff

Office is soliciting applications of environmental education professionals for consideration on the National Environmental Education Advisory Council (NEEAC). There are currently two vacancies on the Advisory Council that must be filled: one State Department of Education (2009–2012); one Primary and Secondary Education (2009–2012). Additional avenues and resources may be utilized in the solicitation of applications.

DATES: Applications should be submitted by November 21, 2008 per instructions below.

ADDRESSES: Submit non-electronic application materials to Ginger Potter, Designated Federal Officer, National Environmental Education Advisory Council, U.S. Environmental Protection Agency, Office of Children's Health Protection and Environmental Education (MC:1704A), 1200 Pennsylvania Ave., NW., Washington, DC 20460, Ph: 202–564–0453, FAX: 202–564–2754, e-mail: *potter.ginger@epa.gov.*

FOR FURTHER INFORMATION CONTACT: For information regarding this Request for Nominations, please contact Ms. Ginger Potter, Designated Federal Officer (DFO), EPA National Environmental Education Advisory Council, at *potter.ginger@epa.gov* or (202) 564–0453. General information concerning NEEAC can be found on the EPA web site at: *http://www.epa.gov/enviroed.*

SUPPLEMENTARY INFORMATION:

Background: Section 9(a) and (b) of the National Environmental Education Act of 1990 (Pub. L. L–101–619) mandates a National Environmental Education Advisory Council. The Advisory Council provides the Administrator with advice and recommendations on EPA implementation of the National Environmental Education Act. In general, the Act is designed to increase public understanding of environmental issues and problems, and to improve the training of environmental education professionals. EPA will achieve these goals, in part, by awarding grants and/or establishing partnerships with other Federal agencies, state and local education and natural resource agencies, not-for-profit organizations, universities, and the private sector to encourage and support environmental education and training programs. The Council is also responsible for preparing a national biennial report to Congress that will describe and assess the extent and quality of environmental education, discuss major obstacles to improving environmental education, and identify the skill, education, and training needs for environmental professionals.

The National Environmental Education Act requires that the Council be comprised of eleven (11) members appointed by the Administrator of EPA. Members represent a balance of perspectives, professional qualifications, and experience. The Act specifies that members must represent the following sectors: primary and secondary education (one of whom shall be a classroom teacher)—two members; colleges and universities—two members; business and industry—two members; non profit organizations involved in environmental education—two members; state departments of education and natural resources—one member each; senior Americans—one member. Members are chosen to represent various geographic regions of the country, and the Council strives for a diverse representation. The professional backgrounds of Council members should include education, science, policy, or other appropriate disciplines. Each member of the Council shall hold office for a one (1) to three (3) year period. Members are expected to participate in up to two (2) meetings per year and monthly or more conference calls per year. Members of the Council shall receive compensation and allowances, including travel expenses, at a rate fixed by the Administrator.

Expertise Sought: The NEEAC staff office seeks candidates with demonstrated experience and/or knowledge in any of the following environmental education issue areas: (a) Integrating environmental education into state and local education reform and improvement; (b) state, local and tribal level capacity building; (c) cross-sector partnerships; (d) leveraging resources for environmental education; (e) design and implementation of environmental education research; (f) evaluation methodology; professional development for teachers and other education professionals; and (g) targeting under-represented audiences, including low-income, multi-cultural, senior citizens and other adults.

The NEEAC staff office is also looking for individuals who demonstrate the ability to make the time commitment, strong leadership skills, strong analytical skills, strong communication and writing skills, the ability to stand apart and evaluate programs in an unbiased manner, team players, have the conviction to follow-through and to meet deadlines, and the ability to review items on short notice.

How to Submit Applications: Any interested and qualified individuals may be considered for appointment on the National Environmental Education Advisory Council. Applications should be submitted in electronic format to the Designated Federal Officer *potter.ginger@epa.gov*) and contain the following: contact information including name, address, phone and fax numbers and an e-mail address; a curriculum vita or resume; the specific area of expertise in environmental education and the sector/slot the applicant is applying for; recent service on other national advisory committees or national professional organizations and; a one-page commentary on the applicant's philosophy regarding the need for, development, implementation and/or management of environmental education nationally. Additionally, a supporting letter of endorsement is required. This letter may also be submitted electronically as described above.

Persons having questions about the application procedure or who are unable to submit applications by electronic means, should contact Ginger Potter, DFO, at the contact information provided above in this notice. Non-electronic submissions must contain the same information as the electronic. The NEEAC Staff Office will acknowledge receipt of the application. The NEEAC Staff Office will develop a short list for more detailed consideration. Short list candidates will be required to fill out the Confidential Disclosure Form for Special Government Employees Serving Federal Advisory Committees at the U.S. Environmental Protection Agency (EPA Form 3110–48). This confidential form allows government officials to determine whether there is a statutory conflict between that person's public responsibilities (which include membership on a Federal advisory committee) and private interests and activities and the appearance of a lack of impartiality as defined by Federal regulation. The form may be viewed and downloaded from the following URL address: *http://www.epa.gov/sab/pdf/epaform3110–48.pdf.*

Dated: October 10, 2008.

Ginger Potter,

Designated Federal Officer.

[FR Doc. E8–25687 Filed 10–27–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

October 22, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before November 28, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC or via Internet at *Cathy.Williams@fcc.gov* or *PRA@fcc.gov.*

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.''

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0896.

Title: Broadcast Auction Form Exhibits.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities; not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 3,500 respondents; 7,605 responses

Estimated Hours per Response: 0.5 to 2 hours

Frequency of Response: On occasion reporting requirement.

Annual Burden: 8,628 hours.

Annual Cost Burden: $10,163,100.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in 154(i) and 309 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: On December 18, 2007, the Commission adopted a Report and Order and Third Further Notice of Proposed Rulemaking (''the Diversity Order'') in MB Docket Nos. 07–294; 06–121; 02–277; 04–228, MM Docket Nos. 01–235; 01–317; 00–244; FCC 07–217, which expands opportunities for participation in the broadcasting industry by new entrants and small businesses, including minority and women-owned businesses.

Currently, the media interests held by an individual or company with an equity and/or debt interest in an auction applicant are attributed to that applicant, for purposes of determining its eligibility for the new entrant bidding credit, if the equity and debt interests exceed 33 percent of the total asset value of the applicant. In order to make it easier for small businesses and new entrants to acquire broadcast licenses, and acquire the capital to compete in the marketplace with better financed companies, in the Diversity Order the Commission relaxed the rule standard, so to allow for higher investment opportunities in entities meeting the definition of ''eligible entities.'' An ''eligible entity'' is defined as an entity that would qualify as a small business consistent with the Small Business Administration (''SBA'') standards for its industry grouping, based on revenue.

Pursuant to the Diversity Order, the Commission will now allow the holder of an equity or debt interest in the applicant to exceed the above-noted 33 percent threshold without triggering attribution provided: (1) The combined equity or debt in the ''eligible entity'' is less than 50 percent, or (2) the total debt in the ''eligible entity'' does not exceed 80 percent and the interest holder does not hold any option to acquire an additional interest in the ''eligible entity.''

Consistent with actions taken by the Commission in the Diversity Order, a new question has been added to the new entrant bidding credit section of the broadcast auction application form. It simply requires applicants to make explicit any claim that they are ''eligible entities,'' as a basis for claiming a bidding credit. The question states: ''Does the applicant claim to be an 'eligible entity' as defined in 47 CFR 73.5008(c), for purposes of claiming eligibility for the new entrant bidding credit?'' Additional information showing proof of compliance is not required at the pre-auction application stage. The Commission also foresees a new universe of respondents to the collection—those broadcast auction applicants claiming eligibility for the new entrant bidding credit based on their status as an ''eligible entity.''

The Commission auctions mutually exclusive applications for full power commercial AM and FM radio, television services, Instructional Television Fixed Services (ITFS), and all secondary commercial broadcast services (e.g., Low Power TV (LPTV), FM translators and television translators). The Commission requires the use of the FCC Form 175 (OMB Control Number 3060–0600) to participate in all broadcast auctions. Broadcast applicants are also required to submit certain exhibits which are covered in this information collection as discussed below.

To facilitate the identification of groups of mutually exclusive applicants for non-table services which include the AM radio, LPTV, and TV/FM translator services, the Commission requires applicants to submit the engineering

portions of the pertinent long-form application (FCC Form 301 (OMB Control Number 3060–0027), FCC Form 346 (OMB Control Number 3060–0016), or FCC Form 349 (OMB Control Number 3060–0405)) necessary to determine mutual exclusivity.

In instances where analog television licensees file major modification applications, the Commission requires that such applicants also file the engineering data. These applicants are required to file the electronic versions of FCC Forms 301, 346 or 349.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–25721 Filed 10–27–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of a Matter To Be Withdrawn From Consideration at an Agency Meeting and Notice of a Matter To Be Added to the Discussion Agenda

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the following matter will be withdrawn from the ''Discussion Agenda'' at the Federal Deposit Insurance Corporation's Board of Directors open meeting scheduled to be held at 2 p.m. on Thursday, October 23, 2008:

Memorandum and resolution re: Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital: Treatment of Perpetual Preferred Stock Issued To the United States Treasury under the Emergency Economic Stabilization Act of 2008.

In addition, the following matter will be added to the ''Discussion Agenda:''

Memorandum and resolution re: Interim Rule Implementing the Temporary Liquidity Guarantee Program.

Dated: October 22, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–25545 Filed 10–27–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Change in Subject Matter of Agency Meeting

Pursuant to the provisions of subsection (e)(2) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(e)(2)), notice is hereby given that at its open meeting held at 2 p.m. on Thursday, October 23, 2008, the Corporation's Board of Directors determined, on motion of Vice Chairman Martin J. Gruenberg, seconded by Director Thomas J. Curry (Appointive), concurred in by Director John C. Dugan (Comptroller of the Currency), Mr. Scott M. Polakoff, acting in the place and stead of Director John M. Reich (Director, Office of Thrift Supervision), and Chairman Sheila C. Bair, that Corporation business required the addition to the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matter:

Memorandum and resolution re: Interim Rule Implementing the Temporary Liquidity Guarantee Program.

In addition, the following matter was withdrawn from the ''Discussion Agenda:''

Memorandum and resolution re: Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital: Treatment of Perpetual Preferred Stock Issued to the United States Treasury under the Emergency Economic Stabilization Act of 2008.

The Board further determined, by the same majority vote, that no notice earlier than October 22, 2008, of the change in the subject matter of the meeting was practicable.

Dated: October 23, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–25744 Filed 10–27–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: Background. Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board–approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer —Michelle Shore—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829).

OMB Desk Officer—Alexander T. Hunt—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Final approval under OMB delegated authority of the extension for three years, without revision, of the following reports:

1. Report title: Recordkeeping and Disclosure Requirements Associated with Loans Secured by Real Estate Located in Flood Hazard Areas Pursuant to Section 208.25 of Regulation H.

Agency form number: Reg H–2

OMB control number: 7100–0280

Frequency: Event–generated

Reporters: State member banks

Annual reporting hours: 43,298 hours

Estimated average time per response: Notice of special flood hazards to borrowers and servicers, 5 minutes; notice to the Federal Emergency Management Agency (FEMA) of servicer, 5 minutes; notice to FEMA of change of servicer, 5 minutes; and retention of standard FEMA form, 2.5 minutes.

Number of respondents: 874

General description of report: This information collection is mandatory pursuant to Section 12 of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. § 4012a) and section 1364 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4104a). The Federal Reserve does not collect any information, therefore no issue of confidentiality would normally arise. However, should the records required by the Regulation H requirements come into possession of the Board during an examination of a state member bank, those records would be protected from disclosure by exemption 8 of the Freedom of Information Act (FOIA). (5 U.S.C. § 552(b)(8)). Additionally, depending on the content of the records, the information could also potentially be protected from disclosure by FOIA exemptions 4 and 6. (5 U.S.C. § 552(b)(4)&(6)).

Abstract: Regulation H requires state member banks to notify a borrower and

servicer when loans secured by real estate are determined to be in a special flood hazard area and notify them whether flood insurance is available; notify FEMA of the identity of, and any change of, the servicer of a loan secured by real estate in a special flood hazard area; and retain a completed copy of the Standard Flood Hazard Determination Form used to determine whether property securing a loan is in a special flood hazard area.

Current Actions: On August 20, 2008, the Federal Reserve published a notice in the Federal Register (73 FR 49205) requesting public comment for 60 days on the extension, without revision, of this information collection. The comment period for this notice expired on October 20, 2008. The Federal Reserve did not receive any comments.

2. Report title: Recordkeeping, Reporting, and Disclosure Requirements in Connection with Regulation BB (Community Reinvestment Act).

Agency form number: Reg BB

OMB control number: 7100–0197

Frequency: Annually

Reporters: State member banks

Annual reporting hours: 61,545 hours

Estimated average hours per response: Recordkeeping Requirement, small business and small farm loan register, 219 hours. Optional Recordkeeping Requirements, consumer loan data, 326 hours; and other loan data, 25 hours. Reporting Requirements, assessment area delineation, 2 hours; small business and small farm loan data, 8 hours; community development loan data, 13 hours; and HMDA out of MSA loan data, 253 hours. Optional Reporting Requirements, data on lending by a consortium or third party, 17 hours; affiliate lending data, 38 hours; strategic plan, 275 hours; and request for designation as a wholesale or limited purpose bank, 4 hours. Disclosure Requirement, public file, 10 hours.

Number of respondents: 874

General description of report: This information collection is authorized pursuant to Section 806 of the Community Reinvestment Act (CRA) which permits the Board to issue regulations to carry out the purpose of CRA (12 U.S.C. § 2905), Section 11 of the Federal Reserve Act (FRA) which permits the Board to require such statements as reports of state member banks as it deems necessary (12 U.S.C. § 248(a)(1)), and section 9 of the FRA which permits the Board to examine state member banks (12 U.S.C. § 325). The requirements are mandatory depending on bank size and other factors. Generally, the data that are reported to the Federal Reserve are not considered confidential.

Abstract: This submission covers an extension of the Federal Reserve's currently approved information collections in their CRA regulations (12 CFR part 228). The submission involves no change to the regulation or to the information collection. The Federal Reserve System needs the information collected to fulfill their obligations under the CRA (12 U.S.C. 2901 et seq.) to evaluate and assign ratings to the performance of institutions, in connection with helping to meet the credit needs of their communities, including low– and moderate–income neighborhoods, consistent with safe and sound banking practices. The Federal Reserve System uses the information in the examination process and in evaluating applications for mergers, branches, and certain other corporate activities. Financial institutions maintain and provide the information to the Federal Reserve System.

Current Actions: On August 20, 2008, the Federal Reserve published a notice in the Federal Register (73 FR 49205) requesting public comment for 60 days on the extension, without revision, of this information collection. The comment period for this notice expired on October 20, 2008. The Federal Reserve did not receive any comments.

Board of Governors of the Federal Reserve System, October 22, 2008.

Jennifer J. Johnson

Secretary of the Board.

[FR Doc. E8–25606 Filed 10–27–08; 8:45 am]

BILLING CODE 6210–01–S

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; Small Business Grant Applications: Identification and Development of Therapeutics.

Date: November 11, 2008.

Time: 1:30 pm to 3 pm.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Richard G. Kostriken, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–402–4454, *kostrikr@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; Leiomyomata Uteri: Basic Science, Translational and Clinical Research.

Date: November 18, 2008.

Time: 8:30 am to 4 pm.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Stuart B. Moss, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, 301–435–1044, *mossstua@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; CB Fellowship.

Date: December 4, 2008.

Time: 8 am to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Alessandra M. Bini, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5142, MSC 7840, Bethesda, MD 20892, 301–435–1024, *binia@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Roadmap HIS Assay for MLPCN.

Date: December 4, 2008.

Time: 8 am to 6 pm.

Agenda: To review and evaluate grant applications.

Place: Hotel Rouge, 1315 16th Street, NW., Washington, DC 20036.

Contact Person: James J. Li, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–435–2417, *lijames@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts in Biological Chemistry and Macromolecular Biophysics.

Date: December 4–5, 2008.

Time: 8 am to 6 pm.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Donald L. Schneider, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5160, MSC 7842 Bethesda, MD 20892, 301–435–1727, *schneidd@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: October 20, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25487 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Cancellation of Meeting

Notice is hereby given of the cancellation of the Center for Scientific Review Special Emphasis Panel, November 12, 2008, 6 p.m. to November 13, 2008, 6 p.m., St. Gregory Hotel and Suites , 2033 M Street, NW., Washington, DC, 20036 which was published in the **Federal Register** on October 7, 2008, 73 FR 58606–58608.

The meeting was cancelled due to administrative problems.

Dated: Ocotober 20, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25597 Filed 10–27–08; 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, ACTS Small Business.

Date: November 20, 2008.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Richard J. Bartlett, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4110, MSC 7814 Bethesda, MD 20892, 301–435–6809, *bartletr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Developmental Genome Anatomy Project/Cytogenetics.

Date: November 25, 2008.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mary P. McCormick, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2208, MSC 7890 Bethesda, MD 20892, 301/435–1047, *mccormim@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: October 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25709 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, November 2, 2008, 8 a.m., to November 3, 2008, 5 p.m., Catamaran Resort Hotel, 3999 Mission Boulevard, San Diego, CA 92109, which was published in the **Federal Register** on October 7, 2008, 73 FR 58606–58608.

The starting time of the meeting on November 2, 2008, has been changed to 5 p.m. until adjournment on November 3, 2008. The meeting is closed to the public.

Dated: October 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25710 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Biomedical Research and Research Training Review Subcommittee B.

Date: November 20–21, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Arthur L. Zachary, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–18, Bethesda, MD 20892, (301) 594–2886, *zacharya@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: October 20, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25488 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Blood Pressure and Dialysis.

Date: November 25, 2008.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Barbara A Woynarowska, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: October 21, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25713 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; PAR–06–291, Centers for AIDS Research, D–CFAR, CFAR.

Date: November 13–14, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Sujata Vijh, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–594–0985, *vijhs@niaid.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: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Development of Novel Interventions and Tools for the Control of Malaria, Neglected Tropical Diseases and their Vectors—Group 1.

Date: November 19, 2008.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Fernwood Building, Room 2C21/23, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Gary S. Madonna, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, Bethesda, MD 20892, (301) 496–3528, *gm12w@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Mircrobicide Innovation Program (MIP IV).

Date: November 20–21, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Roberta Binder, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Room 3130, Bethesda, MD 20892–7616, 301–496–7966, *rbinder@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Development of Novel Interventions and Tools for the Control of Malaria, Neglected Tropical Diseases and their Vectors—Group 2.

Date: November 20, 2008.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Gary S. Madonna, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, Bethesda, MD 20892, (301) 496–3528, *gm12w@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Development of Novel Interventions and Tools for the Control of Malaria, Neglected Tropical Diseases and their Vectors—Group 3.

Date: November 21, 2008.

Time: 8 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Gary S. Madonna, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, Bethesda, MD 20892, (301) 496–3528, *gm12w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 21, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25716 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 Mental Health Special Emphasis Panel; Child Center Review.

Date: November 21, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel & Executive Meeting Center, 8120 Wisconsin Ave., Bethesda, MD 20814.

Contact Person: Henry J Haigler, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Rm. 6150, MSC 9608, Bethesda, MD 20892–9608, 301/443–7216, *hhaigler@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: October 21, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–25729 Filed 10–27–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0013]

Privacy Act of 1974; Department of Homeland Security Claims Records; System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to consolidate nine legacy record systems: DOT/CG 508 Claims and Litigation, Treasury/CS.045 Claims Act File, Treasury/CS.046 Claims Case File, Treasury/CS.144 Mail Protest File, Treasury/CS.148 Military Personnel and Civilian Employees' Claims Act File, Treasury/CS.232 Tort Claims Act File, Treasury/CS.234 Tort Claims Act File, Treasury/CS.268 Military Personnel and Civilian Employees' Claim Act File, and FEMA/GC–1 Claims (litigation) into one Department of Homeland Security-wide system of records. The Department of Homeland Security also proposes to partially consolidate one legacy record system: Treasury/USSS.001 Administrative Information System, August 28, 2001, into this Department-wide system of records. This system will allow the Department of Homeland Security to respond to, and process, claims submitted to, or by, the Department of Homeland Security, including requests for waivers of claims. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department's claims record systems. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This consolidated system, titled Claims Records, will be included in the Department's inventory of record systems.

DATES: Submit comments on or before November 28, 2008.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0013 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern claims submitted to DHS.

As part of its efforts to streamline and consolidate its Privacy Act records systems, DHS is establishing a new agency-wide system of records under the Privacy Act (5 U.S.C. 552a) for DHS claims records. This will ensure that all components of DHS follow the same privacy rules for collecting and maintaining records on claims. DHS will use this system to collect and maintain claims submitted to it by DHS personnel and others.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to consolidate nine legacy record systems: DOT/CG 508 Claims and Litigation (65 FR 19475 April 11, 2000), Treasury/CS.045 Claims Act File (66 FR 52984 October 18, 2001), Treasury/CS.046 Claims Case File (66 FR 52984 October 18, 2001), Treasury/CS.144 Mail Protest File (66 FR 52984 October 18, 2001), Treasury/CS.148 Military Personnel and Civilian Employees' Claims Act File (66 FR 52984 October 18, 2001), Treasury/CS.232 Tort Claims Act File (66 FR 52984 October 18, 2001), Treasury/CS.234 Tort Claims Act File (66 FR 52984 October 18, 2001), Treasury/CS.268 Military Personnel and Civilian Employees' Claim Act File (66 FR 52984 October 18, 2001), and FEMA/GC–1, Claims (litigation) (66 FR 47228 September 11, 2001) into one DHS-wide system of records. DHS also proposes to partially consolidate one legacy record system: Treasury/USSS.001 Administrative Information System (66 FR 45362 August 28, 2001) into this Department-wide system of records. This system will allow DHS to respond to, and process, claims submitted to, or by, DHS, including requests for waivers of claims. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect DHS's claims record systems. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This consolidated system of records, titled Claims Records, will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory

framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and legal permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, visitors, and foreign nationals who are employed by the United States Government. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Claims Records System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

SYSTEM OF RECORDS: DHS/ALL–013

SYSTEM NAME:

Department of Homeland Security Claims Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at several Headquarters locations and in component offices of DHS, in both Washington, DC and field locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any individual or entity who submits a claim to DHS and/or its components or against whom DHS files a claim.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Individual's or entity's name;
- Social security number;
- Entity's corporate tax identification number;
- Addresses;
- Telephone numbers;
- Description of the claim;
- Status of the claim;
- Banking account and routing number;
- Correspondence between the claimant or claimant's representative and DHS;
- Witness statements;
- Photos;
- Documents submitted by the claimant or claimant's representative in support of the claim; and
- Documents relating to the administrative handling of the claim.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; The Federal Records Act, 44 U.S.C. 3101; The Homeland Security Act of 2002, Public Law 107–296; 6 U.S.C. 121; 28 U.S.C. 2671–2680; Federal Tort Claims Act; and Executive Order 9397.

PURPOSE(S):

The purpose of this system is to respond to and process claims submitted to, or by, DHS, including requests for waivers of claims.

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, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

I. To appropriate Federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable disease or to combat other significant public health threats; appropriate notice will be provided of any identified health threat or risk.

J. To another Federal agency or third party, including insurance companies or worker's compensation carriers, when the claimant(s) may be covered for the damage, loss or injury by insurance and/or a third party is alleged to have or may have, caused or contributed to the damage, loss or injury of the claimant(s).

K. To foreign governments when the claimant is a citizen of that foreign nation or when the United States has an agreement with that foreign country which affects payment of the claim

L. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Data may be retrieved by an individual's or entity's name, Social Security number, corporate tax identification number, address, description and status of claim, and/or other personal identifier.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Records are destroyed after six years and three months of claim settlement, in accordance with National Archives and Records Administration General Records Schedule 6, Item 10. For claims which the Government's right to collect was not extended, records are destroyed ten years, three months after the year in which the Government's right to collect first accrued, in accordance with National Archives and Records Administration General Records Schedule 6, Item 10.

SYSTEM MANAGER AND ADDRESS:

For Headquarters components of DHS, the System Manager is the Director of Departmental Disclosure, Department of Homeland Security, Washington, DC 20528. For components of DHS, the System Manager can be found at *http://www.dhs.gov/foia* under ''contacts.''

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters' or component's FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Information originates from individuals and entities who submit claims, responses to claims, or requests for waiver of claims to DHS.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from subsections (c)(3) and (4); (d); (e)(1), (2), (3), (5), and (8); and (g) of the Privacy Act pursuant to 5 U.S.C.(j)(2). In additional, the Secretary of Homeland Security has exempted this system from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (2), and (3).

Dated: October 15, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–25612 Filed 10–27–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5223–C–03]

Final Fair Market Rents for Fiscal Year 2009 for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program: Technical Correction

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice of Final Fair Market Rents (FMRs) for Fiscal Year (FY) 2009, technical correction.

SUMMARY: On September 29, 2008, the Department published its FY2009 Final FMRs for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program. In that notice, HUD incorrectly identified Schedule B as proposed FY2009 FMRs when the rents published were in fact the final FY2009 Final FMRs. Today's **Federal Register** notice corrects the title of Schedule B to ''FY2009 Final Fair Market Rents For Existing Housing.''

DATES: *Effective Date:* October 1, 2008.

FOR FURTHER INFORMATION CONTACT: For technical information on the methodology used to develop FMRs or a listing of all FMRs, please call the HUD USER information line at 800–245–2691 or access the information at the following link on the HUD Web site: *http://www.huduser.org/datasets/fmr.html.* Any questions related to use of FMRs or voucher payment standards should be directed to the respective local HUD program staff. Questions on how to conduct FMR surveys or further methodological explanations may be addressed to Marie L. Lihn or Lynn A. Rodgers, Economic and Market Analysis Division, Office of Economic Affairs, Office of Policy Development and Research, telephone number 202–708–0590. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: On September 29, 2008 (73 FR 56638), the Department published its FY2009 Final Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program. As required by section 8(c)(1) of the United States Housing Act of 1937, the September 29, 2008, notice provided final FY2009 FMRs for all areas that reflect the estimated 40th and 50th percentile rent levels trended to April 1, 2009, using the 2006 American Community Survey data, and more recent Consumer Price Index rent and utility indexes. In that notice, HUD incorrectly identified Schedule B as proposed FY2009 FMRs when the rents published were in fact the final FY2009 Final FMRs. To avoid any confusion, the Department is publishing today's notice to correct the title of Schedule B to ''FY2009 Final Fair Market Rents for Existing Housing.'' Only the title of the Schedule B is changed by today's notice: the FMRs published on September 29, 2008, are the final FY2009 FMRs.

Correction

Accordingly, the document published on September 29, 2008 (73 FR 56638) is corrected to change the title of all pages of the table in Schedule B to ''FY2009 Final Fair Market Rents For Existing Housing''.

Dated: October 21, 2008.

Kurt G. Usowski,

Deputy Assistant Secretary for Economic Affairs.

[FR Doc. E8–25570 Filed 10–27–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORV00000–L10200000.DD0000; HAG 9–0009]

Meeting Notice for the John Day/Snake Resource Advisory Council

AGENCY: Bureau of Land Management (BLM), Vale District.

ACTION: Meeting Notice for the John Day/Snake Resource Advisory Council.

SUMMARY: The John Day/Snake Resource Advisory Council (JDSRAC) meeting is scheduled for December 2, 2008, in Pendleton, Oregon.

The John Day/Snake Resource Advisory Council meeting is scheduled for December 2, 2008. The meeting will take place at the Oxford Suites, 2400 SW Court, Pendleton, OR from 8 a.m.to 4 p.m. The meeting may include such topics as John Day Resource Management Plan, Wallowa-Whitman Weed Management, Climate Change, Forest and BLM Resource Management Planning, Restoration of the Lower Snake River, Transportation Planning, and other matters as may reasonably come before the council.

The meeting is open to the public. Public comment is scheduled for 1 p.m. to 1:15 p.m. (Pacific Time) December 2, 2008. For a copy of the information to be distributed to the Council members, please submit a written request to the Vale District Office 10 days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the John Day/Snake Resource Advisory Council may be obtained from Mark Wilkening, Public Affairs Officer, Vale District Office, 100 Oregon Street, Vale, Oregon 97918, (541) 473–6218 or e-mail *mark_wilkening@blm.gov*.

Dated: October 23, 2008.

David R. Henderson,

District Manager.

[FR Doc. E8–25648 Filed 10–27–08; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW160085]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Delta Petroleum Corporation for competitive oil and gas lease WYW160085 for land in Natrona County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW160085 effective April 1, 2008, under the original terms and

conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–25633 Filed 10–27–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW157568]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Delta Petroleum Corporation for competitive oil and gas lease WYW157568 for land in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW157568 effective April 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–25653 Filed 10–27–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW152696]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Delta Petroleum Corporation and Kerr McGee Oil & Gas Onshore LP for competitive oil and gas lease WYW152696 for land in Fremont County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessees have agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16⅔ percent, respectively. The lessees have paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessees have met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW152696 effective April 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E8–25656 Filed 10–27–08; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and Minnesota Indian Affairs Council, St. Paul and Bemidji, MN

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 U.S. Department of the Interior, Bureau of Indian Affairs, Washington, DC, and in the possession of the Minnesota Indian Affairs Council, St. Paul and Bemidji, MN. The human remains were removed from an unknown location on the White Earth Reservation, Mahnomen County, MN.

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 Minnesota Indian Affairs Council professional staff on behalf of the Bureau of Indian Affairs, in consultation with representatives of the White Earth Band of the Minnesota Chippewa Tribe, Minnesota.

In 1934, human remains representing a minimum of one individual were removed from an unknown location at Rice Lake, White Earth Reservation, Mahnomen County, MN, during a building project by the Indian Emergency Conservation. No known individual was identified. No associated funerary objects are present.

Based on reported associated burial objects not present in the Minnesota Indian Council's collection, including a bone needle with thread, the human remains have been identified as a post-Euroamerican contact cemetery burial related to the local Ojibwe population, also known as Chippewa, residing at the White Earth Reservation.

Officials of the U.S. Department of the Interior, Bureau of Indian Affairs and Minnesota Indian Affairs Council 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 U.S. Department of the Interior, Bureau of Indian Affairs and Minnesota Indian Affairs Council 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 White Earth Band of the Minnesota Chippewa Tribe, Minnesota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact James L. (Jim) Jones Jr., Cultural Resource Director, Minnesota Indian Affairs Council, 1819 Bemidji Ave., Bemidji, MN 56601, telephone (218) 755–3825, before November 28, 2008. Repatriation of the human remains to the White Earth Band of the Minnesota Chippewa Tribe, Minnesota may proceed after that date if no additional claimants come forward.

The Minnesota Indian Affairs Council is responsible for notifying the White Earth Band of the Minnesota Chippewa Tribe, Minnesota that this notice has been published.

Dated: September 30, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–25792 Filed 10–27–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Privacy Act of 1974; Amendments to Existing Systems of Records

AGENCY: National Park Service.

ACTION: Proposed amendment of existing Privacy Act systems of records.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), the National Park Service, Department of the Interior is issuing public notice of its intent to amend 19 existing Privacy Act system of records notices to add a new routine use to authorize the disclosure of records to individuals involved in responding to a breach of Federal data.

DATES: Comments must be received by December 8, 2008.

ADDRESSES: Any persons interested in commenting on these proposed amendments may do so by submitting comments in writing to the National Park Service Privacy Act Officer, Diane Cooke, U.S. Department of the Interior, 1849 C Street, NW. (2550), Washington, DC 20240, or by e-mail to *Diane_Cooke@nps.gov*. 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.

FOR FURTHER INFORMATION CONTACT: National Park Service Privacy Act Officer, Diane Cooke, U.S. Department of the Interior, 1849 C Street, NW. (2550), Washington, DC 20240, or by e-mail to *Diane_Cooke@nps.gov*.

SUPPLEMENTARY INFORMATION: On May 22, 2007, in a memorandum to the heads of Executive Departments and Agencies entitled ''Safeguarding Against and Responding to the Breach of Personally Identifiable Information,'' the Office of Management and Budget directed agencies to develop and publish a routine use for disclosure of information in connection with response and remedial efforts in the event of a data breach. This routine use will serve to protect the interest of the individuals whose information is at issue by allowing agencies to take appropriate steps to facilitate a timely and effective response to the breach, thereby improving its ability to prevent, minimize or remedy any harm resulting from a compromise of data maintained in its systems of records. Accordingly, the National Park Service of the Department of the Interior is proposing to add a new routine use to authorize disclosure to appropriate agencies, entities, and persons, of information maintained in the following systems in the event of a data breach. These amendments will be effective as proposed at the end of the comment period unless comments are received which would require a contrary determination. The Department will publish a revised notice if changes are made based upon a review of comments received.

Dated: May 05, 2008.

Diane Cooke,

National Park Service Privacy Act Officer.

SYSTEM NAMES:

Interior, NPS–1: ''Special Use Permits.'' (Published November 10, 1983, 48 FR 51696)

Interior, NPS–2: ''Land Acquisition and Relocation Files.'' (Published November 10, 1983, 48 FR 51697)

Interior, NPS–3: ''Land Acquisition Management Information System and Master Deed Listing'' (Published November 10, 1983, 48 FR 51698)

Interior, NPS–4: ''Travel Records.'' (Published November 10, 1983, 48 FR 51698, as amended on December 21, 1988, 48 FR 51325)

Interior, NPS–5: ''Retirement Record.'' (Published November 10, 1983, 48 FR 51699)

Interior, DOI–6: The ''America the Beautiful—The National Parks and Federal Recreational Lands Pass.'' (Published June 4, 2007, 72 FR 30817)

Interior, NPS–6: ''Audiovisual Performances Selection Files.'' (Published April 11, 1977, 42 FR 19073)

Interior, NPS–7: ''National Park Service Historical Library.'' (Published, November 10, 1983, 48 FR 51699)

Interior, NPS–8: ''Property and Supplies Accountability.'' (Published November 10, 1983, 48 FR 51700)

Interior, NPS–10: ''Central Files.'' (Published April 11, 1977, 42 FR 19075)

Interior, NPS–12: ''U.S. Park Police Personnel Photograph File.'' (Published April 11, 1977, 42 FR 19075)

Interior, NPS–13: ''Concessioner.'' (Published November 10, 1983, 48 FR 51700)

Interior, NPS–14: ''Concessioner Financial Statement and Audit Report Files.'' (Published November 10, 1983, 48 FR 51701)

Interior, NPS–15: ''Concessions Management Files.''(Published November 10, 1983, 48 FR 51701)

Interior, NPS–17: ''Employee Financial Irregularities.'' (Published November 10, 1983, 48 FR 51702 and amended on December 21, 1988, 53 FR 51325)

Interior, NPS–18: ''Collection, Certifying and Disbursing Officers, and Imprest Fund Cashiers.'' (Published November 10, 1983, 48 FR 51703)

Interior, NPS–19: ''Case Incident and Reporting System.'' (Published April 7, 1999, 64 FR 16983–16984 and amended January 6, 2005, 70 FR 1265–1266)

Interior, NPS–21: ''Visitor Statistical Survey Forms.'' (Published November 10, 1983, 48 FR 51705)

Interior, NPS–22: ''Motor Vehicle Operations Program.'' (Published November 10, 1983, 48 FR 51705)

NEW ROUTINE USE:

DISCLOSURES OUTSIDE THE DEPARTMENT OF THE INTERIOR MAY BE MADE:

To appropriate agencies, entities, and persons when:

(a) It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; and

(b) The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interest, identity theft or fraud, or harm to the

security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and

(c) The disclosure is made to such agencies, entities and persons who are reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

[FR Doc. E8–25680 Filed 10–27–08; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act and Resource Conservation and Recovery Act

Notice is hereby given that on October 20, 2008, a proposed Consent Decree in *United States* v. *Blue Tee Corp., et al.*, Civil Action No. 6:08–cv–1316, was lodged with the United States District Court for the District of Kansas.

In this action, the United States, on behalf of the United States Environmental Protection Agency (''EPA''), sought the performance of response actions and the recovery of certain response costs incurred and to be incurred as a result of releases and threatened releases of hazardous substances from the Treece Subsite of the Cherokee County Superfund Site located in Cherokee County, Kansas. Pursuant to the proposed Consent Decree, Blue Tee Corp, Gold Fields Mining, LLC, and The Doe Run Resources Corporation agree to perform response actions collectively valued at approximately $4.6 million, and to pay certain response costs. The proposed Consent Decree provides the Settling Defendants with a covenant not to sue on the terms set forth therein pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a), and Section 7003 of the Resource Conservation and Recovery Act (''RCRA''), 42 U.S.C. 6973.

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 for the Environment and Natural Resources Division, U.S. Department of Justice, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, NW., Washington, DC 20044–7611, and should refer to *United States* v. *Blue Tee Corp., et al.*, D.J. Ref. 90–11–2–06017/1. 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 Consent Decree may be examined at the Office of the United States Attorney, 1200 Epic Center, 301 N. Main Street, Wichita, KS 67202–4812, and at the offices of EPA, Region 7, 901 N. 5th Street, Kansas City, Kansas 66101. 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 $53.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–25609 Filed 10–27–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Civil Rights Division; Office of Special Counsel's Antidiscrimination Guidance for Employers Following the Department of Homeland Security's Safe-Harbor Procedures

AGENCY: Civil Rights Division, Justice.

ACTION: Notice.

SUMMARY: This notice provides guidance from the Department of Justice's Office of Special Counsel for employers following the Department of Homeland Security's Safe-Harbor Procedures pertaining to the receipt of ''no-match'' letters from the Social Security Administration (''SSA'').

DATES: This notice is effective on October 28, 2008.

FOR FURTHER INFORMATION CONTACT: Sarah DeCosse, Office of Special Counsel for Immigration Related Unfair Employment Practices, Civil Rights Division, Department of Justice, P.O. Box 27728, Washington, DC 20038; Phone 202–616–5594.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security's (''DHS's'') Safe-Harbor Procedures for Employers Who Receive a No-Match Letter (''no-match rule'') was published as a final rule on August 15, 2007 (72 FR 45611). The August 2007 rule was proposed to be modified by a Supplemental Proposed Rule that was published by DHS on March 26, 2008 (73 FR 15944). Elsewhere in this issue of the **Federal Register**, DHS is publishing a Supplemental Final Rule finalizing its March 2008 Supplemental Proposed rule.

The DHS's no-match rule offers employers who receive no-match letters from the Social Security Administration (''SSA'') a safe-harbor in a related-immigration enforcement action if those employers follow the series of steps set forth in the no-match rule to ensure that the information provided by affected employees to confirm their work eligibility is genuine. The no-match rule provides that an employer may terminate an employee whose work eligibility could not be confirmed after the employer has followed the procedures that the rule sets forth.

Employers in the United States have inquired and sought information regarding any antidiscrimination implications for employers who follow these safe-harbor procedures; specifically, when the SSA notifies the employer that certain employees' names and Social Security numbers do not match in the SSA's records, the employer follows the procedures in DHS's no-match rule, the employees cannot resolve the mismatch or successfully complete a new employment eligibility verification, and the employer dismisses those employees. The Department of Justice (the Department) issues this notice to clarify when the Department, through the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), may find reasonable cause to believe that employers following the safe-harbor procedures have engaged in unlawful discrimination in violation of the antidiscrimination provisions of the Immigration and Nationality Act, section 274B, which are codified in 8 U.S.C. 1324b.

OSC enforces the antidiscrimination provisions found at 8 U.S.C. 1324b (corresponding regulations appear in 28 CFR Parts 44, 68). Section 1324b protects United States citizens and certain work-authorized persons from intentional employment discrimination based upon citizenship or immigration status, national origin, and unfair documentary practices relating to the

employment eligibility verification process. The law further prohibits retaliation against individuals who file charges with OSC, who cooperate with an investigation, or who otherwise assert their rights under section 1324b.

OSC is required to investigate charges of discrimination alleging a violation of section 1324b and determine whether or not there is reasonable cause to believe that the charge is true. OSC may, on its own initiative, also conduct investigations respecting unfair immigration-related employment practices. It is OSC's longstanding practice to examine the totality of relevant circumstances in determining whether there is reasonable cause to believe that an employer has engaged in unlawful discrimination. Based upon the outcome of its investigation, OSC may bring a complaint before an administrative law judge seeking remedial relief for victims, injunctive relief to prevent future violations, and/or civil penalties. Section 1324b also provides a private right of action.

As a threshold matter, if OSC receives an allegation of discrimination by an employer in applying the safe-harbor procedures, it will first ascertain whether the alleged victim is an authorized worker who is protected from discrimination under section 1324b. If it concludes that the alleged victim is protected, OSC will initiate an investigation to determine whether there is reasonable cause to believe that the employer has engaged in unlawful discrimination.

An employer that receives an SSA no-match letter and terminates employees without attempting to resolve the mismatches, or who treats employees differently or otherwise acts with the purpose or intent to discriminate based upon national origin or other prohibited characteristics, may be found by OSC to have engaged in unlawful discrimination. However, if an employer follows all of the safe-harbor procedures outlined in DHS's no-match rule but cannot determine that an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly and without the purpose or intent to discriminate on the basis of actual or perceived citizenship status or national origin, then OSC will not find reasonable cause to believe that the employer has violated section 1324b's antidiscrimination provision, and that employer will not be subject to suit by the United States under that provision.

Employers and employees who desire additional guidance regarding their specific circumstances are encouraged to further explore OSC's Web site. Employer and employees also may call OSC for guidance. Employers may call 1–800–255–8155, or 1–800–237–2515 for the hearing impaired. The numbers for employees are 1–800–255–7688 or (202) 616–5525, and 1–800–237–2515 for the hearing impaired. Finally, OSC has an extensive public education program to inform employers and employees regarding their rights and duties under section 1324b. Speakers may be available nationwide for groups of 50 or more attendees for public affairs events, conferences, class seminars, and workshops. To request a speaker, please call OSC's Public Affairs staff at (202) 616–5594 or fax your request to (202) 616–5509.

Dated: October 20, 2008.

Grace Chung Becker,

Acting Assistant Attorney General for Civil Rights.

[FR Doc. E8–25723 Filed 10–27–08; 8:45 am]

BILLING CODE 4410–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated July 30, 2008 and published in the **Federal Register** on August 6, 2008 (73 FR 45781), Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance to bulk manufacture amphetamine.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Boehringer Ingelheim Chemicals, Inc. to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: October 21, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–25650 Filed 10–27–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances Notice of Registration

By Notice dated July 29, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45779), Almac Clinical Services Inc. (ACSI), 2661 Audubon Road, Audubon, Pennsylvania 19403, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Oxycodone (9143)	II
Fentanyl (9801)	II

The company plans to import small quantities of the listed controlled substances in dosage form to conduct clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Almac Clinical Services Inc. (ACSI) to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Almac Clinical Services, Inc. (ACSI) to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: October 21, 2008.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E8–25649 Filed 10–27–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

October 22, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Amy Hobby on 202–693–4553 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employment Standards Administration.

Type of Review: Extension without change of an existing OMB Control Number.

Title of Collection: Notice of Controversion of Right to Compensation.

OMB Control Number: 1215–0023.

Agency Form Number(s): LS–207.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 700.

Total Estimated Annual Burden Hours: 4,375.

Total Estimated Annual Costs Burden: $8,662.

Description: The LS–207 is used by insurance carriers and self-insured employers to controvert claims under the Longshore and Harbor Workers' Compensation Act. For additional information, see related notice published at 73 FR 37987 on July 2, 2008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–25652 Filed 10–27–08; 8:45 am]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,761]

Level 3 Communications, L.L.C., Austin, TX; Notice of Negative Determination Regarding Application for Reconsideration

By application dated September 29, 2008, a worker requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of Level 3 Communications, L.L.C., Austin, Texas (subject firm). The determination was issued on September 11, 2008. The Department's Notice of determination was published in the **Federal Register** on September 24, 2008 (73 FR 55137). The subject workers are engaged in telecommunication activities related to network design and provisioning in support of customer requests, infrastructure, and network grooming activities.

The petition for TAA was denied because the workers do not produce an article within the meaning of Section 222(a)(2) of the Trade Act of 1974. In order to be certified eligible to apply for ATAA, the worker group must be eligible to apply for TAA. Since the worker group is denied eligibility to apply for TAA, they cannot be certified eligible to apply for ATAA.

In the request for reconsideration, the worker stated that ''the position I held did create an article that was required by the customers * * * a document referred to as an LOA (Letter of Authorization).'' The worker also states that the LOA ''provided vital information, which included the actual circuit and channel assignment, to the customer. Without this information they would not be able to physically connect to the correct equipment in the field * * * The LOA also gave them a legal document that stated they were allowed to connect to our equipment and or we were allowed to connect to their equipment in the field. The circuit design and or provisioning could not be done or move forward without this LOA.''

Pursuant to 29 CFR 90.18(c), administrative reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

In order to be considered eligible to apply for adjustment assistance, the worker group seeking certification must work for a firm or appropriate subdivision that produces an article and there must be a relationship between the workers' work and the article produced by the workers' firm or appropriate subdivision.

The workers' firm provides telecommunication network services. The firm's Web site states that it is a ''provider of fiber-based communication services * * * Our network offerings include Internet Protocol (IP) services * * * content and video delivery, data and voice services.'' Further, previously-submitted documents, including the petition and the

questionnaire completed by the subject firm, confirm that the subject firm provides a service.

Unlike a manufacturing firm, Level 3 Communications, L.L.C. (Level 3) is not in the business of producing an article and then selling it, and the subject firm does not receive revenue from the sales of the LOA. Level 3's revenue flows from providing its customers with network communication services. The LOA merely memorializes the service agreement between the subject firm and its customer. As such, it is not an article produced by the subject firm. Rather, the issuance of a LOA is merely incidental to the service provided by the subject firm.

It is the Department's policy that something which is created incidental to the provision of a service is not an ''article'' for purposes of the Trade Act. The Department's policy that those workers who provide services are not engaged in the production of an article for the purposes of the Act, even if something (tangible or intangible) is generated in the provision of those services, has been upheld by the U.S. Court of International Trade (USCIT) in *Former Employees of Mortgage Guaranty Insurance Corporation* v. *United States Secretary of Labor,* Court No. 07–00182. In its August 13, 2008, opinion, the USCIT stated ''the Trade Act does not provide for the eligibility of workers engaged in the provision of services.''

After careful review of the request for reconsideration, the Department determines that there is no new information that supports a finding that Section 222 of the Trade Act of 1974 was satisfied and that no mistake or misinterpretation of the facts or of the law with regards to the number or proportion of workers separated from the subject firm during the relevant period.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 10th day of October 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–25463 Filed 10–27–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0047]

Federal Advisory Council on Occupational Safety and Health (FACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Announcement of meeting.

SUMMARY: The Federal Advisory Council on Occupational Safety and Health (FACOSH) will meet November 13, 2008, in Washington, DC.

DATES: *FACOSH meeting:* FACOSH will meet from 1 p.m. to 4:30 p.m., Thursday, November 13, 2008.

Submission of comments and requests to speak: Comments and requests to speak at the FACOSH meeting must be received by November 6, 2008.

ADDRESSES: *FACOSH meeting:* FACOSH will meet in Room N–3437, Conference Rooms A/B/C, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Submission of comments and requests to speak: Comments and requests to speak at the FACOSH meeting, identified by Docket No. OSHA–2008–0047, may be submitted by any of the following methods:

Electronically: You may submit materials, including attachments, electronically at *http://www.regulations.gov*, the Federal eRulemaking Portal. Follow the online instructions for making submissions.

Facsimile: If your submission, including attachments, does not exceed 10 pages, you may fax it to the OSHA Docket Office at (202) 693–1648.

Mail, express delivery, hand delivery, messenger or courier service: You must submit three copies of your submissions to the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (TTY (877) 889–5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and OSHA Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and docket number for this **Federal Register** notice (Docket No. OSHA–2008–0047). Submissions in response to this **Federal Register** notice, including personal information provided, will be posted without change at *http://www.regulations.gov*. Therefore, OSHA cautions interested parties about submitting certain personal information such as social security numbers and birth dates. Because of security-related procedures, submissions by regular mail may result in a significant delay in their receipt. Please contact the OSHA Docket Office, at the address above, for information about security procedures for making submissions by hand delivery, express delivery, and messenger or courier service. For additional information on submitting comments and requests to speak, see the **SUPPLEMENTARY INFORMATION** section below.

Docket: To read or download submissions in response to this **Federal Register** notice, go to Docket No. OSHA–2008–0047 at *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some documents (e.g., copyrighted material) are not publicly available to read or download through *http://www.regulations.gov.* All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Jennifer Ashley, OSHA, Office of Communications, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999.

For general information: Francis Yebesi, OSHA, Office of Federal Agency Programs, U.S. Department of Labor, Room N–3622, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2122; fax (202) 693–1685; e-mail *ofap@dol.gov*.

For special accommodations for the FACOSH meeting: Veneta Chatmon, OSHA, Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999.

SUPPLEMENTARY INFORMATION: FACOSH will meet Thursday, November 13, 2008, in Washington, DC. All FACOSH meetings are open to the public.

FACOSH is authorized by section 19 of the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 668), 5 U.S.C. 7902, and Executive Order 12196 to advise the Secretary of Labor on all matters relating to the occupational safety and health of Federal employees. This includes providing advice on how to reduce and keep to a minimum the number of injuries and illnesses in the Federal

workforce and how to encourage the establishment and maintenance of effective occupational safety and health programs in each Federal Department and Agency.

The tentative agenda for the FACOSH meeting includes:

- FY 2008 performance status of Federal Executive Branch agencies in meeting the four goals of the Presidential Safety, Health, and Return-to-Employment (SHARE) Initiative;
- Update on the FY 2007 Secretary's Report to the President on Federal Agency Occupational Safety and Health;
- Progress of the Federal Agency Recordkeeping Subcommittee;
- Tracking incidents related to emergency response and recovery operations;
- Update on the Federal Agency Site Specific Targeting Program; and
- Federal agency safety and health training.

FACOSH meetings are transcribed and detailed minutes of the meetings are prepared. Meeting transcripts, minutes and other materials presented at the meeting are included in the official record of FACOSH meetings.

Interested parties may submit a request to make an oral presentation to FACOSH by one of the methods listed in the **ADDRESSES** section. The request must state the amount of time requested to speak, the interest represented (e.g., organization name), if any, and a brief outline of the presentation. Requests to address FACOSH may be granted as time permits and at the discretion of the FACOSH chair.

Interested parties also may submit comments, including data and other information, using any of the methods listed in the **ADDRESSES** section. OSHA will provide all submissions to FACOSH members.

Individuals who need special accommodations and wish to attend the FACOSH meeting should contact Veneta Chatmon, at the address above, at least seven days before the meeting.

Public Participation—Submissions and Access to Official Meeting Record

You may submit comments and requests to speak (1) electronically, (2) by facsimile, or (3) by hard copy. All submissions, including attachments and other materials, must identify the Agency name and the OSHA docket number for this notice (Docket No. OSHA–2008–0047). You may supplement electronic submissions by uploading documents electronically. If, instead, you wish to submit hard copies of supplementary documents, you must submit three copies to the OSHA Docket Office using the instructions in the **ADDRESSES** section. The additional materials must clearly identify your electronic submission by name, date and docket number.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of submissions. For information about security procedures concerning the delivery of submissions by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Meeting transcripts and minutes as well as submissions in response to this **Federal Register** notice are included in the official record of the FACOSH meeting (Docket No. OSHA–2008–0047). Submissions are posted without change at *http://www.regulations.gov*. Therefore, OSHA cautions interested parties about submitting certain personal information such as social security numbers and birth dates. Although all submissions are listed in the *http://www.regulations.gov* index, some documents (e.g., copyrighted material) are not publicly available to read or download through *http://www.regulations.gov*. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Information on using the *http://www.regulations.gov* Web site to make submissions and to access the docket and exhibits is available at the Web site's User Tips link. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the Internet to locate submissions and other documents in the docket.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov*. This notice, as well as news releases and other relevant information, is also available at OSHA's Web page at *http://www.osha.gov*.

Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by section 19 of the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 668), 5 U.S.C. 7902, section 1–5 of Executive Order 12196, the Federal Advisory Committee Act (5 U.S.C. App. 2) and regulations issued under FACA (41 CFR Part 102–3), and Secretary of Labor's Order No. 5–2007 (72 FR 31160).

Signed at Washington, DC, this 22nd day of October, 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–25598 Filed 10–27–08; 8:45 am]

BILLING CODE 4510–26–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Sunshine Act Meetings

TIME AND DATE: 9 a.m. to 12 p.m., Friday, November 14, 2008.

PLACE: The offices of the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, 130 South Scott Avenue, Tucson, AZ 85701.

STATUS: This meeting will be open to the public, unless it is necessary for the Board to consider items in executive session.

MATTERS TO BE CONSIDERED: (1) A report on the U.S. Institute for Environmental Conflict Resolution; (2) A report from the Udall Center for Studies in Public Policy; (3) A report on the Native Nations Institute; (4) Program Reports; and (5) A Report from the Management Committee.

PORTIONS OPEN TO THE PUBLIC: All sessions with the exception of the session listed below.

PORTIONS CLOSED TO THE PUBLIC: Executive session.

CONTACT PERSON FOR MORE INFORMATION: Ellen K. Wheeler, Executive Director, 130 South Scott Avenue, Tucson, AZ 85701, (520) 901–8500.

Dated: October 22, 2008.

Ellen K. Wheeler,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, and Federal Register Liaison Officer.

[FR Doc. E8–25643 Filed 10–27–08; 8:45 am]

BILLING CODE 6820–FN–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

National Industrial Security Program Policy Advisory Committee (NISPPAC)

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing regulation 41 CFR 101–6,

announcement is made for the following committee meeting:

Name of Committee: National Industrial Security Program Policy Advisory Committee (NISPPAC).

DATES: November 20, 2008.

Time of Meeting: 10 a.m.–12 p.m.

Place of Meeting: National Archives and Records Administration, 700 Pennsylvania Avenue, NW., Archivist's Reception Room, Room 105, Washington, DC 20408.

Purpose: To discuss National Industrial Security Program policy matters.

This meeting will be open to the public. However, due to space limitations and access procedures, the name and telephone number of individuals planning to attend must be submitted to the Information Security Oversight Office (ISOO) no later than Wednesday, November 12, 2008. ISOO will provide additional instructions for gaining access to the location of the meeting.

FOR FURTHER INFORMATION CONTACT: Nathaniel C. Nelson, Program Analyst, Information Security Oversight Office, National Archives Building, 700 Pennsylvania Avenue, NW., Washington, DC 20408, telephone number (202) 357–5212.

Dated: October 23, 2008.

Patrice Little Murray,

Alternate Committee Management Officer.

[FR Doc. E8–25788 Filed 10–27–08; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL LABOR RELATIONS BOARD

Appointments of Individuals To Serve as Members of Performance Review Board

5 U.S.C. 4314(c)(4) requires that appointments of individuals to serve as members of Performance Review Boards be published in the **Federal Register**. Therefore, in compliance with this requirement, notice is hereby given that the individuals whose names and position titles appear below have been appointed to serve as members of Performance Review Boards in the National Labor Relations Board for the rating year beginning October 1, 2007 and ending September 30, 2008.

Name and Title

William B Cowen, Solicitor
John H. Ferguson, Associate General Counsel, Enforcement Litigation
Gloria J. Joseph, Director of Administration
Gary W. Shinners, Deputy Chief Counsel to Board Member
Richard A. Siegel, Associate General Counsel, Operations Management
Lafe E. Solomon, Director, Office of Representation Appeals
Terence F. Flynn, Chief Counsel to Board Member (Alternate)
Barry J. Kearney, Associate General Counsel, Advice (Alternate)

Dated: October 23, 2008, Washington, DC.

Direction of the Board.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. E8–25694 Filed 10–27–08; 8:45 am]

BILLING CODE 7545–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Neighborworks® America Regular Board of Directors Meeting; Sunshine Act

TIME & DATE: 12:30 p.m., Tuesday, October 28, 2008.

PLACE: 1325 G Street NW., Suite 800, Boardroom, Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary, (202) 220–2376; *ehall@nw.org.*

AGENDA:

I. Call To Order.
II. Approval of the Minutes.
III. Summary Report of the Finance, Budget and Program Committee.
IV. Summary Report of the Audit Committee.
V. Summary Report of the Finance, Budget and Program Committee.
VI. Financial Report.
VII. Chief Executive Officer's Quarterly Management Report.
VIII. Adjournment.

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. E8–25751 Filed 10–27–08; 8:45 am]

BILLING CODE 7570–02–P

NUCLEAR REGULATORY COMMISSION

Nine Mile Point 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC (Unistar); Notice of Receipt and Availability of Application for a Combined License

On September 30, 2008, Nine Mile Point 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC (UniStar) filed with the U.S. Nuclear Regulatory Commission (NRC, the Commission) pursuant to Section 103 of the Atomic Energy Act and Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' an application for a combined license (COL) for an evolutionary power reactor (US EPR) nuclear power plant adjacent to the existing Nine Mile Point Nuclear Station, Unit 1 and Unit 2, Oswego County, New York. The reactor is to be identified as Nine Mile Point 3 Nuclear Power Plant (NMP3NPP).

An applicant may seek a COL in accordance with Subpart C of 10 CFR Part 52. The information submitted by the applicant includes certain administrative information such as financial qualifications submitted pursuant to 10 CFR 52.77, as well as technical information submitted pursuant to 10 CFR 52.79.

Subsequent **Federal Register** notices will address the acceptability of the tendered COL application for docketing and provisions for participation of the public in the COL review process.

A copy of the application is available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and via the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* The accession number for the application is ML082900227. Future publicly available documents related to the application will also be posted in ADAMS. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/col.html.*

Dated at Rockville, Maryland, this 22nd day of October 2008.

For the Nuclear Regulatory Commission.

Prosanta Chowdhury,

Project Manager, US EPR Projects Branch, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E8–25701 Filed 10–27–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos.: 50–335, 50–389; License Nos.: DPR–67, NPF–16; EA–08–172]

In the Matter of Florida Power and Light Company St. Lucie Nuclear Plant; Confirmatory Order (Effective Immediately)

I

Florida Power and Light Company (FPL or Licensee) is the holder of Operating License Nos. DPR–67 and NPF–16, issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 50 on March 1, 1976, and April 6, 1983, respectively. The license authorizes the operation of St. Lucie Nuclear Plant, Units 1 and 2, (St. Lucie or facility) in accordance with conditions specified therein. The facility is located on the Licensee's site in Jensen Beach, Florida.

This Confirmatory Order is the result of an agreement reached during an alternative dispute resolution (ADR) mediation session conducted on August 25, 2008.

II

On January 7, 2008, the NRC's Office of Investigations (OI) completed an investigation (OI Case No. 2–2007–011) regarding activities at the St. Lucie Nuclear Plant. Based on the evidence developed during the investigation, the NRC staff concluded that on April 21 and 23, 2006, a container was permitted to enter the site without being properly searched, in apparent violation of 10 CFR 73.55(d)(3), Section 9.4 of the St. Lucie Physical Security Plan, and licensee implementing procedure Security Force Instruction (SFI) 2100. Specifically, after permitting the container into the site on April 21, 2006, a Security Operations Supervisor deliberately failed to conduct a search of the container to verify its contents in the manner required by licensee implementing procedure SFI 2100. The Security Operations Supervisor then left the container unattended, and the container remained inside the site for an extended period of time. The results of the investigation were sent to FPL in a letter dated June 27, 2008.

III

On August 25, 2008, the NRC and FPL met in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

1. The NRC and FPL agreed that a violation occurred on April 21 and 23, 2006, when a container was permitted to enter the site without being properly searched, in violation of 10 CFR 73.55(d)(3), Section 9.4 of the St. Lucie Physical Security Plan, and licensee implementing procedure SFI 2100. Specifically, after permitting the container into the site on April 21, 2006, a Security Operations Supervisor deliberately failed to conduct a physical search of the container by verifying its contents, in violation of licensee implementing procedure SFI 2100. The Security Operations Supervisor then left the container unattended, and the container remained inside the site for an extended period of time.

2. Based on FPL's review of the incident, its root cause analysis, and NRC concerns with respect to precluding recurrence of the violation, FPL agreed to corrective actions and enhancements, as fully delineated in Section V of the Confirmatory Order.

3. At the ADR session, the NRC and FPL agreed that the above elements involving the violation, and FPL's corrective actions and enhancements as delineated in Section V, will be incorporated into a Confirmatory Order.

4. In consideration of the commitments delineated in Section V of this Confirmatory Order, the NRC agrees to exercise enforcement discretion to forego issuance of a Notice of Violation against FPL for all matters discussed in the NRC's letter to FPL of June 27, 2008 (EA–08–172).

5. This agreement is binding upon successors and assigns of the St. Lucie Nuclear Plant and FPL.

On October 9, 2008, the Licensee consented to issuance of this Order with the commitments, as described in Section V below. The Licensee further agreed that this Order is to be effective upon issuance and that it has waived its right to a hearing.

IV

Since the licensee has agreed to take actions to address the violation as set forth in Section III above, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that the Licensee's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that the Licensee's commitments be confirmed by this Order. Based on the above and the Licensee's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 104b, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 50, *it is hereby ordered*, Effective Immediately, That License Nos. DPR–67 AND NPF–16 are modified as follows:

a. FPL will ensure current FPL Site procedures clearly address requirements for search thoroughness and completeness and that current FPL Site training lesson plans address this requirement.

b. FPL will proceduralize fleet-wide security force personnel standards of performance and professionalism in a Conduct of Security procedure. Training on the new procedure was conducted for all security force personnel and will be provided to newly hired security force personnel.

c. FPL will create a fleet security organization, and will increase on-site staffing of security organizations at St. Lucie, Turkey Point, and Seabrook Station to augment oversight of the contract security force. FPL will evaluate the security organization at Point Beach to determine management staffing needs.

d. FPL will proceduralize management observations of the security force by FPL security personnel.

e. FPL will conduct a fleet-wide briefing of security force supervisors and officers regarding this event and reinforcing proper search methods and requirements.

f. FPL will establish a fleet-wide vehicle and material search procedure to provide consistency in processes. This procedure will include a standardized search checklist, provisions for documentation of vehicle and material search completion, and guidance to address and mitigate any factors that may impact security officers' ability to perform the search.

g. FPL will establish a fleet-wide lesson plan for individual tasks concerning vehicle and material searches. Training will be conducted for future new hire sessions for security officers and annual requalifications.

h. FPL agrees to complete all corrective actions and enhancements identified in Section V within nine months of the date of issuance of the Confirmatory Order. Training on the

new guidelines and lesson plan will be completed beginning the cycle following the approval date of the relevant procedure and the lesson plan.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by FPL of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

If a person other than FPL requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309 (d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

A request for a hearing must be filed in accordance with the NRC E-Filing rule, which became effective on October 15, 2007. The NRC E-filing Final Rule was issued on August 28, 2007 (72 FR 49,139) and was codified in pertinent part at 10 CFR Part 2, Subpart B. The E-Filing process requires participants to submit and serve documents over the internet or, in some cases, to mail copies on electronic optical storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five (5) days prior to the filing deadline the requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate also is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they may obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their works.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A request for hearing shall not stay the immediate effectiveness of this order.

Dated this 20th day of October 2008.

For the Nuclear Regulatory Commission.

Luis A. Reyes,

Regional Administrator.

[FR Doc. E8–25702 Filed 10–27–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Issuance of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Regulatory Guide 1.114,

Revision 3, ''Guidance to Operators at the Controls and to Senior Operators in the Control Room of a Nuclear Power Unit.''

FOR FURTHER INFORMATION CONTACT: Mark Orr, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6373 or e-mail to *Mark.Orr@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 3 of Regulatory Guide 1.114, ''Guidance to Operators at the Controls and to Senior Operators in the Control Room of a Nuclear Power Unit,'' was issued with a temporary identification as Draft Regulatory Guide DG–1194. This guide describes a method that the staff of the NRC considers acceptable for complying with the Commission's regulations that require the presence of an operator at the controls of a nuclear power unit and a senior operator in the control room from which the nuclear power unit is being operated. In addition, this guide clarifies and provides guidance on the acceptable boundaries of the control room. The ''vital area,'' as identified in Title 10 Section 73.2, ''Definitions,'' of the Code of Federal Regulations (10 CFR 73.2), and 10 CFR 73.55(c) serves as the basis for the ''control room vital area'' as used in this regulatory guide.

II. Further Information

In April 2008, DG–1194 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on June 6, 2008. The staff's responses to the public comments are located in the NRC's Agencywide Documents Access and Management System (ADAMS), Accession Number ML082380256.

Electronic copies of Regulatory Guide 1.114 are available through the NRC's public Web site under ''Regulatory Guides'' at *http://www.nrc.gov/reading-rm/doc-collections/.*

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 21st day of October, 2008.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–25700 Filed 10–27–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of October 27, November 3, 10, 17, 24, December 1, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of October 27, 2008

There are no meetings scheduled for the week of October 27, 2008.

Week of November 3, 2008—Tentative

Thursday, November 6, 2008

1:30 p.m. Briefing on NRC International Activities (Public Meeting) (Contact: Karen Henderson, 301 415–0202).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Friday, November 7, 2008

2 p.m. Meeting with Advisory Committee on Reactor Safeguards (Public Meeting) (Contact: Tanny Santos, 301 415–7270).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of November 10, 2008—Tentative

There are no meetings scheduled for the week of November 10, 2008.

Week of November 17, 2008—Tentative

There are no meetings scheduled for the week of November 17, 2008.

Week of November 24, 2008—Tentative

There are no meetings scheduled for the week of November 24, 2008.

Week of December 1, 2008—Tentative

There are no meetings scheduled for the week of December 1, 2008.

* * * * *

*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.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

* * * * *

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 301–492–2279, 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 *darlene.wright@nrc.gov.*

Dated: October 23, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. E8–25759 Filed 10–24–08; 11:15 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58778A; File No. SR–CBOE–2008–90]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of a Proposed Rule Change Related to Trades in Restricted Classes; Correction

October 23, 2008.

In FR Doc. No. E8–24971, for Tuesday, October 21, 2008, on page 62577, third column, first full paragraph, the first sentence is revised to read:

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 [4a] and, in particular, the requirements of Section 6(b) of the Act [5] and the rules and regulations thereunder.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority (17 CFR 200.30–(a)(12).

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25627 Filed 10–27–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58827; File No. SR–NASDAQ–2008–083]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Nasdaq Options Maintenance Tool and Related Fees

October 21, 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 October 16, 2008, The NASDAQ Stock Market LLC (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders 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 the Substance of the Proposed Rule Change

Nasdaq proposes to establish a new service and related fees for use on the Nasdaq Options Market. The new Nasdaq Options Maintenance Tool will enable subscribers to query trades, correct trades and/or allocate trades to appropriate accounts and sub-accounts.

The text of the proposed rule change is below. Proposed new language is *italicized*.[5]

* * * * *

7039. Nasdaq Options Maintenance Tool

The Nasdaq Options Maintenance Tool will be available to each user at no cost until October 31, 2008, and for a subscription fee of $200 per month, per user thereafter.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to establish a new service, the Nasdaq Options Maintenance Tool (''OMT''), and establish related fees. The OMT is a new web-based options back-office tool that gives users the ability to query trades, correct trades and/or allocate trades to the appropriate accounts and sub-accounts for clearing. The Options Clearing Corporation (''OCC'') requires firms to provide certain information when submitting a trade for clearing. Currently, other options exchanges make available to firms a tool with which they can correct trade clearing information that is submitted to the OCC.[6] Certain firms have requested that Nasdaq provide a similar tool so that they may correct their trade-related clearing information. In response, Nasdaq has developed the OMT, which will allow users to correct certain OCC-required trade information. Specifically, the OMT will allow a firm to correct a trade's account number or designate a sub-account number, correct a trade's designation as opening or closing, and change the Clearing Member Trade Assignment clearing firm. The OMT will also allow firms to correct a trade's OCC designation as Customer, Firm, or Market Maker.

Nasdaq proposes to offer the OMT at no cost through October 31, 2008, after which Nasdaq proposes to charge a subscription fee of $200 per month, per user. Nasdaq believes the subscription fee fairly reflects the value of this product. Use of the OMT is voluntary and the subscription fee will be imposed on all purchasers equally based on the number of users selected.

The proposed fee will cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things. The OMT is responsive to the requests of market participants, some of whom have determined that they could not participate on the Nasdaq Options Platform until they had this functionality was [sic] available.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(5) of the Act,[8] in particular, because it is designed to prevent fraudulent and

[4a] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] Changes are marked to the rules of The NASDAQ Stock Market LLC found at *http://nasdaqomx.cchwallstreet.com.*

[6] *See e.g.*, the International Securities Exchange PrecISE, and the Boston Options Exchange Back Office Trade Management Software.Certain firms have requested that Nasdaq provide a similar tool so that they may correct their trade-related clearing information. In response, Nasdaq has developed the OMT, which will allow users to correct certain OCC-required trade information. Specifically, the OMT will allow a firm to correct a trade's account number or designate a sub-account number, correct a trade's designation as opening or closing, and change the Clearing Member Trade Assignment clearing firm. The OMT will also allow firms to correct a trade's OCC designation as Customer, Firm, or Market Maker.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

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 mechanism of a free and open market and a national market system. Use of the Options Maintenance Tool is voluntary and the subscription fees will be imposed on all purchasers equally based on the number of users.

Nasdaq also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act[9] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. As noted, use of the Options Maintenance Tool is voluntary and the subscription fees will be imposed on all purchasers equally based on the number of users. The proposed fees will cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things. Nasdaq notes that the revenue associated with this product may be negligible as this tool was built to primarily support new volume into Nasdaq's Options Platform.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[12] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Immediate implementation of the OMT functionality should assist Nasdaq members in providing accurate clearing information to OCC by allowing firms to correct inaccurate trade information before it is submitted to OCC. Further, the OMT should assist firms in efficiently managing their back office clearing operations, such as handling Clearing Member Transfer Agreements. Finally, the Commission recognizes that Nasdaq would like to provide the OMT in the most expedited timeframe possible to attract firms to the Nasdaq Options Market, enhancing Nasdaq's competitive position. For these reasons, the Commission designates that the proposed rule change become operative immediately upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2008–083 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–083. 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 NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–083 and should be submitted on or before November 18, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–25651 Filed 10–27–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). Pursuant to Rule 19b–4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Audit and Financial Management Advisory (AFMAC)

AGENCY: U.S. Small Business Administration.

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 Audit and Financial Management Advisory (AFMAC). The meeting will be open to the public.

DATES: The meeting will be held on November 6, 2008 from 1:30 p.m. to approximately 4:30 p.m. Eastern Daylight Time.

ADDRESSES: The meeting will be held at the U.S. Small Business Administration, 409 3rd Street, SW., Office of the Chief Financial Officer Conference Room, 6th Floor, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the AFMAC. The AFMAC is tasked with providing recommendation and advice regarding the Agency's financial management, including the financial reporting process, systems of internal controls, audit process and process for monitoring compliance with relevant laws and regulations.

The purpose of the meeting is to discuss the SBA's FY 2008 Financial Statements, Credit Subsidy Modeling, Audit Findings, Agency Management Challenges, FY 2008 Agency Financial Report, FY 2008 Annual Performance Report, Lender Monitoring, FMFIA Assurance and A–123 Internal Control Program Results.

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 AFMAC must contact Jennifer Main, by fax or e-mail, in order to be placed on the agenda. Jennifer Main, Chief Financial Officer, 409 3rd Street, SW., 6th Floor, Washington, DC 20416, phone: (202) 205–6449, fax: (202) 205–6969, e-mail: *Jennifer.Main@sba.gov.*

Additionally, if you need accommodations because of a disability or require additional information, please contact Jeff Brown at (202) 205–6117, e-mail: *Jeffrey.Brown@sba.gov*, SBA, Office of Chief Financial Officer, 409 3rd Street, SW., Washington, DC 20416.

For more information, please visit our Web site at *http://www.sba.gov/aboutsba/sbaprograms/cfo/index.html.*

Dated: October 17, 2008.

Cherylyn Lebon,

SBA Committee Management Officer.

[FR Doc. E8–25658 Filed 10–27–08; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to existing OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and the SSA Reports Clearance Officer to the addresses or fax numbers listed below.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov*.

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. Therefore, your comments would be most helpful if you submit them to SSA within 60 days from the date of this publication. Individuals can obtain copies of these collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the e-mail address listed above.

1. *Application for EXTRA Help with Medicare Prescription Drug Plan Costs—20 CFR 418.3101—0960–0696.* The Medicare Modernization Act of 2003 mandated the creation of the Medicare Part D prescription drug coverage program and provided for certain subsidies for eligible Medicare beneficiaries to help pay for the costs of prescription drugs. SSA uses Form SSA–1020 (and the i1020, its electronic counterpart), the Application for Extra Help with Medicare Prescription Drug Plan Costs, to collect information to make Part D subsidy eligibility determinations.

In compliance with Public Law 110–275, beginning in January 2010, SSA will use a new version of Form SSA–1020. In this new version, SSA will eliminate questions about the value of life insurance policies and in-kind support and maintenance, and we will ask applicants about their interest in applying for the Medicare Savings Program. This information collection request (ICR) is for the new version we will use in 2010. The respondents are Medicare beneficiaries who are applying for the Medicare Part D subsidy.

Form type	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
SSA–1020 (paper application form)	560,000	1	30	280,000
i1020 (online application)	240,000	1	25	100,000
Field office interview	200,000	1	30	100,000
Totals	1,000,000			480,000

2. *Medicare Subsidy Quality Review Forms—20 CFR 418(b)(5)—0960–0707.* The Medicare Modernization Act of 2003 mandated the creation of the Medicare Part D prescription drug coverage program and provided for certain subsidies for eligible Medicare beneficiaries to help pay for the costs of prescription drugs. As part of its stewardship duties of the Medicare Part D subsidy program, SSA must conduct periodic quality review checks of the

information Medicare beneficiaries report on their subsidy applications (Form SSA–1020). SSA uses the Medicare Quality Review program to conduct these checks.

Beginning in January 2010, SSA will revise the Medicare Quality Review system to comply with Public Law 110–275. Specifically, we will: (1) Eliminate the use of Form SSA–9309, the Life Insurance Verification form; and (2) remove any questions about life insurance policy values and in-kind support and maintenance from the other forms in the collection. This ICR is for the revised Medicare Quality Review System, which we will not use until January 2010. The respondents are applicants for the Medicare Part D subsidy whom we have chosen to undergo a Quality Review.

Form No. and name	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated annual burden (hours)
SSA–9301 (Medicare Subsidy Quality Review Case Analysis Questionnaire)	5,000	1	30	2,500
SSA–9302 (Notice of Quality Review Acknowledgement Form for those with Phones)	5,000	1	15	1,250
SSA–9303 (Notice of Quality Review Acknowledgement Form for those without Phones)	500	1	15	125
SSA–9304 (Checklist of Required Information; burden accounted for with forms SSA–9302, SSA–9303, SSA–9311, SSA–9314)	.....	.....	.....	
SSA–9308 (Request for Information)	10,000	1	15	2,500
SSA–9310 (Request for Documents)	5,000	1	5	417
SSA–9311 (Notice of Appointment—Denial—Reviewer Will Call)	450	1	15	113
SSA–9312 (Notice of Appointment—Denial—Please Call Reviewer)	50	1	15	13
SSA–8510 (Authorization to the Social Security Administration to Obtain Personal Information)	5,000	1	5	417
SSA–9313 (Notice of Quality Review Acknowledgement Form for those with Phones)	2,500	1	15	625
SSA–9314 (Notice of Quality Review Acknowledgement Form for those without Phones)	500	1	15	125
Totals	34,000	.....	.....	8,085

3. *Redetermination of Eligibility for Help with Medicare Prescription Drug Plan Costs—0960–0723.* As required by the Medicare Modernization Act of 2003 (Pub. L. 108–173), SSA conducts low-income subsidy eligibility redeterminations for Medicare beneficiaries who filed for the subsidy and were determined by SSA to be eligible. SSA will conduct subsidy eligibility redeterminations under two circumstances: (1) When an individual completes Form SSA–1026–OCR–SM–SCE to report a subsidy changing event (marriage, separation from a spouse, separated spouses resume living together, divorce, annulment, or death); and (2) when SSA uses Form SSA–1026–OCR–SM–REDE to conduct an annual review of individuals who became entitled during the prior 12 months, an annual review of a percentage of individuals who are eligible for more than 12 months, and a review of individuals who report a change in income, resources, or household size that may affect the subsidy amount.

In compliance with Public Law 110–275, SSA will use a new version of Form SSA–1026 beginning in January 2010. In this new version, SSA will eliminate questions about the value of life insurance policies and in-kind support and maintenance. The respondents are current recipients of the Medicare Part D low-income subsidy who will undergo an eligibility redetermination for one of the reasons mentioned above.

Form	Number of respondents	Frequency of response (per year)	Average burden per response (in minutes)	Estimated annual burden (in hours)
SSA–1026–OCR–SM–SCE	11,984	1	18	3,595
SSA–1026–OCR–SM–REDE or SSA–1026–B	249,652	1	18	74,896
Total	261,636	.....	.....	78,491

Dated: October 22, 2008.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. E8–25691 Filed 10–27–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Request Approval From the Office of Management and Budget of a New Information Collection Activity, Request for Comments; National Flight Attendant Duty/Rest/Fatigue Field Study

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In response to a Congressional directive to conduct a flight attendant fatigue study, FAA's Civil Aerospace Medical Institute, will initiate a comprehensive analysis of fatigue in flight attendants across a range of operational conditions.

DATES: Please submit comments by November 28, 2008.

FOR FURTHER INFORMATION CONTACT: Carla Mauney on (202) 267–9895, or by e-mail at: *Carla.Mauney@faa.gov.*

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: National Flight Attendant Duty/Rest/Fatigue Field Study.

Type of Request: New collection.

OMB Control Number: 2120–XXXX.

Forms(s): There are no FAA forms associated with this collection.

Affected Public: A total of 210 Respondents.

Frequency: The information will be collected daily for one month.

Estimated Average Burden per Response: Approximately 45 minutes per response.

Estimated Annual Burden Hours: An estimated 4,725 hours.

Abstract: In response to a Congressional directive to conduct a flight attendant fatigue study, FAA's Civil Aerospace Medical Institute, will initiate a comprehensive analysis of fatigue in flight attendants across a range of operational conditions. The specific goals of this project are to systematically assess activity patterns, fatigue, and performance on- and off-duty in 210 flight attendants of various levels of seniority from US-based network, low-cost, and regional carriers embarking on domestic and extended international flights.

ADDRESSES: Send comments to the FAA at the following address: Ms. Carla Mauney, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on October 20, 2008.

Carla Mauney,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. E8–25507 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Deadline for Notification of Intent To Use the Airport Improvement Program (AIP) Sponsor, Cargo, and Nonprimary Entitlement Funds for Fiscal Year 2009

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces February 2, 2009, as the deadline for each airport sponsor to notify the FAA whether or not it will use its fiscal year 2009 entitlement funds available under Public Law No. 110–330 to accomplish Airport Improvement Program (AIP)-eligible projects that the sponsor previously identified through the Airports Capital Improvement Plan (ACIP) process during the preceding year. If a sponsor does not declare their intention regarding the use of fiscal year 2009 entitlement funds by February 2, 2009, FAA will be unable to take the necessary actions to designate these as ''protected'' carryover funds; these funds will not be carried over without a legislative enactment that provides an additional AIP authorization and an extension of the FAA's spending authority from the Airport and Airway Trust Fund beyond March 31, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Frank J. San Martin, Manager, Airports Financial Assistance Division, APP–500, on (202) 267–3831.

SUPPLEMENTARY INFORMATION:

Title 49 of the United States Code, section 47105(f), provides that the sponsor of each airport to which funds are apportioned shall notify the Secretary by such time and in a form as prescribed by the Secretary, of the sponsor's intent to apply for the funds apportioned to it (entitlements). This notice applies only to those airports that have had entitlement funds apportioned to them, except those nonprimary airports located in designated Block Grant States. Sponsors intending to apply for any of their available entitlement funds, including those unused from prior years, shall submit by February 2, 2009, a written indication to the designated Airports District Office (or Regional Office in regions without Airports District Offices) that they will advertise, bid, and submit an application prior to February 11, 2009, or by the date established by the designated Airport District or Regional Office.

This notice is promulgated to expedite and prioritize the grant-making process. In the past when there has been full-year funding for AIP, the FAA has established a deadline of May 1 for an airport sponsor to declare that it will defer use of its entitlement funding. Considering that Congress has authorized the AIP program only until March 31, 2009, i.e. into the middle of a fiscal year, and uncertainty about additional statutory action before the end of the fiscal year, the FAA is establishing February 2, 2009, as the deadline for each airport sponsor to notify the FAA whether or not it will use its fiscal year 2009 entitlement funds.

The AIP grant program is operating under the requirements of Public Law 110–329, the ''Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009'', which is a continuing resolution through March 6, 2009, and Public Law 110–330, the ''Federal Aviation Administration Extension Act of 2008, Part II'', enacted on September 30, 2008, which amends 49 U.S.C. 48103, to extend AIP for a six-month period beginning October 1, 2008 and ending on March 31, 2009. The FAA's expenditure authority from the Airport and Airway Trust Fund will expire on March 31, 2009, in the absence of an additional statutory extension. Therefore, to avoid the risk of not being able to carryover funds should an additional extension not be enacted,

and to allow at least three days for accounting processing time, AIP funds should be obligated in FAA's accounting records on or before March 3, 2009.

Sponsors have three options available to them regarding AIP grants during this period. First, sponsors may elect to make an application for a grant based on entitlements currently available to them. Sponsors that elect to take such a grant must submit grant applications to the FAA no later than February 11, 2009, in order to meet the March 3, 2009 obligation deadline. Second, sponsors may elect to wait until after the February 2, 2009 notification date for protection of carryover entitlements. However, if a sponsor does not declare their intention regarding the use of fiscal year 2009 entitlement funds by the February 2, 2009 deadline, FAA will be unable to take the necessary actions to designate these as ''protected'' carryover funds, and these funds would not be carried over without a legislative enactment that provides additional AIP authorization for fiscal year 2009 and extends the FAA's spending authority from the Airport and Airway Trust Fund beyond March 31, 2009. Third, sponsors may elect to declare their intention to carryover the entitlements prior to the February 2, 2009 deadline through sending an acceptable written notification of such intention by February 2, 2009. Unused carryover entitlements that have been deferred will be available in fiscal year 2010 as provided in current law. FAA will then issue discretionary grants from the deferred entitlement funds pursuant to the authority and limitations in section 471 17(f).

If a statutory extension beyond March 31, 2009 of the AIP program and the FAA's authority to make expenditures from the Trust Fund is enacted, additional entitlement funds may be available to sponsors. In that case, airport sponsors who did not previously declare their intention to carryover the entitlements must provide a written indication to the designated Airports District Office (or Regional Office in regions without Airports District Offices) that they will either carryover or use their fiscal year 2009 entitlements by May 1, 2009.

Issued in Washington, DC on October 21, 2008.

Benito DeLeon,

Director, FAA Office of Airport Planning and Programming.

[FR Doc. E8–25712 Filed 10–27–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 680]

Study of Competition in the Freight Railroad Industry

AGENCY: Surface Transportation Board.

ACTION: Notice of board meeting.

SUMMARY: The Board will meet with Christensen Associates at 10 a.m. on Thursday, November 6, 2008, in the Hearing Room on the first floor of the Board's headquarters in Washington, DC. The purpose of the meeting will be to discuss Christensen Associates' independent study entitled *Report to the U.S. STB on Competition and Related Issues in the U.S. Freight Railroad Industry.* The report assesses the current state of competition in the United States freight railroad industry. The meeting will be open for public observation but not public participation.

DATES: The meeting will take place on Thursday, November 6, 2008, beginning at 10 a.m.

ADDRESSES: The meeting will be held in the Hearing Room on the first floor of the Board's headquarters at Patriot's Plaza, 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: A. Dennis Watson, Office of Public Assistance, Governmental Affairs, and Compliance, Telephone: (202) 245–0234, FIRS: (800) 877–8339.

SUPPLEMENTARY INFORMATION: In September 2007, the Board awarded a contract to Christensen Associates to conduct an independent study that provides a comprehensive analysis of a wide range of issues including competition, capacity, and the interplay between the two. The report also includes an examination of various regulatory policy alternatives that could lead to changes in the Board's regulatory approach if necessary.

The Board will release the report to the public in early November and will solicit written public comments at that time.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: October 23, 2008.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–25696 Filed 10–27–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entities Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of four newly-designated entities whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, ''Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.''

DATES: The designation by the Director of OFAC of the four entities identified in this notice pursuant to Executive Order 13382 is effective on October 22, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia*, of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the ''Order''), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of State, in

consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On October 22, 2008, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated four entities whose property and interests in property are blocked pursuant to Executive Order 13382.

The list of additional designees is as follows:

1. EXPORT DEVELOPMENT BANK OF IRAN (a.k.a. BANK TOSEH SADERAT IRAN; a.k.a. BANK TOWSEEH SADERAT IRAN; a.k.a. EDBI), Export Development Building, Next to the 15th Alley, Bokharest Street, Argentina Square, Tehran, Iran; Tose'e Tower, Corner of 15th St., Ahmad Qasir Ave., Argentine Square, Tehran, Iran; No. 129, 21's Khaled Eslamboli, No. 1 Building, Tehran, Iran; C.R. No. 86936 (Iran); all branches worldwide [NPWMD].

2. EDBI STOCK BROKERAGE COMPANY, Tehran, Iran [NPWMD].

3. EDBI EXCHANGE COMPANY, Tehran, Iran [NPWMD].

4. BANCO INTERNACIONAL DE DESARROLLO, C.A., Urb. El Rosal, Avenida Francisco de Miranda, Edificio Dozsa, Piso 8, Caracas, C.P. 1060, Venezuela; RIF # J294640109 (Venezuela); SWIFT/BIC IDUNVECA; [NPWMD].

Dated: October 22, 2008.

Barbara Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–25599 Filed 10–27–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entities Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of six newly-designated entities whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, ''Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.''

DATES: The designation by the Director of OFAC of the six entities identified in this notice pursuant to Executive Order 13382 is effective on September 17, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the ''Order''), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On September 17, 2008, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated six entities whose property and interests in property are blocked pursuant to Executive Order 13382.

The list of additional designees is as follows:

1. ARMAMENT INDUSTRIES GROUP (a.k.a. ''AIG—Armament Industries Group''), Pasdaran Ave., P.O. Box 19585/777 Tehran, Iran; Sepah Islam Road, Karaj Special Road Km 10, Iran [NPWMD].

2. FARASAKHT INDUSTRIES, P.O. Box 83145–311, Kilometer 28, Esfahan—Tehran Freeway, Shahin Shahr, Esfahan, Iran [NPWMD].

3. IRAN AIRCRAFT MANUFACTURING INDUSTRIAL COMPANY (a.k.a. HESA; a.k.a. ''Hava Peyma Sazi–E Iran''; a.k.a. ''Hevapeimasazi''; a.k.a. ''Havapeyma Sazi Iran''; a.k.a. ''Havapeyma Sazhran'';

a.k.a. Iran Aircraft Manufacturing Industries; Karkhanejate Sanaye Havapaymaie Iran; Iran Aircraft Manufacturing Company; a.k.a. IAMCO; a.k.a. IAMI; a.k.a. HESA Trade Center; a.k.a. HTC), P.O. Box 83145–311, 28 km Esfahan—Tehran Freeway, Shahin Shahr, Esfahan, Iran; Shahih Shar Industrial Zone, Isfahan, Iran; P.O. Box 81465–935, Esfahan, Iran; P.O. Box 8140, No. 107 Sepahbod Gharany Ave, Tehran, Iran; P.O. Box 14155–5568, No. 27 Shahamat Ave., Vallie Asr Sqr, Post Code 15946, Tehran, Iran [NPWMD].

4. IRAN COMMUNICATION INDUSTRIES (a.k.a. ICI; a.k.a. Iran Communications Industries Group; a.k.a. Sanaye Mokhaberat Iran), P.O. Box 19295–4731, Pasdaran Avenue, Tehran, Iran; P.O. Box 19575–131, 34 Apadana Avenue, Tehran, Iran; Shahid Langari Street, Nobonyad Square Ave., Pasdaran, Tehran, Iran [NPWMD].

5. IRAN ELECTRONICS INDUSTRIES (a.k.a. IEI; a.k.a. Sanaye Electronic Iran; a.k.a. Sasad Iran Electronics Industries; a.k.a. Sherkat Sanayeh Electronics Iran), Company Registration Number: 829; P.O. Box 19575–365, Shahied Langari Street, Noboniad Sq, Pasdaran Ave, Saltanad Abad, Tehran, Iran; P.O. Box 71365–1174, Hossain Abad/Ardakan Road, Shiraz, Iran [NPWMD].

6. SHIRAZ ELECTRONICS INDUSTRIES (a.k.a. Shiraz Electronic Industries; a.k.a. SEI), P.O. Box 71365–1589, Shiraz, Iran; Hossain Abad Road, Shiraz, Iran [NPWMD].

Dated: October 22, 2008.

Barbara Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–25600 Filed 10–27–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entities Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of five newly-designated entities whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, ''Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.''

DATES: The designation by the Director of OFAC of the five entities identified in this notice pursuant to Executive Order 13382 is effective on August 12, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/offices/enforcement/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the ''Order''), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On August 12, 2008, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated five entities whose property and interests in property are blocked pursuant to Executive Order 13382.

The list of additional designees is as follows:

1. ESFAHAN NUCLEAR FUEL RESEARCH AND PRODUCTION CENTER (a.k.a. ENTC; a.k.a. ESFAHAN NUCLEAR TECHNOLOGY CENTER; a.k.a. NFRPC; a.k.a. ''ESFAHAN NUCLEAR FUEL AND PROCUREMENT COMPANY''; a.k.a. ''NERPC''), P.O. Box 81465–1589, Esfahan, Iran [NPWMD].

2. JABBER IBN HAYAN (a.k.a. JABER IBN HAYAN RESEARCH DEPARTMENT; a.k.a. JABR IBN HAYAN MULTIPURPOSE LABORATORIES; a.k.a. ''JABIR BIN AL-HAYYAN LABORATORY''; a.k.a. ''JHL''), c/o AEOI-JIHRD P.O. Box 11365–8486, Tehran, Iran [NPWMD].

3. NUCLEAR RESEARCH CENTER FOR AGRICULTURE AND MEDICINE (a.k.a. CENTER FOR AGRICULTURAL RESEARCH AND NUCLEAR MEDICINE; a.k.a. KARAJ NUCLEAR RESEARCH CENTER; a.k.a. NRCAM; a.k.a. ''KARAJI AGRICULTURAL AND MEDICAL RESEARCH CENTER''), P.O. Box 31585–4395, Karaj, Iran [NPWMD].

4. JOZA INDUSTRIAL COMPANY (a.k.a. JOZA INDUSTRIES COMPANY), P.O. Box 16595–159, Tehran, Iran [NPWMD].

5. SAFETY EQUIPMENT PROCUREMENT COMPANY (a.k.a. ''SEP CO.''), P.O. Box 16785–195, Tehran, Iran [NPWMD].

Dated: October 22, 2008.

Barbara Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–25601 Filed 10–27–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Blocked Persons Pursuant to the Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of two individuals whose property and interests in property have been unblocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons of the individuals identified in this notice whose property and interests in property were blocked pending investigation pursuant to the Kingpin Act is effective on October 22, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's web site (*http://www.treas.gov/ofac*) via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Act provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property of interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

In order to carry out the purposes of the Kingpin Act, the Secretary of the Treasury is authorized by the Kingpin Act to block during the pendency of an investigation all property and interests in property of any foreign country or a national thereof that are subject to the jurisdiction of the United States.

On October 22, 2008, the Acting Director of OFAC removed from the list of Specially Designated Nationals and Blocked Persons the individuals listed below, whose property and interests in property were blocked pending investigation pursuant to the Kingpin Act.

The listing of the unblocked individuals follows:

1. LUNA RIVERA, Guadalupe Rocio (a.k.a. LUNA DE ARREOLA, Guadalupe Rocio; a.k.a. LUNA DE ARRIOLA, Guadalupe Rocio); Mexico; DOB 22 Sep 1970; POB Chihuahua, Chihuahua, Mexico; Citizen Mexico; Nationality Mexico; (INDIVIDUAL) [BPI–SDNTK].

2. MORALES ANDRADE, Carlos Enrique, c/o AERO CONTINENTE S.A., Lima, Peru; DOB 30 Aug 1954; LE 08779161 (Peru) (INDIVIDUAL) [BPI–SDNTK].

Dated: October 22, 2008.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–25595 Filed 10–27–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control Unblocking of Specially Designated Narcotics Traffickers Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of three individuals whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, *Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers.*

DATES: The unblocking and removal from the list of Specially Designated Narcotics Traffickers of three individuals identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on October 22, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490. '

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and Secretary of State: (a) To play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on

behalf of, persons designated pursuant to the Order.

On October 22, 2008, the Acting Director of OFAC removed from the list of Specially Designated Narcotics Traffickers three individuals listed below, whose property and interests in property were blocked pursuant to the Order:

1. ALMANZA CANON, Nohora Juliana, c/o COSMEPOP, Bogota, Colombia; DOB 6 Dec 1972; Cedula No. 52557912 (Colombia) (individual) [SDNT]

2. GIL OSORIO, Alfonso, c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; c/o DISTRIBUIDORA MIGIL LTDA., Cali, Colombia; c/o BLANCO PHARMA S.A., Bogota, Colombia; c/o LABORATORIOS BLAIMAR DE COLOMBIA S.A., Bogota, Colombia; c/o FARMATODO S.A., Bogota, Colombia; c/o SERVICIOS SOCIALES LTDA., Barranquilla, Colombia; c/o DISTRIBUIDORA DE DROGAS CONDOR LTDA., Bogota, Colombia; c/o DEPOSITO POPULAR DE DROGAS S.A., Cali, Colombia; c/o DISTRIBUIDORA DE DROGAS LA REBAJA S.A., Bogota, Colombia; c/o D'CACHE S.A., Cali, Colombia; DOB 17 Dec 46; alt. DOB 17 Dec 40; Cedula No. 14949279 (Colombia); Passport 14949229 (Colombia); alt. Passport 14949279 (Colombia); alt. Passport 14949289 (Colombia); alt. Passport AC342060 (Colombia) (individual) [SDNT]

3. HERRERA TOBON, Maria Cecilia, c/o LABORATORIOS GENERICOS VETERINARIOS, Bogota, Colombia; DOB 25 Nov 1957; Cedula No. 31397821 (Colombia) (individual) [SDNT]

Dated: October 22, 2008.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–25591 Filed 10–27–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8899

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8899, Notice of Income Donated Intellectual Property.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice of Income Donated Intellectual Property.

OMB Number: 1545–1962.

Form Number: Form 8899.

Abstract: Form 8899 is filed by charitable org. receiving donations of intellectual property if the donor provides timely notice. The initial deduction is limited to the donor's basis, additional deductions are allowed to the extent of income from the property, reducing excessive deductions.

Current Actions: There is no change to the form at this time.

Type of Review: Approval requested from OMB.

Affected Public: Business or other for-profit, and not-for-profit institutions.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 3 hrs.

Estimated Total Annual Burden Hours: 5,430.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 17, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25602 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[PS–102–86]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, PS–102–86 (TD 8316), Cooperative Housing Corporations (§ 1.216–1(d)(2)).

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to R. Joseph Durbala, (202)

622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224 or through the internet (*RJoseph.Durbala@irs.gov).*

SUPPLEMENTARY INFORMATION:

Title: Cooperative Housing Corporations.

OMB Number: 1545–1041.

Regulation Project Number: PS–102–86 Final.

Abstract: Section 1.216–1(d)(2) of this regulation allows cooperative housing corporations to make an election whereby the amounts of mortgage interest and/or real estate taxes allocated to tenant-stockholders of the corporation will be based on a reasonable estimate of the actual costs attributable to each tenant-stockholders based on the number of shares held in the corporation.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 2,500.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 625.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 17, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25603 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8894

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8894, Request to Revoke Partnership Level Tax Treatment Election.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Request to Revoke Partnership Level Tax Treatment Election.

OMB Number: 1545–1955.

Form Number: 8894.

Abstract: IRC section 6231(a)(1)(B)(ii) allows small partnerships to elect to be treated under the unified audit and litigation procedures. This election can only be revoked with the consent of the IRS. Form 8894 will provide a standardize format for small partnership to request this revocation and for the IRS to process it.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time Per Respondent: 1 hour, 52 minutes.

Estimated Total Annual Burden Hours: 186.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 17, 2008.

R. Joseph Durbala,

Acting, IRS Reports Clearance Officer.

[FR Doc. E8–25631 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Third-Party Disclosure in IRS Regulations; Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing regulations, Third-Party Disclosure Requirements in IRS Regulations.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Third-Party Disclosure Requirements in IRS Regulations.

OMB Number: 1545–1466.

Abstract: These existing regulations contain third-party disclosure requirements that are subject to the Paperwork Reduction Act of 1995.

Current Actions: There are no changes being made to these regulations at this time.

Type of Review: Extension of currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 245,073,905.

Estimated Time per Respondent: Varies.

Estimated Total Annual Burden Hours: 68,885,183.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 17, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25632 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[FI–189–84]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the existing final regulations, FI–189–84 (TD 8517, Final), Debt Instruments With Original Discount; Imputed Interest on Deferred Payment Sales or Exchanges of Property.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Debt Instruments With Original Discount; Imputed Interest on Deferred Payment Sales or Exchanges of Property.

OMB Number: 1545–1353.

Regulation Project Number: FI–189–84.

Abstract: These regulations provide definitions, reporting requirements, elections, and general rules relating to the tax treatment of debt instruments with original issue discount and the imputation of, and accounting for, interest on certain sales or exchanges of property.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 525,000.

Estimated Time per Respondent: 2 hours 45 minutes.

Estimated Total Annual Burden Hours: 185,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will

be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 17, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25634 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8927

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8927, Determination Under Section 860(e)(4) by a Qualified Investment Entity.

DATES: Written comments should be received on or before December 29, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Determination Under Section 860(e)(4) by a Qualified Investment Entity.

OMB Number: 1545–XXXX.

Form Number: Form 8927.

Abstract: The American Jobs Creation Act of 2004 (AJCA) expanded the meaning of the term ''determination'' to include self-determinations made by a regulated investment company (RIC) or a real estate investment trust (REIT). IRC section 860(g) provides that no deficiency dividend deduction shall be allowed under IRC section 860(a) unless a claim is filed within 120 days after the date of the determination. Form 8927 is used by the RIC or REIT to establish the date of determination under IRC section 860(e)(4).

Current Actions: This is a new form to be submitted to OMB for approval. This form is being submitted for approval purposes.

Type of Review: New Approval request.

Affected Public: Individuals or households.

Estimated Number of Respondents: 50.

Estimated Time per Respondent: 2 hours 48 minutes.

Estimated Total Annual Burden Hours: 140.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 20, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–25641 Filed 10–27–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0121]

Proposed Information Collection (Obtaining Supplemental Information From Hospital or Doctor); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to this notice. This notice solicits comments for information needed to determine the insured's eligibility for continued disability insurance benefits.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 29, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0121 in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Obtaining Supplemental Information from Hospital or Doctor, VA FL 29–551b.

OMB Control Number: 2900–0121.

Type of Review: Extension of a currently approved collection.

Abstract: This form letter is used to request medical evidence from an insured's attending physician or hospital in connection with continuing disability insurance benefits.

Affected Public: Individuals or households.

Estimated Annual Burden: 61 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 244.

Dated: October 17, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–25642 Filed 10–27–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0034]

Proposed Information Collection (Trainee Request for Leave—Chapter 31, Title 38, U.S.C.) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to evaluate a trainee's request for leave from Vocational Rehabilitation and Employment Program training.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 29, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail to *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0034'' in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 461–9769 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Trainee Request for Leave—Chapter 31, Title 38, U.S.C., VA Form 28–1905h.

OMB Control Number: 2900–0034.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 28–1905h to request leave from their Vocational Rehabilitation and Employment Program training. The trainer or authorized school official must verify on the form that the absence will or will not interfere with claimant's progress in the program. Claimants will continue to receive subsistence allowance and other program services during the leave period as if he or she were attending training. Disapproval of the request may result in loss of subsistence allowance for the leave period.

Affected Public: Individuals or households.

Estimated Annual Burden: 7,500 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 30,000.

Dated: October 17, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–25644 Filed 10–27–08; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0690]

Proposed Information Collection (FSC Product Line Surveys) Activity; Comment Request

AGENCY: Office of Management, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Office of Management (OM), Department of Veterans Affairs (VA), is announcing an opportunity for

public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to obtain customers satisfaction on Financial Services Center (FSC) business process and system features.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 29, 2008.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to Rachel A. Moffitt, Office of Management, Financial Services Center (104/BDD), Department of Veterans Affairs, 1615 Woodward Street, Austin, TX 79772–001 or e-mail *rachel.moffitt@mail.va.gov.* Please refer to ''OMB Control No. 2900–0690'' in any correspondence. During the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rachel A. Moffitt at (512) 460–5310 or fax to (512) 460–5117.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles: FSC Product Line Surveys.

OMB Control Number: 2900–0690.

Type of Review: Extension of a currently approved collection.

Abstract: Financial Services Center (FCS) conducts annual surveys to evaluate customer satisfaction on various products and services provided by FSC. The data will used to improve FSC business practices and customer services.

Affected Public: Federal Government.

Estimated Annual Burden: 42 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 500.

Dated: October 17, 2008.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E8–25645 Filed 10–27–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
October 28, 2008

Part II

Department of Homeland Security

Transportation Security Administration

49 CFR Parts 1540, 1544, and 1560
Secure Flight Program; Final Rule

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Parts 1540, 1544, and 1560

[Docket No. TSA–2007–28572; Amendment Nos. 1540–9, 1544–8, and 1560–(New)]

RIN 1652–AA45

Secure Flight Program

AGENCY: Transportation Security Administration, DHS.

ACTION: Final rule.

SUMMARY: The Intelligence Reform and Terrorism Prevention Act 2004 (IRTPA) requires the Department of Homeland Security (DHS) to assume from aircraft operators the function of conducting pre-flight comparisons of airline passenger information to Federal government watch lists for domestic flights and international flights to, from, and overflying the United States. The Transportation Security Administration (TSA) is issuing this final rule to implement that congressional mandate.

This final rule allows TSA to begin implementation of the Secure Flight program, under which TSA will receive passenger and certain non-traveler information, conduct watch list matching against the No Fly and Selectee portions of the Federal government's consolidated terrorist watch list, and transmit a boarding pass printing result back to aircraft operators. TSA will do so in a consistent and accurate manner while minimizing false matches and protecting personally identifiable information.

On August 23, 2007, U.S. Customs and Border Protection (CBP) published a final rule to implement pre-departure advance passenger and crew manifest requirements for international flights and voyages departing from or arriving in the United States using CBP's Advance Passenger Information System (APIS). These rules are related. After the compliance date of this Secure Flight final rule, aircraft operators will submit passenger information to DHS through a single DHS portal for both the Secure Flight and APIS programs. This will allow DHS to integrate the watch list matching component of APIS into Secure Flight, resulting in one DHS system responsible for watch list matching for aviation passengers.

DATES: Effective December 29, 2008.

FOR FURTHER INFORMATION CONTACT: Kevin Knott, Policy Manager, Secure Flight, Office of Transportation Threat Assessment and Credentialing, TSA–19, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220, telephone (240) 568–5611.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) Web page at *http://www.regulations.gov*;

(2) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html*; or

(3) Visiting TSA's Security Regulations Web page at *http://www.tsa.gov* and accessing the link for ''Research Center'' at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Be sure to identify the docket number of this rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT**. Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at *http://www.sba.gov/advo/laws/law_lib.html*.

Abbreviations and Terms Used in This Preamble

APIS—Advance Passenger Information System
ATSA—Aviation and Transportation Security Act of 2001
AOIP—Aircraft Operator Implementation Plan
CBP—U.S. Customs and Border Protection
DHS—Department of Homeland Security
2006 DHS Appropriations Act—Department of Homeland Security Appropriations Act, 2006
2007 DHS Appropriations Act—Department of Homeland Security Appropriations Act, 2007
DHS TRIP—Department of Homeland Security Traveler Redress Inquiry Program
FBI—Federal Bureau of Investigation
FISMA—Federal Information Security Management Act
GAO—Government Accountability Office
HSPD—Homeland Security Presidential Directive
IASTA—International Air Services Transit Agreement
IATA—International Air Transport Association
IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004
NARA—National Archives and Records Administration
PNR—Passenger Name Record
PRI—Passenger Resolution Information
PIA—Privacy Impact Assessment
SFPD—Secure Flight Passenger Data
SSI—Sensitive Security Information
SORN—System of Records Notice
TSA—Transportation Security Administration
TSC—Terrorist Screening Center
TSDB—Terrorist Screening Database
VID—Verifying Identity Document

Outline of Final Rule

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I. Background

TSA performs passenger and baggage screening at the Nation's commercial airports.[1] Covered aircraft operators currently supplement this security screening by performing passenger watch list matching using the Federal No Fly and Selectee portions of the consolidated terrorist watch list maintained by the Federal government, as required under security directives that TSA issued following the terrorist attacks of September 11, 2001. Covered aircraft operators also conduct this watch list matching process for non-traveling individuals authorized to enter the sterile area[2] of an airport within the United States in order to escort a passenger or for some other purpose approved by TSA.

Section 4012(a) of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) requires DHS to assume from air carriers the comparison of passenger information to the Selectee and No Fly Lists and to utilize all appropriate records in the consolidated and integrated watch list that the Federal Government maintains.[3] The final report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission Report) recommends that the watch list matching function ''should be performed by TSA and it should utilize the larger set of watch lists maintained by the Federal government.'' See 9/11 Commission Report at 393.

Consequently, pursuant to sec. 4012 (a) of the IRTPA, TSA issues this final rule to implement the Secure Flight program. Under the program, TSA will receive passenger and certain non-traveler information from aircraft operators. After conducting watch list matching, TSA will transmit boarding pass printing results based on watch list matching results back to aircraft operators.

II. Secure Flight Program Summary

This final rule will affect all covered flights operated by U.S. aircraft operators that are required to have a full program under 49 CFR 1544.101(a),[4] and covered flights operated by foreign air carriers that are required to have a security program under 49 CFR 1546.101(a) or (b). These aircraft operators generally are the passenger airlines that offer scheduled and public charter flights from commercial airports. This final rule refers to them as ''covered U.S. aircraft operators'' and ''covered foreign air carriers'' respectively, and ''covered aircraft operators'' collectively.

TSA will assume the watch list matching function from aircraft operators to more effectively and consistently prevent certain known or suspected terrorists from boarding aircraft where they may jeopardize the lives of passengers and others. The Secure Flight program is designed to better focus enhanced passenger screening efforts on individuals likely to pose a threat to civil aviation, and to facilitate the secure and efficient travel of the vast majority of the traveling public by distinguishing them from individuals on the watch list.

In general, the Secure Flight program will compare passenger information only to the No Fly and Selectee List components of the Terrorist Screening Database (TSDB), which contains the Government's consolidated terrorist watch list, maintained by the Terrorist Screening Center (TSC).[5] In general, comparing passenger information against the No Fly and Selectee components of the TSDB during normal security circumstances will be satisfactory to counter the security threat versus using the entire TSDB. The No Fly and Selectee Lists are based on all the records in the TSDB and the No Fly and Selectee Lists represent the subset of names who meet the criteria of the No Fly and Selectee designations. However, as recommended by the 9/11 Commission and as required under the IRTPA, TSA may use ''the larger set of watch lists maintained by the Federal government'' when warranted by security considerations. For example, TSA may learn that flights on a particular route may be subject to increased security risk. Under this circumstance, TSA may decide to compare passenger information on some or all of the flights on that route against the full TSDB or other government databases, such as intelligence or law enforcement databases. Thus, TSA defines ''watch list'' for purposes of the Secure Flight program as the No Fly and Selectee List components of the Terrorist Screening Database maintained by the Terrorist Screening Center. For certain flights, the ''watch list'' may include the larger set of watch lists maintained by the Federal government as warranted by security considerations.

After the Secure Flight program completes the comparison of passenger information, TSA will return to the covered aircraft operators the boarding pass printing result to allow the aircraft operators to begin the process for issuing boarding passes to passengers. The boarding pass printing result for each passenger will return one of the following instructions to the covered aircraft operator regarding that passenger: (1) The covered aircraft operator may issue an unrestricted boarding pass; (2) the aircraft operator may issue a boarding pass indicating that the passenger has been selected for enhanced screening; (3) or the covered aircraft operator may not issue a boarding pass to the passenger, and the passenger must come to the airport for resolution. If TSA instructs the covered aircraft operator not to issue a boarding pass to a passenger, the covered aircraft operator must comply with procedures in its security program for requesting the passenger to present a verifying identity document when the passenger checks in at the airport. The covered aircraft operator may issue a boarding pass to that passenger only after

[1] See the Aviation and Transportation Security Act (ATSA) (Pub. L. 107–71, 115 Stat. 597, Nov. 19, 2001).

[2] ''Non-traveling individual'' means as an individual to whom a covered aircraft operator or covered airport operator seeks to issue an authorization to enter the sterile area of an airport in order to escort a minor or a passenger with disabilities or for some other purpose permitted by TSA. It would not include employees or agents of airport or aircraft operators or other individuals whose access to a sterile area is governed by another TSA regulation or security directive. 49 CFR 1540.3.

''Sterile Area'' means a portion of airport defined in the airport security program that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA, or by an aircraft operator under part 1544 of this chapter or a foreign air carrier under part 1546 of this chapter, through the screening of persons and property. 49 CFR 1540.5.

[3] Pub. L. 108–458, 118 Stat. 3638, Dec. 17, 2004; 49 U.S.C. 44903(j)(2).

[4] Covered U.S. aircraft operators who also operate flights under other security programs in 49 CFR 1544.101 may submit Secure Flight Passenger Data (SFPD) for their operations to TSA. 49 CFR 1560.101(a)(5).

[5] The TSC was established by the Attorney General in coordination with the Secretary of State, the Secretary of Homeland Security, the Director of the Central Intelligence Agency, the Secretary of the Treasury, and the Secretary of Defense. The Attorney General, acting through the Director of the Federal Bureau of Investigation (FBI), established the TSC pursuant to Homeland Security Presidential Directive 6 (HSPD–6), dated September 16, 2003, which required the Attorney General to establish an organization to consolidate the Federal government's approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in screening processes.

receiving a boarding pass printing result indicating that the passenger is cleared or has been selected for enhanced screening.

The final rule covers all flights conducted by covered U.S. aircraft operators, as well as all flights conducted by a covered foreign air carrier arriving in or departing from the United States, or overflying the continental United States, defined as the lower contiguous 48 states. The final rule collectively refers to the flights conducted by U.S. carriers and covered international flights that are regulated under this final rule as ''covered flights.''

IRTPA also requires DHS to assume from air carriers the task of comparing passenger information for international flights to or from the United States against the Federal government's consolidated and integrated terrorist watch list before departure of such flights. Initially, CBP will implement this requirement and conduct pre-departure watch list matching for international flights, through the Advance Passenger Information System (APIS). APIS is a widely used electronic data interchange system that commercial carriers with flights or vessel voyages arriving to or departing from the United States use to transmit electronically to CBP certain data on passengers and crew members. The former U.S. Customs Service, in cooperation with the former Immigration and Naturalization Service (INS) and the airline industry, developed APIS in 1988. On August 23, 2007, CBP published the Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels final rule (APIS Pre-Departure final rule) that requires air and vessel carriers to submit to CBP passenger manifest information before departure of a flight to or from the United States and for voyages from the United States to enable the DHS system to conduct watch list matching on passengers before they board an international flight or depart on certain voyages.[6]

In response to a substantial number of comments from the aviation industry, DHS has developed a unified approach to watch list matching for international and domestic passenger flights, to avoid unnecessary duplication of watch list matching efforts and resources and reduce the burden on aircraft operators. Pursuant to the APIS Pre-Departure final rule, the CBP system currently performs the watch list matching function for international flights to or from the United States as part of its overall screening of travelers. Ultimately, the watch list matching function for covered flights that are international air arrivals and departures will be transferred to TSA through the phased implementation of the Secure Flight rule. TSA will assume the aviation passenger watch list matching function for domestic and international passengers covered by this rule, while CBP will continue to conduct border enforcement functions. To streamline the transmission of passenger information, DHS has established one portal through which aircraft operators will send their passenger information for both programs and receive a printing result.

A. Differences Between the Proposed Rule and the Final Rule

Below is a table, which summarizes the difference between the proposed rule text in the Secure Flight NPRM and the rule text in this final rule.

	Secure flight proposed rule	Secure flight final rule
Required Passenger Information in the SFPD (49 CFR 1540.107 and 1560.101).	1. Covered aircraft operators would be required to request individuals' date of birth and gender to transmit this information, if available, to TSA. 2. Individuals would not be required to provide their date of birth and gender.	1. Covered aircraft operators must collect individuals' date of birth and gender and transmit this information to TSA. 2. Individuals must provide their date of birth and gender.
Definition of Overflight (49 CFR 1560.3)	Overflights mean flights that overfly the continental United States.	The final rule clarifies that continental United States does not include Hawaii or Alaska.
Request for and Transmission of SFPD (49 CFR 1560.101).	Covered aircraft operators would not be able to accept a reservation or request to enter the sterile area unless the individual provides his or her full name.	Covered aircraft operators may accept a reservation without a full name, date of birth, or gender. For reservations made 72 hours prior to the scheduled time of departure for each covered flight, the covered aircraft operator may choose to collect full name, gender, and date of birth for each passenger when the reservation is made or at a time that is no later than 72 hours prior to the scheduled time of departure of the covered flight. For an individual that makes a reservation for a covered flight within 72 hours of the scheduled time of departure for the covered flight, the covered aircraft operator must collect the individual's full name, date of birth, and gender at the time of reservation. Covered aircraft operators may not transmit SFPD to TSA without these data elements.
Implementation Schedule (49 CFR 1560.101)	1. Covered aircraft operators would be required to request passenger information 60 days after the effective date of the final rule. 2. Covered aircraft operators would be required to begin transmitting SFPD to TSA on the date set forth in their AOIP.	Implementation schedule will be set forth in the AOIP.

[6] 72 FR 48320 (Aug. 23, 2007).

	Secure flight proposed rule	Secure flight final rule
Boarding Pass Issuance for a Covered International Flight that was Connected to a Non-Covered Flight (49 CFR 1560.105).	A covered aircraft operator may not issue a boarding pass for a covered international flight in conjunction with issuing a boarding pass for the non-covered flight unless the covered aircraft operator has obtained a boarding pass printing result from TSA permitting it to issue a boarding pass for the covered international flight.	A covered aircraft operator may authorize the issuance of a boarding pass for a covered international flight in conjunction with issuing a boarding pass for the non-covered flight provided that the covered aircraft operator takes the required actions to confirm and to comply with the boarding pass printing result for the passenger prior to the passenger boarding the aircraft.
Presenting Verifying Identity Document (VID) (49 CFR 1560.105).	Covered aircraft operators must request VID from passengers for whom TSA has not provided a watch list matching result or has placed on inhibited status.	The final rule clarifies that covered aircraft operators must request the VID from passengers at the airport. The VID may be presented at a kiosk that is capable of determining that the identification is a valid VID, authenticating the VID, and reading and transmitting passenger information from the VID.
Aircraft Operator Implementation Plan (49 CFR 1560.109).	Covered aircraft operators would be required to submit their AOIP to TSA within 30 days of the effective date of the final rule for approval. Once approved, the AOIP would be part of the covered aircraft operator's security program.	TSA will provide the AOIP to each covered aircraft operator for them to adopt as an amendment to their security program.

B. Secure Flight Passenger Data

Under the Secure Flight program, TSA requires covered aircraft operators to collect information from passengers, transmit passenger information to TSA for watch list matching purposes, and process passengers in accordance with TSA boarding pass printing results regarding watch list matching results. 49 CFR 1560.101 and 1560.105. TSA defines this passenger information, along with other information summarized below, as Secure Flight Passenger Data (SFPD). See 49 CFR 1560.3.

For passengers on covered flights, TSA requires covered aircraft operators to request a passenger's full name, gender, date of birth, and Redress Number [7] (if available) or Known Traveler Number [8] (if available once the known traveler program is implemented). Even though covered aircraft operators are required to request all of the above data elements from passengers, passengers are only required to provide their full name, date of birth, and gender to allow TSA to perform watch list matching. TSA is not requiring individuals to provide the other data elements to aircraft operators. Covered aircraft operators must transmit to TSA the information provided by the passenger in response to the request described above.

TSA notes that one of the changes between the NPRM and the final rule is the addition of this requirement that individuals are required to provide their date of birth and gender to aircraft operators. In the Secure Flight NPRM, TSA had discussed its legal authority for this rule, in general. See 72 FR 48357. With respect to this changed provision, TSA notes that it has legal authority to do so under § 4012 of the IRTPA. Section 4012 mandates that TSA obtain passenger information in order to assume the function of conducting watch list matching comparisons. In addition, TSA has broad authority to do so under the Aviation and Transportation Security Act (ATSA) (Pub. L. 107–71, Nov 19, 2001). Specifically, TSA can assess threats to transportation; enforce security-related regulations and requirements; oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities; require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel; and carry out such duties, and exercise such other powers, relating to transportation security as appropriate. See 49 U.S.C. 114(f)(2), (7), (11), (12), and (15). In conjunction with these provisions, TSA also has authority specifically for the Secure Flight Program. Under 49 U.S.C. 44903(j)(2)(C)(iv), the Assistant Secretary ''shall require air carriers to supply the Assistant Secretary the passenger information needed to begin implementing the advanced passenger prescreening system.'' Given that TSA is required to collect this information from air carriers, it follows that individuals must provide that information to air carriers. Air carriers would be unable to fulfill their obligation if there were not a corresponding obligation on individuals to provide their information to air carriers.

Covered aircraft operators also must transmit to TSA passport information, if available. Although TSA is not requiring covered aircraft operators to request passport information under this final rule, passengers may provide passport information pursuant to other travel requirements such as CBP APIS if a passenger is traveling abroad as part of the same reservation/itinerary. When passengers provide passport information to covered aircraft operators, the operators must transmit the passport information to a single DHS portal from which the appropriate information will be sent to TSA and CBP.

Additionally, covered aircraft operators must transmit to TSA certain non-personally identifiable information such as itinerary information and record locator numbers. This information will allow TSA to effectively prioritize watch list matching efforts, communicate with the covered aircraft operator, and facilitate an operational response, if necessary, to an individual who is on the watch list.

When a non-traveling individual seeks authorization from a covered

[7] A Redress Number is a unique number that DHS currently assigns to individuals who use the DHS Traveler Redress Inquiry Program (TRIP). Under the Secure Flight program, individuals will use the Redress Number in future correspondence with DHS and when making future travel reservations. The Redress Number is further discussed in the Secure Flight Information Collection Requirements section below. See § 1560.3.

[8] A Known Traveler Number would be a unique number assigned to ''known travelers'' for whom the Federal government has already conducted a threat assessment and has determined do not pose a security threat. The Known Traveler Number is further discussed in the Secure Flight Information Collection Requirements section. See § 1560.3.

aircraft operator to enter an airport sterile area in the United States (such as to escort a minor or assist a passenger with a disability), covered aircraft operators must request from the non-traveler and transmit to TSA the same information requested from passengers. Non-travelers are only required to provide their full name, date of birth, and gender to allow TSA to perform watch list matching, as well as certain non-personally identifiable information, including the airport code for the sterile area in the U.S. to which the non-traveler seeks access.

The following chart details the information that TSA requires covered aircraft operators to request from passengers and certain non-traveling individuals, the information that those individuals are required to provide, and the information covered aircraft operators must transmit to TSA if available.

INFORMATION COLLECTION REQUIREMENTS FOR SECURE FLIGHT

Data elements	Covered aircraft operators must request from passengers and certain non-travelers	Passengers and certain non-travelers must provide at time of reservation	Covered aircraft operators must transmit to TSA if available
Full Name	X	X	X
Date of Birth	X	X	X
Gender	X	X	X
Redress Number or Known Traveler Number	X		X
Passport Information [9]			X
Itinerary Information [10]			X
Reservation Control Number			X
Record Sequence Number			X
Record Type			X
Passenger Update Indicator			X
Traveler Reference Number			X

C. 72-Hour Requirement

Under the Secure Flight program, covered aircraft operators must transmit the SFPD that is available in their system, to TSA approximately 72 hours prior to the scheduled flight departure time. For reservations created within 72 hours of flight departure, covered aircraft operators must submit SFPD as soon as it becomes available.

D. Instructions to Covered Aircraft Operators

TSA matches the SFPD provided by covered aircraft operators against the watch list. Based on the watch list matching results, TSA will instruct a covered aircraft operator in its boarding pass printing result to process the individual in the normal manner, to identify the individual for enhanced screening at a security checkpoint, or to deny the individual transport or authorization to enter a U.S. airport's sterile area. To ensure the integrity of the boarding pass printing results and to prevent use of fraudulent boarding passes, TSA will also provide instructions for placing bar codes on the boarding passes in the future. TSA may provide instructions to the covered aircraft operators through an amendment to their security programs.

E. Summary of Requirements

A brief summary of the requirements in this final rule is presented below. A detailed explanation of these requirements and any applicable changes from the NPRM are provided in Section III, Response to Comments, of this final rule.

Requirements of Covered Aircraft Operators. This final rule requires covered aircraft operators that conduct certain scheduled and public charter flights to:

- Adopt an Aircraft Operator Implementation Plan (AOIP). 49 CFR 1560.109(b).
- Conduct Operational Testing with TSA in accordance with their AOIP. 49 CFR 1560.109(a).
- Request full name, date of birth, gender, and Redress Number (if available) or Known Traveler Number (if implemented and available) from passengers and certain non-traveling individuals. 49 CFR 1560.101(a).
- Transmit full name, date of birth, and gender and any other available SFPD for passengers and non-traveling individuals seeking transport and/or authorization to enter a U.S. airport's sterile area, in accordance with the covered aircraft operator's AOIP, approximately 72 hours prior to the scheduled flight departure time. 49 CFR 1560.101(b).
- Make a privacy notice available on public Web sites and self-serve kiosks before collecting any personally identifiable information from passengers or non-traveling individuals. 49 CFR 1560.103.
- Request a verifying identity document (VID) at the airport in either of the following situations: (1) TSA has not informed the covered aircraft operator of the results of watch list matching for an individual by the time the individual attempts to check-in; or (2) if TSA informs the covered aircraft operator that an individual must be placed on inhibited status [11] and may not be issued a boarding pass or authorization to enter a U.S. airport's sterile area. A verifying identity document is one that has been issued by a U.S. Federal, State, or tribal government that: (1) Contains the individual's full name, photo, and date of birth; and (2) has not expired. 49 CFR 1560.3 and 1560.105(c).
- When necessary, submit information from the VID to TSA to resolve potential watch list matches. In some cases, TSA may also request that the covered aircraft operator communicate a physical description of the individual. See 49 CFR 1560.105(c).

[9] Passport information is the following information from a passenger's passport: (1) Passport number; (2) country of issuance; (3) expiration date; (4) gender; (5) full name. See § 1560.3.

[10] Itinerary information is the following information about a covered flight: (1) Departure airport code; (2) aircraft operator; (3) departure date; (4) departure time; (5) arrival date; (6) scheduled arrival time; (7) arrival airport code; (8) flight number; (9) operating carrier (if available). For non-traveling individuals in the United States, the airport code for the sterile area to which the non-traveling individual seeks access. See § 1560.3.

[11] ''Inhibited status,'' as defined in this rule, means the status of a passenger or non-traveling individual to whom TSA has instructed a covered aircraft operator or a covered airport operator not to issue a boarding pass or to provide access to the sterile area. See 49 CFR 1560.3.

• Not issue a boarding pass or permit an individual to board an aircraft or enter a sterile area in a U.S. airport that serves covered flights under this regulation until that individual provides a VID when requested under the circumstances described above, unless otherwise authorized by TSA. 49 CFR 1560.105(d).

• Comply with instructions from TSA to designate identified individuals for enhanced screening before boarding a covered flight or accessing a sterile area in a U.S. airport. 49 CFR 1560.105(b)(2).

• Place codes on boarding passes in accordance with TSA instructions to be set forth in the Consolidated User Guide in the future. 49 CFR 1560.105(b)(2) and (3).

Requirements of Individuals

• Individuals who wish to make a reservation on a covered flight or to access a sterile area must provide their full names, date of birth, and gender to the covered aircraft operators.

• Passengers and non-traveling individuals seeking access to a U.S. airport's sterile area, for whom TSA has not provided a watch list matching result or has provided inhibited status, must present a VID to the covered aircraft operator if they wish to board their flights. After presenting the VID, an individual may receive a boarding pass to board an aircraft or enter a sterile area if the aircraft operator receives a watch list matching result from TSA that permits the issuance of a boarding pass or authorization to enter a sterile area. 49 CFR 1540.107(c).

Government Redress Procedures Available to Individuals. This final rule explains the redress procedures for individuals who believe they have been improperly or unfairly delayed or prohibited from boarding a flight as a result of the Secure Flight program. These individuals may seek assistance through the redress process by submitting certain personal information, as well as copies of certain identification documents, to the existing DHS Traveler Redress Inquiry Program (DHS TRIP).[12] The final rule explains the process the Federal government will use to review the information submitted and to provide a timely written response. 49 CFR part 1560, subpart C.

F. Implementation Phases of Secure Flight

TSA will implement the Secure Flight program in two phases. The first phase includes covered flights between two domestic points in the United States. The second phase includes covered flights overflying the continental United States, covered flights to or from the United States, and all other flights (such as international point-to-point flights) operated by covered U.S. aircraft operators not covered in the first phase.

1. Implementation of Secure Flight for Domestic Flights

During the first phase of implementation, TSA will assume the watch list matching function for domestic flights conducted by covered U.S. aircraft operators, including those covered aircraft operators' private charter flight operations. TSA will conduct operational testing with such covered U.S. aircraft operators to ensure that the aircraft operators' systems are compatible with TSA's system. After successful operational testing with covered U.S. aircraft operators, TSA will assume the watch list matching function for domestic flights from those aircraft operators.

2. Implementation of Secure Flight for Overflights and International Flights

During the second phase of Secure Flight, TSA will require all covered aircraft operators to submit SFPD for covered flights that overfly the continental United States. The continental U.S. is defined as the contiguous lower 48 states and does not include Alaska or Hawaii. Flights that transit the airspace of the continental United States between two airports or locations in the same country, where that country is Canada or Mexico, are not included in this final rule. We discuss in further detail below the reason for excluding these flights from this final rule. Covered aircraft operators that are unsure whether a particular flight overflies the continental United States may ask TSA for a determination on whether the flight is an overflight.

The second phase of Secure Flight will also include international flights. Until TSA implements the Secure Flight program for international flights by covered U.S. and foreign aircraft operators, the CBP system will conduct pre-departure watch list matching for international flights under the APIS Pre-Departure final rule. This interim approach will allow DHS to more quickly address the threat of terrorism on flights arriving in and departing from the United States.

During the second phase of Secure Flight implementation, TSA will assume the watch list matching function for covered international flights from the CBP system. There are a few differences between TSA and CBP processes. Under the Secure Flight program, covered aircraft operators will need to request passenger information at the time of reservation or prior to transmitting the passenger's SFPD; this is not the case under the APIS Pre-Departure final rule. Also, as described below, TSA requires collection of different data elements (SFPD) under the Secure Flight program than CBP collects under the APIS regulations. For its border-control functions, which CBP will continue to perform under the APIS rule, the Department (through CBP) will continue to collect APIS data. Given this, and to provide a single point of contact, covered aircraft operators can transmit both APIS data and SFPD in a single transmission to the DHS portal, which will route information to TSA and CBP accordingly.[13] In turn, aircraft operators will receive one boarding pass printing result from DHS. The following table lists the data elements that CBP collects under its APIS regulations and that TSA will collect under the Secure Flight[14] program.[15]

Data elements	APIS regulation (international flights)[14]	Secure flight regulation[15]
Full Name	X	X
Date of Birth	X	X
Gender	X	X
Redress Number or Known Traveler Number		X*
Passport Number	X	X*

[12] Information about DHS TRIP is available at *http://www.dhs.gov/trip*.

[13] Covered aircraft operators may also submit Passenger Name Record information to CBP through this DHS portal.

[14] All APIS data elements are required, except country of residence (which is not required for departure from the U.S.) and passport information (which is required only when a passport is required for travel).

[15] Covered aircraft operators must provide data elements listed for Secure Flight to the extent they are available.

Data elements	APIS regulation (international flights) [14]	Secure flight regulation [15]
Passport Country of Issuance	X	X*
Passport Expiration Date	X	X*
Passenger Name Record Locator	X	
International Air Transport Association (IATA) Foreign Airport Code—place of origination	X	X
IATA Code—Port of First Arrival	X	X
IATA Code of Final Foreign Port for In-transit Passengers	X	
Airline Carrier Code	X	X
Flight Number	X	X
Date of Aircraft Departure	X	X
Time of Aircraft Departure	X	X
Date of Aircraft Arrival	X	X
Scheduled Time of Aircraft Arrival	X	X
Citizenship	X	
Country of Residence	X	
Status on Board Aircraft	X	
Travel Document Type	X	
Alien Registration Number	X	
Address While in U.S.—(except for outbound flights, U.S. citizens, lawful permanent residents, crew and in-transit passengers)	X	
Reservation Control Number		X
Record Sequence Number		X
Record Type		X
Passenger Update Indicator		X
Traveler Reference Number		X

* If available.

If passenger information that is required under this final rule resides in covered aircraft operators' systems, covered aircraft operators must transmit the SFPD information to TSA. Covered aircraft operators must submit this information, through the same DHS portal used for APIS submissions, approximately 72 hours before departure of a covered flight, or if a passenger books after this 72 hour mark, as soon as that information becomes available. Those that elect to transmit the SFPD and all manifest information required under the APIS Pre-Departure final rule at the same time would be able to send a single transmission to DHS for the Secure Flight and APIS Pre-Departure programs and would receive a single boarding pass printing result in return.

Additionally, for reservations made within 72 hours of the scheduled flight departure time, covered aircraft operators must submit SFPD as soon as the information becomes available. If the covered aircraft operator is also required and ready to transmit APIS information at that time, the covered aircraft operator is able to send one transmission for both Secure Flight and APIS Pre-Departure and will receive one boarding pass printing result. If the covered aircraft operator does not have full and complete APIS data as required under the APIS Pre-Departure rule, the covered aircraft operator must transmit the passenger information required for Secure Flight, at a minimum.

Covered aircraft operators will use the same portal to transmit SFPD to TSA and APIS data to CBP. TSA will need to conduct operational testing with the covered U.S. aircraft operators and covered foreign air carriers to confirm that the Secure Flight process operates properly from end-to-end with these carriers.

After TSA assumes responsibility for the watch list matching function under phase two of the Secure Flight program, the CBP system will no longer be responsible for pre-departure watch list matching or the issuance of related boarding pass printing results for covered flights based on watch list matching results. Consequently, covered aircraft operators will receive, and have to comply with, one result from DHS, via TSA, regarding the issuance of boarding passes to or the boarding of passengers on covered international flights. CBP will, however, continue to require carriers to provide APIS data to carry out its border enforcement mission.

In some international airports, passengers may transit from one international flight to another, where the flights are operated by different aircraft operators and only the second flight may be covered under this final rule. TSA understands that currently, in these situations, the aircraft operator operating the first flight may issue a boarding pass for both portions of the passenger's itinerary, including the flight to the United States. Under the Secure Flight program, TSA will not prevent the aircraft operator operating the first flight from issuing a boarding pass for the second flight. The covered aircraft operator whose flight will arrive in, or overfly the United States is responsible for preventing the boarding of passengers for whom TSA has returned an inhibited boarding pass printing result. Additionally, the covered aircraft operator should ensure that passengers for whom TSA has returned a Selectee boarding pass printing result are subjected to enhanced screening prior to boarding. Covered aircraft operators must also comply with measures in their security program to ensure that they have confirmed the boarding pass status of each passenger who receives a boarding pass for a covered flight under these circumstances. They may not rely on a lack of markings on a boarding pass issued by another aircraft operator; covered aircraft operators must take their direction from TSA.

G. Privacy Documents

TSA is committed to safeguarding individuals' privacy in conducting the Secure Flight program to the greatest extent possible. In conjunction with this final rule, TSA has published a Privacy Impact Assessment (PIA) and a Privacy Act System of Records Notice (SORN),[16] DHS/TSA 019. A final rule that explains the Privacy Act exemptions for the Secure Flight program was published in

[16] 72 FR 63711 (Nov. 9, 2007).

the **Federal Register**.[17] These three documents outline how TSA collects, uses, stores, protects, retains, and shares personally identifiable information collected and used as part of the Secure Flight program. Furthermore, TSA has identified the privacy risks and mitigation measures that will be employed to reduce or eliminate privacy risks such as false positive matches or insufficient safeguards for the information. All three documents are available at *http://www.tsa.gov*.

H. The Watch List Matching Process Under Secure Flight

This Secure Flight final rule requires all covered aircraft operators to request the information discussed above from passengers on a covered flight and certain non-traveling individuals. The final rule, however, does not require all covered aircraft operators to begin transmitting that information to TSA at the same time. TSA will bring covered aircraft operators into the Secure Flight program in phases and require all covered aircraft operators to begin providing passenger and certain non-traveler information to TSA in accordance with the deadlines set forth in their approved AOIP, discussed further below.

TSA requires covered aircraft operators to transmit information to TSA approximately 72 hours in advance of departure unless one of the following occurs: The individual makes a reservation with the covered aircraft operators within 72 hours of the scheduled flight departure time; there are changes to the name, date of birth, gender, Redress Number, Known Traveler Number, or passport information on a reservation within 72 hours of the scheduled flight departure time; there are changes to a flight within 72 hours of the scheduled flight departure time; or the individual requests to enter a sterile area upon arrival at the airport. In such cases, TSA requires covered aircraft operators to send the required information to TSA as soon as it becomes available. TSA, in coordination with the TSC where necessary, will compare the passenger and certain non-traveler information obtained from each covered aircraft operator to information contained in the watch list. TSA will also compare passenger and certain non-traveler information to a list of individuals who have previously been distinguished from persons on the watch list.

If an automated comparison using the information transmitted to TSA indicates that the passenger is not a match to the watch list, TSA will notify the covered aircraft operator that check-in and boarding pass issuance for the individual can proceed normally. Such individuals will undergo standard passenger and baggage screening, which may include additional, random screening. If an automated comparison using the non-traveler information identifies a potential match to the watch list, the covered aircraft operator must not allow access to the sterile area for that individual unless further resolution procedures indicate otherwise or authorized by TSA.

TSA will complete the watch list matching process for, and permit covered aircraft operators to issue boarding passes to, the vast majority of passengers through this fully-automated initial comparison. If the automated comparison indicates a reasonably similar or exact match to a person on the watch list, TSA will inform the covered aircraft operator that the individual must be placed on inhibited status and consequently the covered aircraft operator may not issue a boarding pass or other authorization to enter the sterile area for that individual unless further resolution procedures indicate otherwise. If the SFPD for that individual contains sufficient data, a TSA analyst will review all available information to determine if the passenger appears to be the individual on the watch list. If necessary, the TSA analyst will check other classified and unclassified governmental terrorist, law enforcement, and intelligence databases, including databases maintained by the Department of Homeland Security, Department of Defense, National Counter Terrorism Center, and Federal Bureau of Investigation (FBI), in order to resolve the possible match between the individual and a person on the watch list.

This careful review process is intended to significantly reduce the number of false positive matches identified by the automated watch list check. If the TSA analyst determines that the individual is not a match to the watch list, TSA will inform the covered aircraft operator that the individual no longer has inhibited status, and the covered aircraft operator may issue a boarding pass or authorization to enter a sterile area to that individual. If the TSA analyst identifies a possible match between a passenger and an individual identified on the watch list, TSA will send the passenger information to TSC and request confirmation of the match.

The final rule provides that if TSA or TSC cannot determine from the information provided by the covered aircraft operator whether an individual is a match to the watch list prior to the individual's arrival at the airport or online check-in, it will be necessary for the individual to provide additional information at the airport. Pursuant to the procedures in the security program, the covered aircraft operator must request that the individual present a VID when he or she arrives at the airport. A VID must be an unexpired form of identification that was issued by a U.S. Federal, State, or tribal government, and contains the individual's full name, photo, and date of birth, or an unexpired passport issued by a foreign government. TSA may also authorize other types of identity documents that may be used as a VID. TSA will notify the public when it authorizes another type of identity document that may be used as a VID. TSA may use one or more of the following methods to notify the public: A notice published in the **Federal Register**; a public affairs announcement; and an announcement on TSA's Web site. This requirement would not replace current requirements that covered aircraft operators request all passengers and non-traveling individuals to provide identification, such as at check-in or at the screening checkpoint.

Covered aircraft operators must follow the procedures in its security program for requesting and reviewing a VID from an individual. Examples of such procedures are that the covered aircraft operator may request that the individual present a VID: (1) To an agent at a ticket counter; and (2) at a self-serve kiosk that is capable of determining that the identification is a valid VID, authenticating the VID, and reading and transmitting passenger information from the VID. Covered aircraft operators may also submit a request to TSA for approval of other procedures for requesting and accepting a VID through the security program amendment process in § 1544.105(b).

Once the individual provides a VID to the covered aircraft operator or swipes the VID at a kiosk, the aircraft operator must update the passenger's SFPD with the additional information from the individual's VID and transmit it to TSA. There may be occasions where the aircraft operator will need to call TSA. In such cases, the aircraft operator may be asked to provide additional identifying information, such as a physical description referred to as ''Passenger Resolution Information'' (PRI), that TSA may need to complete the watch list matching process, in coordination with the TSC, and provide the aircraft operator with watch list matching results for that individual.

[17] 72 FR 63706 (Nov. 9, 2007).

Covered aircraft operators will not submit this PRI to TSA electronically. Rather, an aircraft operator will provide this information over the telephone to TSA.

Where warranted, TSA may notify another Federal agency or other public, private, or foreign government entity as appropriate to initiate an operational response to a potential watch list match.[18] TSA will provide the agency or entity with sufficient information about the passenger and his or her itinerary to facilitate coordination of the operational response. TSA may also notify the Federal Security Director, Federal Air Marshals, or other law enforcement personnel responsible for airport security to facilitate a timely law enforcement response to an individual identified in the watch list. Further inquiry by law enforcement may, for example, help resolve a situation of mistaken identity or confirm a determination made in the matching process that an individual should be denied boarding or entry to a sterile area.

If TSA determines that the passenger is a match to the Selectee List, TSA will notify the covered aircraft operator that the passenger and his or her baggage must be identified for enhanced screening by TSA. If TSA determines that the passenger is a match to the No Fly List, the covered aircraft operator must not issue a boarding pass to the passenger unless authorized by TSA.

In the preamble to the Secure Flight NPRM, TSA described the resolution process for the potential matches to the No Fly List but did not discuss a resolution process for potential matches to the Selectee List.[19] Because it is an important security measure to confirm whether a passenger is an individual on the Selectee List, TSA is applying the same resolution process for potential matches to the Selectee List as it applies to potential matches to the No Fly List. This resolution process will reduce the number of passengers who may be misidentified as a match to the Selectee List and will allow these passengers to enter the sterile area without undergoing enhanced screening for Selectees. (This does not ensure that such passengers will not always avoid enhanced screening. Random procedures employed by TSA result in enhanced screening.) TSA may also authorize alternate resolution procedures in a covered aircraft operator's security program to address unique circumstances.

The Secure Flight NPRM also proposed that passengers with an inhibited status would present their VID to the agent at the airport ticket counter. See proposed § 1560.105(b)(1). TSA is revising the rule text to state that covered aircraft operators must request VIDs from individuals at the airport. The language change will allow a covered aircraft operator the flexibility to request and accept VID at the ticket counter, at a self-serve kiosk, or through other processes or technology that the covered aircraft operator may develop, subject to TSA approval.

I. Operational Testing of Secure Flight

As part of the implementation of the Secure Flight program, TSA will conduct operational testing of TSA's capabilities to interact with and perform watch list matching for each covered aircraft operator shortly after the effective date of this final rule and before assuming the watch list matching function from each covered aircraft operator. During the operational testing for each covered aircraft operator, the covered aircraft operator will establish data transmission connections to TSA through an established DHS portal, and TSA will test its ability to receive passenger and non-traveler information, conduct watch list matching and transmit watch list matching results back to the aircraft operator in real time. Operational testing will allow TSA to refine program operations and ensure that TSA will be able to effectively conduct watch list matching for passengers and non-traveling individuals of each covered aircraft operator before TSA assumes the watch list matching function.

Covered U.S. aircraft operators will continue to match passengers against the watch lists for domestic flights under current procedures during their operational test phase and will maintain responsibility for denying issuance of boarding passes or identifying individuals for enhanced screening as a result of their own watch list matching determinations. If, during operational testing, TSA identifies a match to the No Fly or Selectee Lists that a covered aircraft operator has not identified, TSA may identify such passengers to the TSC and the covered aircraft operator for appropriate action. Once TSA officially notifies a carrier that they have successfully completed testing and that TSA has assumed the watch list matching function from a covered aircraft operator, the aircraft operator will discontinue conducting watch list comparisons for passengers and non-traveling individuals.

For international flights, covered U.S. aircraft operators must follow the CBP result in accordance with the APIS Pre-Departure final rule until TSA informs the covered U.S. aircraft operator that it will assume the watch list matching function. Foreign air carriers must also follow the CBP system boarding pass printing results in accordance with the APIS Pre-Departure final rule during operational testing and until TSA informs the covered foreign air carriers that TSA will assume the watch list matching function.

TSA will provide prior written notification to each covered aircraft operator of the date on which it will assume the watch list matching function from that covered aircraft operator. Because operational testing will begin with covered aircraft operators in phases, TSA will transition to implementation in phases as well and may continue operational testing with some covered aircraft operators while beginning implementation with others.

III. Response to Comments

TSA received 337 comments on the Secure Flight NPRM. These comments were submitted by a broad cross-section of parties with an interest in the function of conducting preflight comparisons of airline passenger information to Federal government watch lists for international and domestic flights. Commenters included domestic aircraft operators, foreign air carriers, privacy advocacy groups, and travel agency organizations. These comments are addressed below, and are organized by major issue.

A. Scope of the Rulemaking

Comment: Many commenters argued that the Secure Flight program is unconstitutional and infringes on an individual's freedom of movement, assembly, and right to travel. A commenter also argued that the Secure Flight program violates Article 12 of the International Covenant on Civil and Political Rights (ICCPR) because it restricts ''liberty of movement.''

TSA Response: TSA disagrees with the comments. The Government may place reasonable restrictions on the right to travel in order to protect compelling interests; in this case, transportation and national security. The Secure Flight program does not deny individuals their right to travel or other constitutional rights. Courts have consistently held that travelers do not have a constitutional right to travel by a single mode or the most convenient form of

[18] For the types of public and private entities that TSA may notify, see ''Routine Uses of Records Maintained in the System, Including Categories of Users and Purpose of Such Uses'' in the **Federal Register** notice entitled, ''Privacy Act of 1974: System of Records; Secure Flight Records.'' 72 FR 63711 (Nov. 9, 2007).

[19] 72 FR 48356, 48365–66 (Aug. 23, 2007).

travel. The Secure Flight program would only regulate one mode of travel (aviation) and would not impose any restriction on other modes of travel. Thus, Secure Flight does not unlawfully infringe or restrict individuals' freedom of movement or assembly. Also, the Secure Flight regulations are reasonable and are not onerous or unduly burdensome to individuals.

Additionally, Article 12 of the ICCPR does not apply to laws that are necessary to protect national security. Because the purpose of the Secure Flight program is to protect national security, Article 12 would not apply even if the Secure Flight program did somehow restrict liberty of movement.

1. Overflights and Foreign Air Carriers

Comment: Several commenters expressed concern about the Federal government collecting information in the case of overflights from individuals who have no intention of entering the United States. Several commenters argued that including overflights within the scope of Secure Flight may violate international treaties such as the Convention on International Civil Aviation (Chicago Convention).

TSA Response: U.S. regulations currently require aircraft touching ground in the United States to deny transportation to any passenger appearing on the U.S. No Fly List. The Secure Flight program will extend application of this rule to aircraft that only fly through U.S. airspace, without actually touching ground in the United States. The international legal bases under which a State might deny overflight to aircraft that fail to comply with the State's security-based regulations are outlined below.

Although international law recognizes the general right of overflight,[20] it also recognizes a State's right to regulate aircraft entering into, within or departing from its territory. Moreover, the Chicago Convention expressly recognizes that each State has sovereignty over its airspace.

The Chicago Convention, the International Air Services Transit Agreement (IASTA), and the U.S. model open skies agreement all contain provisions requiring aircraft in U.S. territory to comply with a broad array of U.S. laws and regulations. Article 11 of the Chicago Convention requires compliance with ''the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory.'' Similarly, Article 13 requires compliance with a State's laws and regulations ''as to the admission to or departure from its territory of passengers, crew or cargo of aircraft * * * upon entrance into or departure from, or while within the territory of that State.'' These Chicago Convention obligations are incorporated by reference in Article I, Section 2, of IASTA, and are restated in Article 5 of the model open skies agreement.

The domestic laws and regulations with which compliance is mandated are defined broadly and may include security-based measures, such as Secure Flight. This is reinforced by the security provisions in most U.S. bilateral air services agreements. Those provisions generally obligate our bilateral partners to observe and assist the U.S. Government in its enforcement of U.S. security-based regulations. For instance, Article 7 of the U.S. model open skies agreement obligates each party to observe the ''security provisions required by the other party for entry into, for departure from, and while within the territory of that other [p]arty, and to take adequate measures to protect aircraft and to inspect passengers * * * prior to and during boarding or loading.'' Model Article 7 also imposes specific obligations on our bilateral partners to assist in preventing unlawful acts against the safety of aircraft, and ''to address any other threat to security of civil air navigation.''

Moreover, in the event that an airline fails to comply with the laws and regulations with which compliance is mandated, both IASTA and most U.S. bilateral agreements grant a State the option of revoking or denying that airline's operating authorizations or technical permissions. Under Article I, Section 5, of IASTA, each State reserves the ''right to withhold or revoke a certificate or permit to an air transport enterprise of another State * * * in case of failure of such air transport enterprise to comply with the laws of the State over which it operates.'' Similar rights exist in almost all U.S. bilateral agreements. For example, Article 4 of the U.S. model open skies agreement provides that either party may ''revoke, suspend or limit the operating authorizations or technical permissions'' of an airline of the other party in the event that that airline has failed to comply with the laws and regulations with which compliance is mandated.

Accordingly, TSA's Secure Flight program does not violate international treaties, such as the Chicago Convention, and is entirely consistent with and is buttressed by international and bilateral agreements.

Comment: TSA received several comments opposed to including overflights in the scope of the final rule. Some commenters argued that overflights are an overextension of the Secure Flight mission. Other commenters suggested that overflights will cause costly system and operational changes for flights that did not require collection of APIS data or SFPD previously. Another commenter suggested that it would not be possible for third party agents to know if data collection was required for a particular flight since they do not have any knowledge of which flights qualify as an overflight.

TSA Response: Flights that overfly the United States have the potential to cause harm within the United States due their proximity to sensitive areas that may be potential terrorist targets such as major metropolitan areas and critical infrastructure. The Secure Flight program will provide TSA the ability to determine whether a passenger on an overflight poses a potential threat to national or transportation security. TSA acknowledges that there are costs associated with including overflights within the scope of Secure Flight but believes that the security benefit justifies the cost. If a covered aircraft operator is unsure whether a particular flight overflies the United States, TSA will provide assistance in determining whether that flight is an overflight. The covered aircraft operator will be responsible for informing their third party agents of the flights that are overflights.

Comment: Several commenters raised concerns regarding unplanned overflights. Commenters provided examples of situations such as diversions for weather, emergency, medical, or mechanical reasons when a flight may be diverted into U.S. airspace. These commenters suggested that TSA not require data collection for unplanned overflights.

TSA Response: As stated above, TSA will assist covered aircraft operators in determining which flights are overflights. TSA is not likely to consider flights that occasionally overfly the United States due to weather diversions or emergencies to be overflights.

Comment: Several commenters indicated concern that this provision may set a precedent for other countries to invoke overflight data collection requirements that would be costly to implement and present an inconvenience to U.S. passengers.

[20] For example, the Chicago Convention, Article 5 and the International Air Services Transit Agreement (IASTA), Article I, Section 1.

TSA Response: The Federal government understands that countries have a legitimate interest in protecting their territory from potential threats from overflights. DHS will work and coordinate with the governments of those countries to determine data collection requirements that would enhance security.

Comment: TSA received several comments about exemptions to the overflight provision. A commenter requested that any geographic exceptions to the Secure Flight final rule allow for the designation of low-risk areas to be consistent with the overall purpose of security and to take into account the risk associated with diverting air traffic to lower risk geographic areas. Another commenter expressed support for any efforts to decrease the number of flights this would apply to, based on selected geographic areas.

TSA Response: This final rule allows the Assistant Secretary (Transportation Security Administration) to exempt certain overflights from the Secure Flight program. In determining whether to exempt a particular flight or category of flights, TSA will take into consideration the security implications of exempting such flights, including the geographic locations of the overflights.

Comment: One commenter questioned why flights that are not subject to this final rule, for example those flights that overfly the U.S. with an origin and destination in Canada, pose less of a risk to U.S. aviation security than a flight originating in Canada and flying to another destination, for example the Caribbean. One commenter sought confirmation that all airlines overflying U.S. territory would be subject to the same requirements, irrespective of their nationality. The Canadian Embassy requested that all flights to, from, and within Canada that overfly the U.S. be exempt from the Secure Flight final rule in light of the security initiatives that Canada has in place and the security cooperation between Canada and the United States.

TSA Response: Flights between two Canadian locations or between two Mexican locations that overfly the United States are likely to merely skirt the border with the United States or enter U.S. airspace only for a brief period of time. This provision applies to all covered aircraft operators regardless of their country of nationality. All covered aircraft operators must comply with the Secure Flight rule for all other flights that overfly the continental United States, regardless of nationality.

TSA is not exempting all overflights that originate from Canada, because most international flights originating from Canada overfly a significant portion of the United States. As stated above, TSA has determined that conducting watch list matching of passengers on these flights is an important security measure to protect national and transportation security.

However, the Assistant Secretary may exempt categories of flights that overfly the United States as provided in § 1560.3. TSA will consider requests to exempt certain categories of flights and will consider all the applicable factors, including the security risks and the benefits from doing so. For instance, TSA will consider whether the country requesting the exemption applies a no fly list system to flights that may affect the security of the United States, whether that no fly list system will provide robust protection from persons who may endanger the flights, and whether the requesting country sufficiently shares information with the United States.

Comment: Some commenters expressed support for the limitation of the overflight provision to the continental United States. However, the Canadian Embassy and other commenters requested clarification of the definition of ''continental United States'' as it applies to the overflight provision of the Secure Flight final rule.

TSA Response: TSA agrees that the definition should be clarified. The definition of ''overflying the continental United States'' in this final rule has additional language that clearly states that the continental United States includes the lower 48 states and does not include Alaska or Hawaii.

2. Include Other Aircraft Operators in Secure Flight Program

Comment: TSA received one comment from an individual who suggested that TSA include all-cargo operators within the scope of the Secure Flight rule, because many all-cargo aircraft operators also transport individuals who are not flight crew members, such as couriers and animal handlers. The commenter was concerned that these individuals may be foreign nationals, and they frequently sit immediately outside the flight deck on these all-cargo flights.

TSA Response: During development of the Secure Flight program, TSA determined that the scope of the initial Secure Flight implementation phases should include only those aircraft operators that are required to have a full security program under 49 CFR 1544.101(a), and foreign air carriers that are required to have a security program under 49 CFR 1546.101(a) or (b). These aircraft operators are the passenger airlines that offer scheduled and/or public charter flights from commercial airports. TSA has decided to limit the scope of the Secure Flight final rule to these aircraft operators in order first to focus on those areas that raise the most aviation security concerns. After successful implementation of the original population of covered aircraft operators, TSA will consider broadening Secure Flight's scope to include other categories of aircraft operators. In the interim, the all-cargo operators must conduct watch list matching for these individuals.

Comment: A commenter requested TSA modify the Secure Flight final rule to accommodate the processes of private charter carriers.

TSA Response: In the Secure Flight NPRM, TSA proposed to limit the scope of the Secure Flight program to U.S. aircraft operators that are required to have a full security program under 49 CFR 1544.101(a), and covered flights operated by foreign air carriers that are required to have a security program under 49 CFR 1546.101(a) or (b). Many U.S. aircraft operators also operate private charter operations that are subject to the requirements in 49 CFR 1544.101(f), which include requiring aircraft operators to conduct watch list matching of the passengers. TSA recognizes that it may be more efficient for the covered U.S. aircraft operators to submit the names of passengers on their private charters to Secure Flight for watch list matching. Consequently, the definition of covered flight includes private charter flights operated by covered U.S. aircraft operators. TSA intends to implement Secure Flight for other private charter flights through future rulemakings.

Comment: One commenter requested that TSA require foreign air carriers conducting private charter passenger operations to and from the United States to adopt and carry out a security program. Alternatively, the commenter requested that TSA include foreign operators of private charter flights within the scope of the Secure Flight program instead of the existing TSA/FAA airspace waiver procedures for flights entering, departing, or overflying U.S. airspace.

TSA Response: TSA appreciates the comments received concerning aircraft operators covered under this final rule. TSA did not propose, however, to require foreign air carriers not currently subject to an existing security program to adopt a security program or to apply the Secure Flight requirements on these foreign air carriers as part of this Secure Flight rulemaking.

However, foreign air carriers operating flights to and from the United States are subject to the APIS Pre-Departure final rule under which DHS will perform watch list matching of the passengers on their flights.

Comment: TSA received several comments from aircraft operators arguing that airlines do not have the ability to impose Secure Flight requirements on travel agents and other third parties. A commenter suggested the government should mandate travel agencies to collect full name in the reservation and place a privacy notice on associated Web sites.

TSA Response: TSA disagrees that covered aircraft operators are unable to require travel agents and other third parties that sell tickets for their flights to collect the necessary passenger information. Because aircraft operators control the inventory of seats on their airplanes, TSA believes that it is reasonable to expect that aircraft operators will include in their agreements with third party agents who sell tickets on the aircraft operator's behalf a requirement to collect the necessary data for the aircraft operator to comply with this rule.

Additionally, the requirement to include the Privacy Act Statement on Web sites only applies to Web sites where passenger information is collected to create the SFPD that will be sent to TSA. Third-party Web sites that provide information about their services but do not collect passenger information that create SFPD do not need to post the Privacy Act Statement.

Comment: A commenter agreed with TSA's definition of a non-traveling individual, which does not include employees or agents of an airport or aircraft operator.

TSA Response: TSA appreciates the commenter's support of Secure Flight's definition of a non-traveling individual.

Comment: TSA received some comments urging TSA to include watch list matching of covered aircraft operators' employees and other employees that must undergo watch list matching within the scope of Secure Flight. Similarly, a few carriers requested clarification on whether TSA plans to perform this function.

TSA Response: TSA agrees that comparing the names of covered aircraft operators' employees and other employees against the watch list is an important layer of security and that the Federal government should assume the responsibility for conducting the watch list matching for this population. TSA has decided to focus the Secure Flight program on watch list matching of passengers as part of this final rule. TSA plans to assume responsibility for watch list matching of employees. TSA has begun the process by conducting watch list matching for certain persons at commercial airports.

B. Coordination With CBP and Other Government Agencies

TSA received several comments expressing support for both the Secure Flight and APIS Pre-Departure programs. Several commenters indicated their support for the shift of responsibility for passenger watch list matching from the air carriers and CBP to TSA. TSA received several comments expressing support for the ''One DHS Solution'' approach proposed for the Secure Flight and CBP APIS Pre-Departure programs whereby covered aircraft operators would send passenger information through one portal for both programs.

Comment: One commenter requested that DHS and other agencies coordinate Secure Flight's requirements with other U.S. and non-U.S. government data collection requirements.

TSA Response: DHS oversaw the development of the Consolidated User Guide to standardize requirements and minimize the impact to covered aircraft operators for implementation of both the Secure Flight and the APIS Pre-Departure programs. DHS will continue to work and coordinate with other Federal government agencies and other countries to develop and implement common data collection requirements to address the security concerns of the Federal government and the governments of other countries.

Comment: TSA received a comment expressing concern that CBP and covered aircraft operators would be required to act upon TSA's watch list matching results without a process in place for quality assurance and review.

TSA Response: TSA will implement a number of quality control measures as part of the Secure Flight program to ensure that the processes and procedures for watch list matching and returning results to covered aircraft operators are accurate and timely. TSA cannot provide further detail as to the control measures in place as they are Sensitive Security Information (SSI).[21] However, TSA is confident that these measures will ensure the accuracy of the program.

Comment: TSA received several comments expressing concern and requesting clarification on the differences in requirements for the APIS Pre-Departure final rule and Secure Flight NPRM. They questioned the need to send TSA SFPD 72 hours before the flight departure while APIS Pre-Departure requires batch transmission no later than 30 minutes before the securing of the aircraft door or APIS Quick Query (AQQ) transmission up to the securing of the aircraft door.

TSA Response: From the perspective of covered aircraft operators, there are two major differences from APIS Pre-Departure and Secure Flight. First, TSA and CBP require different sets of data elements for their respective programs with some identical data elements. The chart above in section II of this final rule, Secure Flight Program Summary, compares the required and optional data elements for each program. Additionally, the timing of the transmission of the data elements is different for each program. As explained above in section II of this final rule, Secure Flight Program Summary, TSA will require covered aircraft operators to transmit all available SFPD 72 hours before the scheduled departure of the flight and for reservations made within 72 hours, and other SPFD as soon as they become available. Under the APIS Pre-Departure rule, CBP requires commercial air carriers to transmit APIS information 30 minutes before the securing of the aircraft door if the transmission is a batch transmission and up to the securing of the aircraft doors for AQQ transmissions.

While both rules will be used in our nation's fight against terrorism, the two rules have somewhat different purposes. The purpose of the APIS rule is to protect our nation's borders by evaluating the risk associated with passengers entering or leaving the United States. Generally, CBP conducts this analysis prior to passengers arriving in or departing the United States, to ensure more efficient and expeditious processing of legitimate travelers. By the time passengers arrive into the United States, CBP has completed its analysis and determined the appropriate operational response when the passengers present themselves to the CBP officer.

The purpose of the Secure Flight program is to protect aviation security by conducting watch list matching of the names of passengers and non-travelers. TSA must complete its watch list matching prior to the individuals' receiving a boarding pass or

[21] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

authorization to enter a sterile area. Many passengers prefer to obtain their boarding passes 24 hours before departure. By receiving the SFPD 72 hours before departure, TSA will be able to allow the majority of passengers to obtain their boarding passes 24 hours in advance.

DHS' goal is to consolidate the watch list matching process into the Secure Flight program, including the timing of the transmission of passenger information for watch list matching. The watch list matching component of the APIS Pre-Departure final rule is an interim solution until such time that the Secure Flight program can assume responsibility for watch list matching for international flights. Although CBP requires that aircraft operators send batch transmission no later than 30 minutes before the securing of the aircraft doors, it allows and encourages aircraft operators to transmit the passenger information as early as 72 hours before the flight. As stated below in the excerpt from the APIS Pre-Departure final rule, CBP and DHS recognized that earlier transmission of the data benefits the aircraft operators and the passengers, including reducing the risk that passengers may miss their flights while TSA conducts further analysis.

> Advance transmissions will enable earlier vetting by CBP and earlier issuance of boarding passes by carriers if warranted by vetting results, relieving the pressure that a high volume of later transmitted data could have on the carriers' operations. DHS believes that earlier transmissions, though not required, would be to the carriers' advantage and encourages carriers to adopt it as a best business practice.
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> In addition, carriers have requested that CBP allow manifest data transmissions as early as 72 hours prior to departure. CBP agrees that such early transmissions, which DHS encourages carriers to adopt as a best business practice, would generate early vetting results, subject to later validation by the carrier (swiping of passport or other travel document or examination of document by carrier personnel), and allow early issuance of boarding passes, resulting in fewer passengers to be vetted within the 30-minute window and a reduced risk of passengers missing their flights while further vetting is conducted. APIS Pre-Departure final rule, 72 FR at 48323, 48329.

Comment: Some commenters suggested that TSA did not fulfill the aim of the ''One DHS Solution,'' because Secure Flight would create a process for watch list matching that differs from the process already under implementation by the airlines for APIS Pre-Departure programs and systems. These commenters suggested that the Secure Flight requirements would obstruct processing recently put into place and require further investments by the covered aircraft operators to update systems and processes. Several aircraft operators requested that Secure Flight further align the two programs. Specifically, aircraft operators suggested that Secure Flight require the same data elements and data transmission timeframe as APIS in order to avoid the time and cost associated with updating their systems twice. Several commenters also requested that TSA align requirements with CBP so that aircraft operators are only required to submit one data transmission to DHS and receive one response in return.

TSA Response: TSA has worked with CBP to align the Secure Flight and APIS Pre-Departure programs and systems. TSA and CBP jointly created the Consolidated User Guide to standardize requirements and minimize the impact to aircraft operators. In the Consolidated User Guide, TSA provided additional clarification that describes the technical and operational guidance for both programs.

Under the CBP APIS Pre-Departure final rule, aircraft operators are required to send APIS data for international flights to CBP. Secure Flight requires that covered aircraft operators provide SFPD to TSA as outlined in this final rule.

Secure Flight will not necessarily require multiple data transmissions to and responses from DHS. Covered aircraft operators may transmit both APIS data and SFPD in a single transmission to the DHS portal, which will route information to TSA and CBP as appropriate. These covered aircraft operators will receive a single boarding pass printing result in return.

CBP described the procedures for when aircraft operators submit APIS data prior to a passenger's presenting his or her travel document at the airport in its APIS Pre-Departure final rule:

> [T]he CBP system has the ability to accept certain passenger data up to 72 hours in advance, including APIS data. Such very early transmissions would be more likely under either of the batch transmission options, as AQQ transmissions are more likely to occur in closer proximity to the time or day of the flight. However, as mentioned previously, any early ''cleared'' vetting result obtained in this process is considered provisional by CBP until the passport or other travel document is validated, either by the swiping of the travel document's machine-readable zone or through manual verification by the carrier. Successful validation by the carrier of any passenger holding a provisional boarding pass as herein described (i.e., based on early data transmission and early receipt of a ''cleared'' response) requires that the APIS passenger data checked during validation be identical to the passenger data transmitted early to obtain the boarding pass. Where the data transmitted differs from data presented at validation, the carrier must transmit the new data and obtain vetting clearance on that data. Until that occurs, the carrier may not allow the passenger to board. 72 FR at 43822.

Additionally, for reservations made within 72 hours of scheduled flight departure time, covered aircraft operators must transmit SFPD as soon as possible. If the covered aircraft operator is also ready to transmit APIS information at that time, the covered aircraft operator will be able to send one transmission for both Secure Flight and APIS and will receive one boarding pass printing result. If the covered aircraft operator is not ready to transmit passenger data under the APIS Pre-Departure final rule at the same time, the covered aircraft operator must transmit the passenger information separately for Secure Flight and APIS.

Once TSA assumes responsibility under Secure Flight for the watch list matching function for the majority of passengers covered by the APIS Pre-Departure final rule, the CBP system will no longer be responsible for pre-departure watch list matching or the issuance of related boarding pass printing results for covered flights. Consequently, covered aircraft operators will receive, and will have to comply with, one result from DHS through TSA regarding the issuance of boarding passes to, or the boarding of passengers on, covered international flights. CBP will, however, continue to require carriers to provide APIS data to carry out its border enforcement mission, and the timing of that transmission will follow that of the Secure Flight program, rather than APIS.

Comment: TSA received several comments indicating confusion regarding how aircraft operators will determine the final boarding pass printing result and which program, APIS or Secure Flight, will provide that result throughout different phases of the program.

TSA Response: DHS plans to implement watch list matching in stages. Initially, the CBP system will take over watch list matching for all commercial flights into and out of the United States through the APIS Pre-Departure program, and aircraft operators will continue to conduct watch list matching for domestic flights. In the first phase of Secure Flight, TSA will conduct watch list matching for all covered U.S. aircraft operators' domestic flights under the Secure Flight Program. The CBP system will continue to

conduct watch list matching for international flights into and out of the United States.

In the second phase of Secure Flight, TSA will begin to conduct watch list matching for covered aircraft operators' flights that overfly the continental United States. Also in phase two, watch list matching for the remaining covered aircraft operator international flights will be transitioned from the CBP system to TSA under the Secure Flight program. During phase two, if an itinerary contains an international flight on a foreign-based aircraft operator covered by the APIS Pre-Departure final rule with a connecting domestic code share flight on a covered U.S.-based aircraft operator, the aircraft operator will transmit one set of data to DHS and receive one boarding pass printing result. The aircraft operator must comply with this boarding pass printing result. As discussed above, the timing of the aircraft operator's transmission of data to DHS will follow CBP's schedule under the APIS Pre-Departure final rule, until such time as Secure Flight assumes responsibility for international flights under phase two.

C. Implementation and Compliance

Comment: TSA received several comments objecting to the NPRM's requirement that covered aircraft operators comply with the rule within 60 days after the Secure Flight final rule's effective date, or 120 days after publication of the final rule in the **Federal Register**. TSA also received comments that 30 days after the effective date for submission of the AOIP does not provide covered aircraft operators with sufficient time to develop the AOIP. Several commenters proposed various alternatives. Many commenters suggested that Secure Flight align its compliance schedule with CBP's APIS Pre-Departure final rule, which is 180 days from publication of the final rule in the **Federal Register**. Another commenter suggested that TSA provide an 18-month compliance schedule for covered aircraft operators.

TSA Response: Based on the comments received on this issue, TSA agrees that full implementation of the collection and data transmission requirements in § 1560.101 within 120 days of publication of this final rule in the **Federal Register** may be difficult, if not impossible, for several covered aircraft operators. Consequently, TSA is changing the implementation timing requirements in § 1560.101 to allow for greater flexibility in implementing the various elements of the Secure Flight program.

Also, TSA is modifying the AOIP adoption process that was originally proposed in the NPRM. Because the primary purpose of the AOIP is to set forth a schedule for compliance with elements of the Secure Flight program for each covered aircraft operator, TSA believes that it is appropriate for TSA, rather than the covered aircraft operator, to develop the AOIP. Therefore, under the final rule, TSA will assume responsibility for drafting the AOIP for each covered aircraft operator and will notify each covered aircraft operator of the proposed AOIP for the covered aircraft operator.

After receiving the proposed AOIP from TSA, the covered aircraft operator will have 30 days to submit written comments on the proposed AOIP to TSA's designated official. This designated official will review the covered aircraft operator's comments and other relevant materials. After consideration of the written submission, the designated official will notify the covered aircraft operator of the AOIP. The AOIP will be effective not less than 30 days after notice is given, unless the covered aircraft operator petitions the designated official or the Assistant Secretary for reconsideration of the AOIP. In no case will an AOIP become effective prior to the effective date of the final rule. When TSA sends the covered aircraft operator their final AOIP, the covered aircraft operator may petition the designated official or the Assistant Secretary for reconsideration of the AOIP no later than 15 days before its effective date. A timely reconsideration petition will stay the effective date of the AOIP. TSA will amend, affirm, or withdraw the AOIP within 30 days of receipt of the petition for reconsideration.

Many commenters stated that TSA did not provide sufficient time for covered aircraft operators and third party agents to make all the necessary technological and process changes to satisfy the requirements of the Secure Flight program. To address this concern, TSA is not requiring covered aircraft operators to be capable of collecting and transmitting all of the SFPD elements at the same time. Instead, TSA will allow them to implement the individual SFPD elements in phases. TSA is not specifying in the rule text the dates by which covered aircraft operators must be capable of collecting and transmitting the different data elements in the SFPD. The covered aircraft operator's AOIP will set forth these specific dates. By including the specific implementation dates in the AOIP, TSA and covered aircraft operators will have flexibility to develop a compliance schedule that satisfies TSA's security needs to implement Secure Flight expeditiously while taking into account the covered aircraft operators' operations and technology.

The first SFPD element that covered aircraft operators will likely be able to provide is a passenger's full name. Because covered aircraft operators and third party agents currently collect the name as part of their business practice, TSA expects that they will have little difficulty collecting and transmitting full name within 120 days of publication of this final rule in the **Federal Register**. Covered aircraft operators will implement the other SFPD elements such as gender and date of birth in subsequent months in accordance with the AOIP. This approach will allow covered aircraft operators to make their technological changes gradually. However, covered aircraft operators may choose to make all their system changes for the Secure Flight program at the same time provided that the covered aircraft operators are capable of collecting and transmitting the full name within 120 days of publication of the final rule in the **Federal Register**.

TSA anticipates that covered aircraft operators will be capable of collecting and transmitting all of the SFPD elements within nine months of final rule publication in the **Federal Register**, because many covered aircraft operators have already made changes to comply with CBP's APIS Pre-Departure data submission requirements. TSA expects that these covered aircraft operators would be able to use much of the data submission and formatting system functions that they already execute. A small number of covered U.S. aircraft operators do not have international flights and, therefore, did not have to make any changes to comply with the APIS Pre-Departure final rule. TSA anticipates that the majority of the remaining covered U.S. aircraft operators that do not have international routes will use the web-based alternative data transfer mechanism. TSA will assist all covered aircraft operators in their efforts to comply with the Secure Flight requirements.

The AOIP also will set forth the implementation schedule for other aspects of the Secure Flight program such as when the covered aircraft operators will begin transmitting SFPD for covered international flights. Establishing the implementation schedule within the AOIP framework allows for some flexibility with implementation dates, taking into consideration both TSA security needs

and the covered aircraft operators' technological capabilities.

Comment: TSA received several comments regarding the Secure Flight implementation phases. One commenter requested clarification as to when foreign air carriers and international flights would be covered in the second phase. One aircraft operator requested a single implementation date for Secure Flight on the ground that it would be less expensive for the aircraft operators than the proposed phased implementation. Many aircraft operators offered suggested implementation timeframes and strategies, including a suggestion to ''pilot'' Secure Flight with one or two covered foreign air carriers in order to work out any software and operational issues.

TSA Response: TSA will conduct extensive testing to confirm and validate the Secure Flight watch list matching results, including benchmark testing with voluntary aircraft operators and a period of parallel testing with covered aircraft operators. TSA plans to resolve software and operational issues during the various phases of testing with participating aircraft operators and will only implement Secure Flight once these issues are resolved. TSA and covered aircraft operators will conduct the extensive testing prior to TSA assuming responsibility for watch list matching and may face operational issues in implementing Secure Flight after testing. Consequently, TSA believes that Secure Flight should be implemented in phases to ensure that the implementation process occurs as smoothly as possible and to minimize disruption of covered aircraft operators' operations and inconvenience to their passengers.

TSA will begin by implementing Secure Flight for U.S. domestic flights operated by aircraft operators required to have a full security program under 49 CFR 1544.101(a) after a period of parallel testing with all covered aircraft operators. The second implementation phase will include covered aircraft operators' flights that overfly the continental United States. TSA will determine the timing of implementing Secure Flight for covered flights that fly to and from the United States after TSA assumes the watch list matching responsibilities for covered U.S. aircraft operators' covered domestic flights. The exact implementation dates for covered aircraft operators will be in their AOIP.

Comment: One commenter observed that TSA developed the Secure Flight program tailored for covered U.S. aircraft operators. The commenter is concerned that TSA, in developing Secure Flight, did not take into account the different systems that foreign air carriers use for their reservation and document control systems.

TSA Response: TSA is aware of the existing differences between international and domestic systems and business processes. Secure Flight is working with covered foreign carriers to determine the best way to address these differences during the implementation of the Secure Flight program.

Comment: TSA received one comment that stated, ''Airlines should be given not less than 60 days notice of the known traveler collection requirement and that travel agents should receive no less than 55 days notice. This approach gives the airlines an ample five days to communicate the requirement to travel agents.''

TSA Response: TSA understands the concern regarding the coordination of aircraft operator and travel agent systems to allow for entry of the Known Traveler Number. TSA believes that any programming that is required to comply with the Secure Flight implementation should be sufficient to capture Known Traveler Number when it becomes available. Thus, TSA believes that 30 days' notice should be sufficient notification for the inclusion of the Known Traveler Number.

D. Secure Flight Passenger Data (SFPD)

1. General

Comment: One commenter stated that the U.S. government failed to demonstrate how the scope of the information being required is necessary to carry out the mandate of the Secure Flight program.

TSA Response: TSA has chosen a limited data set for use in watch list matching. Based on automated watch list matching test results, TSA has determined that it will be able to complete watch list matching for the vast majority of individuals based on full name, date of birth, and gender. As discussed below, the additional data elements may clear individuals whose names indicate that they are potential matches to individuals on the watch list. The data elements in the SFPD will help prevent passenger misidentification and will allow TSA to more effectively and consistently prevent certain known or suspected terrorists from boarding aircraft.

Comment: A commenter stated that the Redress Number, the Known Traveler Number, the Reservation Control Number, the Record Sequence Number, Record type, Passenger update indicator, and the Traveler Reference Number are passenger identifier codes that are used to access subsets of individual passenger information and are most used for customer service purposes such as special needs request. The commenter questioned the need for TSA to obtain these subsets of individual passenger information.

TSA Response: TSA will use the Redress Number and the Known Traveler Number to attempt to distinguish a person who has been identified as a potential match to the watch list from an individual on the watch list. TSA will use the other numbers listed in the comment to manage the SFPD as they are transmitted to and from TSA and are processed through Secure Flight to ensure that results are matched correctly with the appropriate SFPD and that results are transmitted to covered aircraft operators timely and accurately. Under the Secure Flight program, covered aircraft operators will transmit or ''push'' SFPD to TSA and TSA will not access or ''pull'' information from the covered aircraft operators'' systems. Thus, TSA will not use the numbers to pull the subsets of individual passenger information from the covered aircraft operators' systems.

Comment: TSA received one comment expressing a concern that domestic passengers may be required to submit the same data that is required for international flights.

TSA Response: TSA will require covered aircraft operators to request a passenger's full name, gender, date of birth, and Redress or Known Traveler Number (if known). Unlike flights subject to APIS Pre-Departure, TSA will not require covered aircraft operators to request or collect passport information from individuals. However, if covered aircraft operators collect passport information for passengers, then they must transmit that information to TSA. For example, if a passenger has a flight itinerary that includes a domestic flight that connects to an international flight, the passenger may provide passport information along with his or her full name, date of birth, and gender when he or she purchases a ticket for the domestic and international flights. In this situation, the covered aircraft operator must transmit the passport information to TSA along with the other data elements in the SFPD.

Comment: TSA received several comments requesting clarification of the term ''passenger,'' and whether the term includes crew members who are not on duty.

TSA Response: TSA is changing the definition of ''passenger'' as proposed in the Secure Flight NPRM to exclude employees of aircraft operators who are identified as crew members on the

manifest for that flight. TSA's Crew Vetting program conducts watch list matching of individuals who are on the manifest as crew members.[22] The Secure Flight program will conduct watch list matching of all other employees, including crew members traveling as passengers and not identified as crew on the manifest.

Comment: A commenter was concerned about Secure Flight's impact on travelers engaged in unique religious and cultural activities.

TSA Response: TSA appreciates and respects both religious and cultural diversity. As such, the Secure Flight program will match travelers to entries on the TSDB without prejudice, placing no specific emphasis on any particular religion. With this approach, the limited information that individuals must provide, and the ability of the Secure Flight program to respond to last minute SFPD transmissions, the Secure Flight program is not likely to impact unique religious and cultural activities.

Comment: Several commenters requested clarification on the requirement for an aircraft operator to validate the underlying accuracy of the collected passenger information on covered domestic flights or non-traveler information.

TSA Response: The Secure Flight final rule mandates that covered aircraft operators request SFPD, but that they need not validate the accuracy of that information beyond rules currently governing verifications of biographic data of international passengers. TSA would not hold a covered aircraft operator responsible or subject the aircraft operator to enforcement action if the information provided by a passenger is found to be inaccurate unless the covered aircraft operator knowingly provided the inaccurate information to TSA.

Comment: TSA received one comment that requested clarification on how to record consumer refusals to provide optional SFPD.

TSA Response: TSA does not require a record of an individual's refusal to provide optional elements of the SFPD when the covered aircraft operator initially requests the information.

Comment: A commenter expressed concern that TSA may change the required data elements in the SFPD after operational testing because covered aircraft operators will have already made system changes based on this final rule by the time they undergo operational testing.

TSA Response: TSA understands this concern based on the Secure Flight NPRM. The SFPD elements in this final rule will not change as a result of operational testing.

Comment: Several comments requested that TSA clarify SFPD transmission requirements and the format for full name, date of birth, and gender in the final rule. Several commenters requested that all formats be standardized to ensure ease of collection and transmission to TSA.

TSA Response: TSA developed transmission requirements and the standard formats for the SFPD elements in the Consolidated User Guide. TSA will provide the Consolidated User Guide to all covered aircraft operators.

2. SFPD Is Not Passenger Name Record (PNR)

Comment: TSA received comments expressing concern about the potential improper use of a Passenger Name Record (PNR). Many commenters mistakenly believed that SFPD is PNR or a subset of PNR. TSA also received a comment stating that PNR is already provided to CBP 72 hours prior to departure and should be sufficient for extraction by TSA for Secure Flight watch list matching.

TSA Response: TSA is not requiring covered aircraft operators to submit PNR, and TSA will not have direct access to PNR. Instead, TSA is requiring covered aircraft operators to submit SFPD which is a separate set of data elements. Covered aircraft operators may chose to extract the data elements from the PNR to create the SFPD for operational reasons. TSA, however, is not mandating that they do so nor is it mandating where covered aircraft operators store SFPD. Covered aircraft operators may choose to create a separate system to collect and store SFPD. CBP has access to PNR under a separate regulatory requirement.

Comment: A commenter expressed concern that TSA will require covered aircraft operators to include an individual's nationality in the PNR that would be transmitted to the Secure Flight program.

TSA Response: As stated above, TSA is not requiring covered aircraft operators to include any information in the PNR or to send PNR to the Secure Flight program. Furthermore, TSA is not requiring covered aircraft operators to request or to collect an individual's nationality.

3. Date of Birth and Gender

Comment: TSA received several comments regarding the inclusion of date of birth and gender as SFPD elements. Some commenters supported date of birth and gender becoming mandatory data elements. One commenter argued that unless TSA mandates the collection of this additional information, many passengers would not be cleared by TSA. Another commenter supported making both elements mandatory, but objected to collecting this data at the time of booking. Other commenters opposed TSA requiring individuals to provide date of birth and gender. Another commenter sought clarification on whether individuals must provide any information other than full name.

TSA Response: Through careful consideration of the public comments and both privacy and security concerns, TSA has concluded that it will require full name, date of birth, and gender from individuals under § 1540.107(b). It is expected that these data elements in combination will be sufficient to conduct watch list matching for the vast majority of individuals and to distinguish more persons from individuals on the watch list as part of the automated process reducing instances of misidentification. Reducing misidentification is an important program goal mandated by Congress and collection of all three data elements is an important step in reaching that goal.[23]

Comment: TSA received several comments requesting that TSA require covered aircraft operators only to request date of birth and gender if a person is not cleared by submitting only their full name.

TSA Response: TSA believes that by requiring the airlines to ask for and passengers to provide the data elements at time of original submission, TSA can make a determination about the boarding pass printing result quickly and efficiently. There would be no need

[22] The Crew Vetting program vets airline crews entering, departing, or flying over U.S. airspace against terrorist-related information to determine if they are a potential threat to the aviation system. It uses computerized risk analysis and manual review of automated vetting results and matching analysis (Vetting Operations) to assess and evaluate potential threats of terrorists posing as cleared aviation or other transportation system personnel. The Crew Vetting program maintains a 24/7 operations center to receive and analyze Flight Crew Manifests (FCM) and Master Crew List (MCL) from the airlines throughout a 24-hour period. These individuals are then vetted against the various watchlists to identify potential security threats prior to an aircraft receiving authorization for departure.

[23] Section 518(a) of the Department of Homeland Security Appropriations Act, 2006, Pub. L. 109–90 (Oct. 18, 2005) (2006 DHS Appropriations Act), requires DHS to certify and purports to require GAO to report that TSA satisfies 10 conditions before TSA may deploy Secure Flight other than on a test basis. One of the conditions is the Secure Flight system ''will not produce a large number of false positives that will result in a significant number of passengers being treated mistakenly * * *.'' *Cf. INS* v. *Chadha,* 462 U.S. 919 (1983).

for a second transmission that may necessitate the individual going to the ticket counter.

Comment: TSA received one comment requesting that TSA eliminate the gender requirement from SFPD information and instead require passengers to submit information regarding their ethnicity, race, or national origin.

TSA Response: Many names are gender neutral. Additionally, names not derived from the Latin alphabet, when translated into English, do not generally denote gender. Providing information on gender will reduce the number of false positive watch list matches, because the information will distinguish persons who have the same or similar name. Consequently, TSA is including gender as a required element of the SFPD, which covered aircraft operators must request from individuals and which individuals must provide to the covered aircraft operator.

TSA disagrees that ethnicity, race, or national origin should be included in SFPD information provided by passengers of covered aircraft operators and certain non-travelers seeking access to the sterile area of a U.S. airport. Secure Flight matches names of passengers to entries on the TSDB without prejudice or regard to an individual's race, ethnicity, or national origin.

4. Redress Number and Known Traveler Number

Comment: TSA received several comments requesting that the final rule clarify the handling of Redress Numbers and Known Traveler Numbers. Some commenters expressed opposition to the Secure Flight requirement for requesting these two numbers.

TSA Response: Individuals who believe they have been incorrectly delayed, identified for enhanced screening, denied boarding, or denied access to a U.S. airport's sterile area may apply for redress through DHS TRIP. DHS will assign a unique Redress Number to each individual who uses DHS TRIP. Individuals who have already undergone TSA's redress process do not need to use DHS TRIP to reapply for redress once the Secure Flight program is operational. Individuals will be less likely to be delayed by misidentification as a match to the watch list if they provide their Redress Number at the time they make a flight reservation or request access to a U.S. airport's sterile area. While TSA requires that each covered aircraft operator request a Redress Number, TSA does not require individuals to provide a Redress Number when making a reservation for a covered flight.

TSA intends to develop and implement the Known Traveler Number as part of the Secure Flight program. Like the Redress Number, the Known Traveler Number is a unique number assigned to ''known travelers'' for whom the Federal government has already conducted terrorist security threat assessments and has determined do not pose a terrorist security threat. The Known Traveler Number may draw upon information from programs such as the Transportation Worker Identification Card program. Once TSA has determined the details of the Known Traveler Number program, it will inform covered aircraft operators that they must begin to request and transmit the number, if provided by the individual. The covered aircraft operators must do so in the time specified in their AOIP.

Similar to other optional information, TSA will not compel individuals to provide a Redress Number or a Known Traveler Number upon request from the aircraft operator. Without either of these numbers, the individual may be more likely to experience delays, be subjected to enhanced screening, be denied boarding, or be denied access to a U.S. airport's sterile area.

Comment: TSA received several comments indicating support for the development and implementation of the Known Traveler Number. TSA also received several comments against the requirement for Known Traveler Number as they claim it would be redundant. Several commenters also suggested integration of the Known Traveler Number with existing registered traveler schemes and with future plans between the U.S. and other foreign governments. They suggested that TSA relate Known Traveler Numbers for other groups of individuals, including those with national security clearances or members of the U.S. or foreign governments. Another commenter suggested that the name of the Known Traveler Number be changed to ''Cleared Passenger Number'' to more accurately identify those individuals who participate in the program.

TSA Response: TSA assures these commenters that all possible solutions for the Known Traveler Number will be considered during development efforts. At this time, however, TSA is unable to comment on whether the Known Traveler Number will be fully integrated with existing credentialing programs or future domestic or international programs. Although ''Cleared Passenger Number'' is a possible alternate name, TSA prefers ''Known Traveler Number'' because the number is assigned to individuals ''known'' to the government through the credentialing program. Finally, TSA has not determined which individuals or programs will be included under the Known Traveler Number but will continue to consider the proposed inclusion of certain groups.

Comment: A commenter questioned whether or not TSA would continue to conduct watch list matching for known travelers. The commenter argued that if this watch list matching does occur, it would be redundant and unnecessary.

TSA Response: TSA intends to continue to conduct watch list matching for individuals who provide a Known Traveler Number for covered flights to ensure that the individuals' Known Travel Numbers have not expired or been revoked.

Comment: A covered aircraft operator stated that it will not be able to request the Known Traveler Number from passengers who made their reservation before TSA issued the 30-day written notice to them.

TSA Response: TSA will not require covered aircraft operators to request the Known Traveler Number for reservations made before TSA implements the Known Traveler Number program.

Comment: TSA received several comments regarding the requirement in proposed § 1560.101(a) prohibiting covered aircraft operators from accepting a reservation from an individual who did not provide all the required information at the time of booking. The commenters provided examples such as when an individual or a tour operator is making a reservation for a large group and does not have access to every individual's full name or passport information.

TSA Response: The reason for proposed § 1560.101(a) was to ensure that the Secure Flight program receives full names to conduct effective watch list matching. TSA does not intend for the Secure Flight program to impact current business practices regarding the blocking of group space without complete passenger information. TSA is changing the language in proposed § 1560.101(a) to provide that covered aircraft operators may not submit a SFPD for an individual until the individual provides his or her full name, date of birth, and gender; the regulation does not prohibit covered aircraft operators from accepting a reservation without a full name, date of birth, and gender. Once a covered aircraft operator receives the full name, date of birth, and gender associated with the blocked or group space, the aircraft

operator must transmit that SFPD to TSA in accordance with this final rule. Additionally, TSA has designed the data transmission processes to receive changes and updates to these data elements.

This change will still ensure that individuals do not receive a boarding pass or authorization to enter a sterile area without TSA's conducting watch list matching based on a full name, date of birth, and gender at a minimum. Also, the only data elements that passengers must provide are full name, date of birth, and gender; other optional information, such as passport information, does not need to be included as part of the SFPD.

E. Watch List Matching Process

1. Transmission of SFPD

Comment: Numerous airlines commented that Secure Flight requires data not currently contained in the airlines' systems or incorporated in the UN–EDIFACT message standards. The UN–EDIFACT is the international electronic data interchange (EDI) standard developed under the United Nations for inter-industry electronic interchange of business transactions. Many commenters expressed concern that the requirements for collection and transmission of SFPD do not follow international standards.

TSA Response: TSA recognizes that programming will be required to add additional data to airline systems, but TSA has diligently limited the data requested to the minimum required to support the security processes and to provide the transactional support required for airlines to apply the boarding pass printing result provided by Secure Flight. As part of the implementation of APIS Pre-Departure, CBP has defined the additional fields for UN–EDIFACT transmissions and the Secure Flight program will use that message format. DHS has identified and harmonized the modifications to UN–EDIFACT messaging standards for these additional data with those required for APIS Pre-Departure systems. TSA will coordinate with the appropriate worldwide standards bodies, as required.

Comment: Several commenters expressed concern that Secure Flight would be unable to efficiently process the transactions resulting from airline passenger travel, especially during periods of irregular operations and passenger re-accommodation.

TSA Response: TSA understands the need for Secure Flight to efficiently process transactions, especially during periods of irregular operations and passenger re-accommodations. In developing Secure Flight, TSA has accounted for the additional transmission volume associated with changes in passenger travel information, resolution of boarding pass printing results, and changes caused by irregular operations or passenger re-accommodation. All of these factors contributed to the design decision to require that covered aircraft operators provide available SFPD 72 hours in advance of flight departure. This advance booking information allows Secure Flight to increase real time resources available to respond to off schedule operations and passenger re-accommodation and to process SFPD for passengers who make reservations within 72 hours of the scheduled departure of the flight.

Comment: One aircraft operator commented that TSA should not dictate when, and from which system, the airline sends SFPD to TSA.

TSA Response: TSA does not specify the system from which a covered aircraft operator must transmit SFPD, and covered aircraft operators may choose the appropriate system from which to transmit SFPD. However, obtaining passenger data in advance is an integral part of the Secure Flight watch list matching process; it is designed to optimize the number of boarding pass printing results available to the covered aircraft operator prior to passenger check-in. The rule specifies that a covered aircraft operator must submit the SFPD to TSA beginning 72 hours before departure or as soon as it becomes available.

Comment: Several airlines expressed concern that the Secure Flight response time would adversely affect their passenger check-in processes and levels of customer service.

TSA Response: Secure Flight's requirement for advance transmission of SFPD is designed to provide a boarding pass printing result prior to passenger check-in. Secure Flight has made considerable investments to ensure a prompt response.

Comment: Several airlines and airline associations expressed concern that even a short outage of the Secure Flight system would severely impact airline operations.

TSA Response: TSA designed Secure Flight technical operations with geographic and component redundancy to provide for continuous, uninterrupted operations. Covered aircraft operators will receive boarding pass printing results for a majority of passengers beginning 72 hours before flight departure. TSA believes the number of individuals affected by a significant short term outage with multiple redundancy failures would be comparatively small and likely limited to those passengers making last minute reservations or changes. The Consolidated User Guide includes a comprehensive plan to address processes and procedures for outages.

2. 72-Hour Requirement

Comment: TSA received several comments about the requirement to submit SFPD to Secure Flight beginning 72 hours before departure and the potential impact to travelers who make last minute reservations or changes.

TSA Response: Secure Flight will perform watch list matching on all reservations for covered flights operated by covered aircraft operators regardless of when the reservation is made. TSA is not requiring that individuals make their reservations or purchase tickets 72 hours or more before departure. In this final rule, TSA describes two scenarios whereby a covered aircraft operator must submit SFPD to Secure Flight. The first is when a covered aircraft operator accepts a reservation with a full name, date of birth, and gender earlier than 72 hours before departure. In this situation, the covered aircraft operator must transmit the SFPD to Secure Flight 72 hours in advance of departure. The second scenario occurs when a covered aircraft operator accepts a reservation within 72 hours of departure, updates a TSA-requested SFPD within 72 hours of departure, changes a flight within 72 hours of the departure time, or seeks to authorize individuals to enter a sterile area upon arrival at the airport. For those reservations or requests, the covered aircraft operator must transmit the SFPD to Secure Flight as soon as the SFPD is available.

Comment: TSA received several comments from covered aircraft operators who indicated that they have two systems: A reservation system and a departure control system (DCS). These commenters, predominantly covered foreign air carriers, are concerned that Secure Flight does not take into account that their reservations system does not store all SFPD elements and that their DCS often captures SFPD elements at check-in when the individual's passport is swiped. Several comments noted that covered aircraft operators would incur costs to program their reservation systems to accept SFPD. Some covered aircraft operators indicated that they cannot transmit UN–EDIFACT messages from their reservations system; they can only be transmitted from their DCS. Many commenters also expressed concern that TSA will return a boarding pass printing result to the incorrect

system, and passengers may experience difficulties in obtaining a boarding pass.

TSA Response: TSA understands the concerns raised by these covered aircraft operators. The Secure Flight program is developing a solution for covered aircraft operators that have separate reservations systems and DCS as described in the comments. The solution will support the covered aircraft operators' systems as well as the transmission and boarding pass printing requirements in this final rule.

Comment: TSA received several comments questioning TSA's requirement that SFPD transmission begin 72 hours in advance considering that CBP is willing to accept data up to departure time.

TSA Response: TSA considered a number of factors in determining that covered aircraft operators should submit SFPD to TSA beginning 72 hours before departure time. The CBP system will conduct watch list matching only for covered flights that involve a flight to or from the United States. When TSA assumes watch list matching, the Secure Flight program will conduct the watch list matching for (1) all flights conducted by U.S. aircraft operators (including flights between two international points); (2) flights operated by foreign air carriers that fly to or from the United States or overfly the United States; and (3) non-travelers who are seeking authorization to enter a sterile area. While TSA believes that the automated process alone for vetting this significantly larger population of travelers may not take 72 hours, several factors that suggest a 72-hour lead time is appropriate. These include the volume of data involved, the increase in records requiring a manual review due to a potential match or an insufficient amount of information to differentiate someone from an individual on the watch list, and the time required to coordinate an operational response when necessary.

By requiring covered aircraft operators to transmit available SFPD 72 hours prior to departure, TSA will be able to prioritize SFPD by departure time. This prioritization will permit TSA to return boarding pass printing results for the vast majority of passengers in time for them to print their boarding passes 24 hours in advance of their flights while also returning boarding pass printing results for individuals who make reservations within 72 hours of the scheduled departure in time for them to obtain their boarding passes prior to the scheduled departure.

TSA understands that a certain amount of expense is involved in making programming changes for Secure Flight. TSA believes, however, that the security benefit to covered aircraft operators and passengers is such that the 72 hour requirement is a necessity.

Comment: A few commenters expressed concern that there will still be a number of changes to reservations within the 72 hour period that will require messaging back and forth between the covered aircraft operator and TSA. The commenters suggest that reducing the time from 72 hours to something less than 72 hours will reduce the need for such messages.

TSA Response: TSA believes that, on average, an overwhelming majority of reservations become stable at 72 hours before departure time. However, TSA understands that there are still some reservations that continue to change within the 72 hour period. As explained above, TSA believes that the security benefits to covered aircraft operators and passengers of providing SFPD for passengers who have made their reservations more than 72 hours before departure time are important enough to require this timeframe.

3. Boarding Pass Issuance

Comment: Several commenters argued that prohibiting covered aircraft operators from issuing a boarding pass until they receive a boarding pass printing result from TSA would unnecessarily impact the check-in of connecting passengers, specifically those inbound to the United States who are connecting/transferring through airports outside of the United States.

TSA Response: In the United States, the boarding pass is used to designate to personnel at the security checkpoint whether passengers are permitted to enter the sterile areas and whether passengers must first undergo enhanced screening. TSA recognizes that, outside the United States, access and enhanced screening are determined by the applicable operating authority of the airport. In some international airports, passengers may transit from one international flight to another where the flights are operated by different aircraft operators; only the second flight would be covered under this final rule. TSA understands that currently, in these situations, the aircraft operator operating the first, non-covered flight may issue a boarding pass for both legs of the passenger's itinerary, including the covered flight to the United States.

Accordingly, TSA has modified § 1560.105(b) to allow for the issuance of connecting boarding passes inbound to the United States for connecting passengers without complying with the requirements regarding boarding pass printing result in § 1560.105(b). Under the Secure Flight program, the aircraft operator operating the first, non-covered flight is able to issue a boarding pass for the second, covered flight without obtaining a boarding pass printing result from TSA. The second aircraft operator, however, must submit SFPD or APIS data to DHS and confirm the boarding pass printing results prior to permitting the passenger to board the aircraft for the covered flight. The covered aircraft operator must comply with the measures in its security program to prevent the boarding of any individual who is identified as a No Fly match by TSA and to ensure that any passenger TSA identifies as a Selectee undergoes enhanced screening prior to boarding the aircraft. These conditions mitigate the security vulnerability associated with issuance of a boarding pass for covered flights outside of the Secure Flight program. These provisions will also apply to passengers whose connecting flight is a covered overflight.

Comment: One aircraft operator recommended that TSA eliminate the requirement for applying the Secure Flight requirements on subsequent connecting flights.

TSA Response: TSA believes that the elimination of the watch list matching requirements on subsequent connecting flights is inconsistent with the security mandate of Secure Flight. One of the benefits of the Secure Flight program is that any update to the watch list will be compared against all active SFPD. This update comparison will allow TSA and the covered aircraft operators to take appropriate action regarding any passenger whose status changes during his or her travel.

Comment: A commenter requested that TSA clarify the provision ''that carriers can choose to designate a more restrictive boarding pass status in conjunction with other TSA or aircraft operator procedures.'' Secure Flight NPRM at 48374.

TSA Response: Covered aircraft operators must designate passengers for enhanced security screening for reasons unrelated to watch list matching pursuant to a TSA security directive such as the Computer Assisted Passenger Prescreening System (CAPPS). TSA will continue to require aircraft operators to conduct these programs once Secure Flight is implemented and a passenger may receive a more restrictive boarding pass status based on the results of these other programs. Also, TSA recognizes that covered aircraft operators may designate a more restrictive boarding pass status

based on their own policies and procedures.

Comment: A few commenters supported the implementation of bar codes on boarding passes to authenticate the boarding passes, because it will enhance security in the sterile area. Another commenter stated that the inability to authenticate boarding passes minimizes the benefits of the Secure Flight program. The commenter argues that Secure Flight should not be implemented until this security issue is adequately addressed.

TSA Response: As one commenter noted, bar codes on the boarding pass will address the security issue of altered or fraudulent boarding passes. TSA is developing the protocols and standards for placing a bar code on boarding passes and the requirement for covered aircraft operators to place the code on their boarding passes is part of this final rule in §§ 1560.105(b) and (c). When TSA updates the Consolidated User Guide with the protocols and standards for the code, covered aircraft operators must implement this requirement in accordance with their AOIP.

Comment: Several airlines requested additional clarification on the bar code requirements. Some commenters raised concerns that bar code requirements would be costly to implement. Many commenters suggested that TSA take advantage of existing bar code standards such as the International Air Transport Association standards and business processes. The commenters also requested more information about how TSA would intend to use the bar code in addition to any verification procedure.

TSA Response: TSA recognizes the importance and potential impact of requiring bar codes to be placed on boarding passes. As stated above, TSA believes that bar codes are an important security measure to authenticate boarding passes. TSA is continuing to research new and existing technologies to develop a technologically sound solution that meets the TSA mission and budgetary requirements and minimizes impacts to aircraft operators. TSA will take into consideration the IATA bar code standard in developing its protocols and standards to determine the most effective solution that meets the TSA mission.

Comment: Several commenters noted that the airline industry was seeking alternatives to the traditional paper boarding pass. They expressed concern that Secure Flight would hinder innovation in this respect.

TSA Response: Secure Flight uses ''boarding pass'' to refer to an entitlement for aircraft enplanement issued by an aircraft operator. TSA will consider alternative means of conveying that boarding entitlement, subject to specific requirements like bar coded information. This final rule refers to the issuance of ''a boarding pass or other authorization'' thereby providing for alternatives to paper boarding passes.

Comment: TSA received comments suggesting that TSA should inform passengers and non-traveling individuals of their boarding status at the checkpoint, rather than send boarding pass printing results to the covered aircraft operators.

TSA Response: TSA believes that moving this process from the individual aircraft operators to the security checkpoint will create unacceptably long lines at the checkpoint, will cause unnecessarily lengthy delays for individuals who are not a potential match to the No Fly or Selectee lists, and will cause travelers to miss flights.

Comment: TSA received comments requesting that TSA not include in the Secure Flight program a provision for enhanced screening of randomly selected cleared passengers.

TSA Response: TSA believes that randomly selecting individuals for enhanced screening is an important layer of security and adds unpredictability to the screening process. While the current CAPPS program includes a random selection element, TSA does not anticipate that Secure Flight will initially include a random selection element. TSA may, however, include a random selection element to Secure Flight as part of its continuous efforts to review and improve its screening procedures.

Comment: One aircraft operator commented that the Secure Flight Service Center should be adequately and continuously staffed.

TSA Response: The Secure Flight Service Center will be staffed 24-hours a day, 7-days a week to receive telephone calls from covered aircraft operators' staff and assist in the clearance of inhibited passengers. If additional information such as a physical description is required, covered aircraft operators' staff would provide that information during a conversation with Secure Flight Service Center personnel.

Comment: Several commenters suggested that TSA expand the period in which boarding passes can be issued to a period greater than 24 hours prior to scheduled flight departure.

TSA Response: While TSA appreciates that covered aircraft operators and passengers would prefer greater advance boarding pass issuance, expansion of the advance time period for boarding pass issuance increases the potential that changes to the watch list will not be correctly reflected in the traveler's boarding pass. This potential for inaccurate boarding passes may create additional security and operation exposure. Therefore, TSA does not plan to expand the authority to issue boarding passes beyond 24 hours prior to the scheduled flight departure.

Comment: A commenter objected to a perceived restriction to issuance of a ''single boarding pass.''

TSA Response: The Secure Flight NPRM and final rule contain no restriction on the issuance of duplicate or replacement boarding passes. The rule provides for a ''single boarding pass printing result'' in those cases in which a passenger itinerary would result in a watch list evaluation by both TSA and CBP.

4. Passenger Resolution

Comment: TSA received several comments requesting further information about the provision of PRI by aircraft operators for those passengers to whom TSA has provided an inhibited boarding pass printing result. A few commenters question the need for this requirement. Some commenters suggested that TSA should not require the PRI to be transmitted electronically or it should be eliminated altogether.

TSA Response: TSA may require covered aircraft operators to provide PRI for individuals who have been identified as a potential match to the watch list. Without the PRI, individuals for whom TSA has returned an inhibited status result will not be able to obtain a boarding pass, because TSA would not have the means to distinguish that individual from the individual on the watch list.

In the event that it is necessary to collect additional information when there is a potential watch list match, including certain physical description information about the passenger, the covered aircraft operator will contact the Secure Flight Service Center and provide the information. Covered aircraft operators will provide PRI, including physical description information, to TSA only via a telephone call to the Secure Flight Service Center. TSA is not requiring PRI to be transmitted electronically.

Comment: TSA received one comment asking if a foreign passport is the only foreign document that is acceptable to TSA for VID purposes.

TSA Response: The definition of VID in § 1560.3 includes a valid, unexpired passport issued by a foreign government. TSA has determined that,

at this time, an unexpired foreign passport is the only document issued by a foreign government that can serve as a VID. This is because the process of issuing the passport involves procedures for verifying the identity of the individual. Also, passports universally contain required identifying information, such as full name, date of birth, and a photograph of the individual. TSA, however, may authorize covered aircraft operators to accept other foreign documents as valid VIDs.

5. Use of the Terrorist Screening Database (TSDB)

Comment: Several commenters expressed a concern that the watch lists used by Secure Flight contain errors and inaccuracies. One of these commenters further stated that using the watch lists would not expedite the pre-boarding process or improve transportation security.

TSA Response: TSA seeks to ensure that data used in the watch list matching process is as thorough, accurate, and current as possible. TSA has worked with the Terrorist Screening Center (TSC) to review the No Fly list name by name, and many names have been removed; a similar process for Selectee names is ongoing. TSA continues to be committed to eliminating erroneous and out-of-date information from the watch list matching process. DHS TRIP will facilitate the redress process for Secure Flight. DHS TRIP provides the opportunity for individuals who believe that they have been delayed or prohibited from boarding or denied entry to the airport sterile area as the result of the Secure Flight program to seek redress and relief.

Comment: TSA has received several comments on the proposed requirement to use a larger subset list in the Terrorist Screening Database (TSDB) when the threat level changes in a particular airport, airline, and/or region in the United States. The commenters were concerned that the use of a larger list to select a particular group of travelers would be based solely on nationality.

TSA Response: During normal Secure Flight operations, the watch list check will consist of the No Fly and Selectee components of the TSDB. TSA will only use a larger list when warranted for security purposes, such as intelligence that terrorists are targeting a specific route. The decision to use the larger list will not be based on nationality.

Comment: TSA received one comment expressing concern that TSA's use of the watch list would result in individuals with criminal records being arrested.

TSA Response: The watch list identifies individuals with a nexus to terrorism. We believe that the commenter's concern about those with criminal records without a nexus to terrorism is a misunderstanding of the mission of Secure Flight.

6. Non-Traveling Individuals

Comment: TSA received several comments regarding the issuance of gate passes for non-traveling individuals and the collection of these individuals' data for Secure Flight purposes. Many international carriers expressed a concern that their systems are not capable of capturing such data and asserted that the function of collecting non-traveler data and issuing gate passes should remain in the hands of airports or other authorities. A commenter suggested that TSA provide a manual alternative for covered aircraft operators to provide the non-traveler information to Secure Flight. Furthermore, several foreign air carriers believe it is outside of the purview of TSA's authority to require such data collection and submission for airports outside of the United States. Commenters also argued that submission of information for non-travelers should be the responsibility of airport authorities.

TSA Response: TSA is clarifying that the requirement to submit information on non-travelers seeking entry to a sterile area is limited to airports within the United States. Moreover, TSA recognizes that covered aircraft operators' systems for collecting non-traveler information vary. Thus, while covered aircraft operators may create an SFPD for the non-traveler in their systems and submit the information in the same manner that they submit SFPD for passengers, they are not required to do so. They may instead opt to submit the information in a manner that is consistent with their particular system and business practices for collecting non-traveler information. TSA also is developing an alternative method for covered aircraft operators to submit information for non-travelers through the internet.

Comment: A commenter expressed concern that the Secure Flight NPRM fails to adequately address the needs of non-travelers to be quickly provided access to an airport's sterile area, because it will be difficult for the covered aircraft operator to advise non-travelers that they must provide their personal information 72 hours in advance.

TSA Response: Covered aircraft operators may submit a non-traveler's information to TSA at any time before departure or whenever that individual wishes to access the sterile area. Furthermore, aircraft operators also have the option of using the alternative data transfer mechanism, such as a web-based alternative, for non-travelers who must be vetted and need a response quickly.

7. General Comments

Comment: TSA received a number of comments about Secure Flight's ability to reduce false positives. TSA received a comment that suggested that the only improvement as a result of implementing Secure Flight is that a significant effort has been made to reduce false positives. Another commenter suggested that better use of a ''cleared list'' in the existing process alone would be sufficient to reduce false positives. One commenter questioned the capability of the Secure Flight watch list matching process to distinguish between similar sounding names, and argued that this could result in more false positives. Another commenter suggested that travelers who have been previously misidentified (false positives) would benefit from enrollment in the Registered Traveler program.

TSA Response: TSA agrees that a significant benefit of Secure Flight watch list matching is the expected outcome of relatively few misidentified passengers (or false positive matches). We disagree with those comments that suggest TSA retain the current system. In addition to meeting the IRPTA requirement that the government assume watch list matching from the airlines, we believe that Secure Flight brings needed consistency to the watch list matching process that does not exist currently, including more consistent application of the cleared list. With this consistency, there is the expected outcome of a low number of false positive matches.

Comment: A commenter expressed concern that the Secure Flight NPRM does not state that Secure Flight will supersede any current TSA security directives that require carriers to match their passengers against the watch lists. The commenter feels that this leaves carriers unable to comply with both conflicting regulations.

TSA Response: TSA will update security directives and programs to make them consistent with the Secure Flight regulation.

Comment: The commenter asks what the procedures will be for law enforcement officials to question an

individual who is a potential match to the No Fly List in a foreign country.

TSA Response: Today, foreign air carriers perform watch list matching and contact the TSA Office of Intelligence (OI) to resolve any potential No Fly matches. In the future, foreign air carriers will contact the Secure Flight Service Center to resolve any potential No Fly matches. Secure Flight does not change existing procedures related to law enforcement officials' involvement in questioning individuals.

Comment: A commenter asked what procedures will be in place to ensure other airlines are alerted when an identified No Fly passenger has attempted to purchase a ticket on an airline within a certain region.

TSA Response: TSA is sensitive to the commenter's concern about an identified No Fly individual attempting to purchase a ticket from one carrier after being refused by another. One of the benefits of Secure Flight is the consistency it will provide. In this scenario, TSA will send an inhibited response back to the covered aircraft operator when that operator submits the SFPD for the individual.

Comment: TSA received a comment requesting that the Secure Flight final rule not require repetitive requests for information for subsequent flights by the same passenger.

TSA Response: TSA requires covered aircraft operators to request passenger information and to submit a SFPD for each passenger on every covered flight. Covered aircraft operators may program their systems to store passenger information for future use to alleviate the burden on passengers to input the passenger information every time they make a reservation or purchase a ticket. Covered aircraft operators may also program their systems to automatically use the stored information to populate the SFPD data fields for future flights. TSA is not mandating that covered aircraft operators program their systems in this manner. If they choose, however, to use systems that automatically populate the fields in their reservation system, TSA is requiring covered aircraft operators to submit passenger information that is automatically entered into the SFPD.

F. Privacy

1. General Comments

Comment: TSA received comments stating that U.S. carriers should not be subjected to conflicting privacy data requirements between the U.S. Government and foreign governments.

TSA Response: SFPD is security data provided pursuant to government directive and typically exempted from data privacy requirements around the world.

Comment: Several commenters expressed a concern with the Federal government collecting any data from U.S. citizens flying domestically.

TSA Response: The threat to aviation security exists for both domestic and international flights and watch list matching of passengers on these flights is an important security measure. TSA has carefully selected the minimal personal information that TSA believes is necessary to conduct effective watch list matching for aviation security and is collecting it only for watch list matching purposes.

2. Required Privacy Notice

Comment: TSA received several comments objecting to providing the privacy notice outlined in this final rule.

TSA Response: While TSA appreciates the concerns posed by these commenters, TSA has deemed sufficient privacy notice to passengers a key element of the program in order to ensure passengers are adequately aware that their data will be shared with the government. TSA will also develop a public awareness campaign to educate the traveling public regarding information collection and TSA's use of that information.

Comment: TSA received several comments suggesting that TSA take into account that privacy notices are already a requirement of European law and the wording is provided by data protection agencies in European Union (EU) Member States.

TSA Response: This final rule requires covered aircraft operators to use specific language to provide the complete privacy notice, unless TSA approves alternative language. For instance, if a governmental entity or entities develops a common privacy notice for use for international flights, that common privacy notice may be approved for use in lieu of the privacy notice specified in this final rule. Individuals who wish further information with respect to TSA's privacy policies should refer to TSA's Web site. The proposed privacy notice requirement applies to all passengers who travel and who will be screened by Secure Flight, not just individuals traveling to/from EU member states.

The privacy notice in this final rule does not affect the covered aircraft operators' responsibilities under other countries' laws or regulations regarding notice and consent. In addition to the requirements in 49 CFR 1560.103, covered aircraft operators should comply with any notice and consent requirements of other countries, such as Canada, in which they operate.

Comment: TSA received several comments expressing a concern that enforcing third parties' inclusion of a privacy notice on their Web sites or elsewhere cannot be controlled by covered aircraft operators.

TSA Response: TSA believes that privacy is an important component of the Secure Flight program. Because of its importance, TSA is requiring covered aircraft operators to post the privacy notice on their Web sites and on Web sites of third parties if the third party's Web site is capable of creating a reservation for the covered aircraft operator's reservation system. This comment is closely related to comments indicating that covered aircraft operators cannot require third parties to collect the required SFPD when they sell tickets for the covered aircraft operators' flights. As stated above in response to this comment, TSA believes that it is reasonable to expect that covered aircraft operators will include a requirement that the third parties post the privacy notice on their Web sites in agreements with third parties that have Web sites capable of making a reservation for covered aircraft operators' reservation systems.

Comment: A commenter argued that the privacy notice must be provided to individuals prior to collection of SFPD.

TSA Response: TSA seeks to have the privacy notice provided through a layered approach to reach the greatest number of passengers practicable. TSA is requiring covered aircraft operators to make the privacy notice available on their Web sites and to ensure that third parties that maintain Web sites capable of making a reservation for the covered aircraft operators' reservation system also make the privacy notice available on their Web sites. TSA will also post the privacy notice on its Web site. TSA believes that making the privacy notice available on Web sites is the most cost-effective and efficient method for providing notice. Requiring covered aircraft operators to provide the privacy notice for individuals who make reservations via the telephone, through a travel agent, and via other non-internet based methods would be costly and burdensome.

Comment: TSA received a comment requesting clarification on how covered aircraft operators should comply with the privacy notice requirement. The comment stated that the NPRM did not provide any guidance regarding how to manage the display and traveler acknowledgement of the privacy notice, when the privacy notice is required to

be shown (one time or during each subsequent reservation made by that traveler) and, where the notice must be shown.

TSA Response: The PIA TSA published in conjunction with the NPRM as well as this final rule explains that, prior to collecting information from an individual through a Web site or an airport kiosk, a covered aircraft operator must make the privacy notice available to the individual. The aircraft operator can achieve this by posting the privacy notice on its Web site or by providing a link to the TSA Web site.

TSA requested comments from the public on how a privacy notice could be provided during the collection of information through means not identified in section 1560.103 of the NPRM, but did not receive any.

3. Privacy Impact Assessment (PIA)

Comment: A commenter stated that DHS must address the privacy implications of the Secure Flight program and ensure that it remains within the scope of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).

TSA Response: In conjunction with this final rule, DHS is publishing a Privacy Impact Assessment on the DHS Web site at *http://www.dhs.gov* which assesses the privacy impacts of the final rule. TSA will also post the Privacy Impact Assessment on the TSA Web site at *http://www.tsa.gov.* TSA has designed Secure Flight to implement the Fair Information Principles and the Privacy Act [24] to the greatest extent possible. TSA will collect the minimum amount of personal information necessary to conduct effective watch list matching, adding more consistency and efficiency to the process by minimizing false positives and negatives while preventing known and suspected terrorists from boarding an airplane, and will provide notice and choice where possible.

Comment: TSA received several comments expressing concern about the requirement that covered aircraft operators submit passenger information stored in their system even though the passenger did not provide the information when he or she made the reservation. One commenter suggested that this requirement is not voluntary submission of personal data and TSA should not require SFPD to be collected in this manner.

TSA Response: The requirement to transmit passenger information that is stored but not provided at the time of reservation is limited to covered aircraft operators that program their systems to automatically use the stored information to populate the SFPD data fields for future flights. TSA notes that individuals may refuse to provide covered aircraft operators with passenger information that is stored for use to populate SFPD fields when making reservations.

This requirement allows TSA to rule out individuals as a watch list match and subsequently precludes that individual from being delayed or denied boarding or access to the sterile area. Reduction of misidentification is an important program goal that can be accomplished with the addition of data passengers have already provided to aircraft operators.

Comment: TSA received a comment stating that TSA does not provide adequate assurance that personal information other than that listed in the SFPD will not be collected and stored. The commenter was concerned that, according to the SORN, TSA's database will include communications between TSA and covered aircraft operators and the communications may include information about individuals' belongings screened during secondary screening at the security checkpoint.

TSA Response: TSA will employ processes to filter out and prevent any additional personal information beyond what is identified in this final rule as SFPD from being accessible to TSA for use. As a result, the Secure Flight program will only receive the Personally Identifiable Information that would be required under the Secure Flight final rule and described in its PIA. The Secure Flight system will not collect information about an individual's belongings that are screened at the security checkpoint.

The SFPD reflects the minimal amount of personal information necessary to conduct watch list matching. This information will be transmitted, stored, used, shared, retained, and destroyed consistent with stringent privacy laws, principles, and guidance.

4. Privacy Act Exemptions

Comment: TSA received approximately 12 comments regarding the Privacy Act of 1974: Implementation of Exemption and System of Records; Secure Flight Records; final rule and notice, 72 FR 63705 (Nov. 9, 2007) (Exemption final rule).

TSA Response: TSA appreciates the time the commenters took to review and comment on the Exemption final rule. The Exemption final rule became effective on December 10, 2007 and is beyond the scope of this final rule. The commenters raised many of the issues addressed in the Exemption final rule. A full discussion of these issues and the Privacy Act exemptions that TSA claimed for the Secure Flight program is in the Exemption final rule and the PIA that TSA is publishing in conjunction with this final rule.

5. System of Records Notice (SORN)

Comment: TSA received several comments expressing a concern that the Secure Flight program does not provide sufficient access to an individual's personal information under the Privacy Act. Commenters argued that individuals will not be able to access most of the information collected about them, and the program does not have a requirement to provide personal information upon request. The commenters stated that the NPRM did not provide an explanation for the restricted access and this restriction is contradictory to the Privacy Act of 1974.

TSA Response: Secure Flight complies with the Privacy Act access provisions, has published a SORN describing its Privacy Act system of records and providing access procedures, and also published a NPRM in connection with its exemptions as permitted under the Privacy Act. TSA fully considered public comment on the exemptions before publishing the Exemption final rule in the **Federal Register** on November 9, 2007.

Comment: TSA received several comments expressing concern that the public does not have sufficient information regarding the way TSA will use personal information as part of its watch list matching function. One commenter sought clarification on which databases TSA intends to use within Secure Flight.

TSA Response: In this final rule, TSA has determined that it will use the No Fly and Selectee components of the TSDB to perform its watch list matching function. In addition, TSA may decide to compare passenger information on some or all flights on a particular route or routes to the entire TSDB or other government databases, such as intelligence or law enforcement databases, when warranted by security considerations.

Comment: TSA received one comment arguing that, under the Privacy Act, an agency must collect information directly from individuals, to the extent practicable, when the agency may use the information to make a decision that adversely affects an individual's rights, benefits, and privileges under a Federal program.

TSA Response: TSA notes that covered aircraft operators currently

[24] 5 U.S.C. 552a.

collect information directly from passengers and non-travelers that is necessary for security purposes. Under this final rule, TSA requires covered aircraft operators to collect passenger and certain non-traveler information, by electronic means or verbally, at the time of reservation or when the traveler provides passenger information as part of a group or blocked space reservation, and to accurately transmit the SFPD to TSA. It is neither practical nor economically feasible for TSA to collect SFPD directly from the individual. TSA will leverage the existing practice of the aircraft operator, or a third party acting on behalf of the aircraft operator, collecting passenger and non-traveler reservation information for the purposes of conducting watch list matching comparisons. Any concern that data may be inaccurate unless collected directly from the individuals is mitigated by other factors and redress processes.

Comment: TSA received comments that expressed concern that the collection of SFPD ''exceeds the purposes of the Secure Flight Program.'' The commenters also raised concerns that Secure Flight may become a law enforcement tool that collects information that may be shared with other agencies without appropriate safeguards, legal standards, or oversight. The comment stated that the SORN and NPRM lack any explanation of the proper safeguards and protocols that TSA has put in place to protect the information that will be collected.

TSA Response: TSA has strictly limited the function of Secure Flight to accomplish watch list matching as mandated by Congress. Data collection has been limited to minimal identifying data elements and information used to manage the watch list matching and to notify the appropriate aircraft operator in the event of a possible match. Additional protections include the very short data retention (seven days) for the vast majority of individuals affected by the program, and integrating administrative, technical, and physical security safeguards as outlined in the PIA to place limitations on the collection of Personally Identifiable Information and to protect information against unauthorized disclosure, use, modification or destruction. Specifically, administrative safeguards will restrict the permissible uses of personal information and implement the controls for adherence to those uses. As part of the many technical safeguards employed, Secure Flight will implement role-based access controls and audit logging (the chronicling of information accesses and uses of information) as described in section 8.0 of the PIA to control and monitor the use of personal information. Privacy risks have been mitigated by a defense-in-depth strategy, access controls, auditing, and appropriate oversight.

6. Retention of Data

Comment: TSA received a number of comments expressing the opinion that the retention of SFPD must be consistent with European Union/United States data privacy rules as well as privacy laws of other countries. A few commenters argued that TSA should not require covered aircraft operators to comply with regulations that conflict with European Union laws and other countries' national data privacy laws.

TSA Response: SFPD is security information exempt from European Union Data Protection Directives and typically from other data privacy governance around the world. It is not the same as PNR data and thus, it is not subject to the DHS–EU PNR agreement. TSA will retain Secure Flight data pursuant to published record retention schedules as specified in the final rule. The records retention schedule for this rule requires that the Secure Flight program retain records for most individuals encountered by Secure Flight for only a short period. Records for individuals who are cleared by the automated matching tool would only be retained for seven days after the completion of the individual's directional travel. This 7-day period will be the retention period for the majority of people who travel. Records for individuals who are potential matches would be retained for seven years after the completion of the individual's directional travel in order to expedite future screening and to enable TSA to respond to any possible legal action. Records for individuals confirmed as a positive match to an individual on the watch list will be retained for 99 years after the completion of the individual's directional travel to support law enforcement and intelligence activities.

Comment: A commenter argued that the data retention schedule for overflights should be the same as the data retained for all other covered flights.

TSA Response: The retention schedule for Secure Flight records will be applicable to all flights, including overflights, regardless of origin or destination.

Comment: TSA received several comments concerned that TSA would be free to use SFPD for commercial or marketing activities.

TSA Response: TSA does not engage in commercial or marketing activities. It is only authorized to share information in accordance with the applicable routine uses under the governing SORN as required by the Privacy Act. In general, information may be shared with external organizations for national security, law enforcement, immigration, or intelligence purposes and as necessary to facilitate an operational response to threats to transportation or national security. Privacy risks that personal information may be disclosed to unauthorized individuals is minimized using a set of layered privacy safeguards that include physical, technical, and administrative controls to protect personal information as appropriate.

Comment: A commenter expressed concern that TSA will retain information for seven years about individuals who are identified as potential matches, but are in fact misidentified and will use the information to track these individuals. Although these individuals may obtain a Known Traveler Number or a Redress Number after being misidentified by Secure Flight, the commenter was also concerned that TSA will retain information about the misidentification for seven years.

TSA Response: The Secure Flight program will employ processes to prohibit tracking of itinerary information for those individuals not identified as a potential or confirmed match; it will permit controlled access to Personally Identifiable Information related to only those individuals identified as a potential or confirmed match. Retaining the record of potential matches for seven years provides the individual with the greatest opportunity for legal review.

Comment: TSA received several comments that argue TSA's self-imposed data retention restrictions are meaningless.

TSA Response: TSA disagrees with the commenters. TSA is committed to the enforcement of the records retention schedule approved by the National Archives and Records Administration (NARA).

Comment: TSA received one comment from a foreign government that expressed an unspecified concern regarding the retention of potential watch list matches' information for seven years, without those individuals' consent.

TSA Response: While TSA is sensitive to the concerns posed by this commenter, the seven-year retention provides the individual with the maximum opportunity to seek legal

review under the law.[25] Consequently, TSA will retain potential matches for seven years in accordance with the approved data retention schedule for Secure Flight records.

7. Sharing of Data With Other Agencies

Comment: Several commenters were concerned about TSA's authority to collect personal information from private citizens.

TSA Response: The authority for TSA to collect passenger information is section 4012 of the IRTPA, which mandates that TSA obtain passenger information in order to assume the function of conducting watch list comparisons.

Comment: TSA received several comments related to the sharing of data with other agencies.

TSA Response: External sharing will be conducted in accordance with the applicable routine uses under the governing SORN as required by the Privacy Act. Information is shared with external organizations for national security, law enforcement, immigration, or intelligence purposes and as necessary to facilitate an operational response to threats to transportation or national security. Privacy risks that personal information may be disclosed to unauthorized individuals is minimized using a set of layered privacy safeguards that include physical, technical, and administrative controls to protect personal information as appropriate. Any Federal agency receiving information is required to handle those data in accordance with the requirements of the Privacy Act and their applicable SORNs.

8. Collection and Use by Private Entities

Comment: TSA received several comments regarding the collection and use of passenger information by private entities, such as covered aircraft operators, for marketing and sales purposes.

TSA Response: TSA notes that the identified entities already collect passenger information that may be used for marketing and sales purposes, including data not mandated by TSA such as address or phone number. TSA limits the use of a boarding pass printing result that TSA provides to covered aircraft operators and airport operators for any purposes other than those necessary for Secure Flight. TSA will also instruct covered aircraft operators to appropriately safeguard the data related to Secure Flight, in terms of the SFPD it generates through the collection of information from passengers. TSA lacks the authority, however, to dictate any rules for data retention for aircraft operators. The cost associated with the storage of passenger data collected for Secure Flight purposes is beyond the scope of this final rule.

Comment: One association commented that some carriers might also not be allowed to collect and transmit data for these passengers according to their national data privacy laws.

TSA Response: SFPD is security data, which is typically exempt from privacy governance requirements around the world.

Comment: TSA received several comments that expressed concern that the required and ''voluntary'' data gathered and retained by TSA under Secure Flight could lead to traveler dossiers.

TSA Response: The Secure Flight program will not create ''traveler dossiers.'' TSA has established a very short (seven day) retention period for those individuals who are not a match or potential match in the automated matching process. This is expected to be the vast majority of individuals, and the addition of gender and date of birth to the mandatory data elements is expected to reduce even further the number of individuals identified as possible matches. For those individuals whose status cannot be resolved through the initial automated comparison, TSA may be unable to rule out such individuals as a watch list match, and consequently, they may be subjected to additional screening or denied boarding or authorization to enter a sterile area. TSA will make every attempt to clear these individuals through validation of an identity document or the collection of additional information provided via telephone to the Secure Flight Service Center. The seven-year data retention period established for these individuals is to provide the greatest ability to seek review.

G. Redress

Comment: TSA received two comments expressing general support for the DHS TRIP program. The commenters expressed support for DHS TRIP as the proper mechanism for individuals who believe that they have been improperly or unfairly delayed or prohibited from boarding an aircraft or entering a sterile area as a result of Secure Flight to seek redress. A commenter noted that DHS TRIP will minimize the number of people who will be misidentified. Other commenters noted that DHS TRIP will not be successful unless misidentified passengers who receive redress are no longer identified as potential matches to the watch list.

TSA Response: DHS TRIP is a robust and effective mechanism for individuals to seek redress and relief when they believe that they have been delayed or prohibited from boarding or denied entry to the airport sterile area as the result of the Secure Flight program to seek redress and relief. With the implementation of the Secure Flight program, TSA believes that it will become even more effective with uniform application by the Government rather than relying on application by individual covered aircraft operators. TSA has a continuing commitment to ensure the integrity and ease of the DHS TRIP process.

Comment: Various commenters objected to using DHS TRIP as the redress process for the Secure Flight program. They claim it does not meet the access and amendment criteria as required by the Privacy Act, that DHS TRIP is insufficiently transparent, and that DHS TRIP is ineffective, vague, and inadequate. Another commenter argued for the need for judicial review of TSA decisions regarding redress applications.

TSA Response: TSA disagrees that DHS TRIP is ineffective, vague, and inadequate. DHS TRIP is a Web-based customer service initiative developed as a voluntary program to provide a one-stop mechanism for individuals to request redress.

If TSA determines that the delay or prohibition from boarding or access to a sterile area resulted from a misidentification of the individual, TSA will retain the information provided by the individual as part of the redress process to facilitate authentication of the individual's identity during future air travel and to prevent repeated and unnecessary delays of misidentified individuals. Once the redress process is complete, an individual who has applied for redress may provide his or her Redress Number to covered aircraft operators. With this Redress Number, the Secure Flight program will have greater success in clearing this individual when it receives and processes the SFPD for the individual.

TSA is committed to minimizing misidentifications by continuously updating information as it becomes available to ensure the accuracy of the watch lists and the Cleared List.

Comment: One commenter stated concerns regarding the cost to airlines

[25] Under 28 U.S.C. 2401(a), the statute of limitation to bring suit against the U.S. Government is six years. Retaining the records for seven years ensures that the records are available should an individual file suit against the U.S. Government within the statute of limitation period.

for accommodating individuals who have been delayed or inhibited and are unable to make their scheduled flights.

TSA Response: TSA believes that the DHS TRIP redress process addresses the issue of individuals who have been delayed or inhibited. TSA does not require covered aircraft operators to absorb costs associated with passengers' inability to board their scheduled flights because of the Secure Flight program. Covered aircraft operators may make the appropriate customer service decisions for their operations.

Comment: One comment states that TSA should not require misidentified individuals to seek redress through DHS TRIP.

TSA Response: Individuals who believe they have been misidentified are not required to go through the redress process. DHS TRIP is designed as a voluntary program to provide a mechanism for individuals to request redress. In addition, a redress mechanism is required under the IRTPA. For individuals who choose not to seek redress through DHS TRIP, TSA does not have another mechanism to obtain the necessary information to determine whether the individual is a match to a person on the watch list.

Comment: Several commenters expressed concerns about the DHS TRIP redress process and offered recommendations on how to improve the DHS TRIP process.

TSA Response: TSA will share these commenters' concerns and recommendations with DHS TRIP.

Comment: One commenter stated that TSA should describe ''the names on the list'' and questioned the validity of the stated rationale for not disclosing the names as protecting national security.

TSA Response: TSA cannot respond to non-specific concerns. To the extent the commenter is referring to the watch list used by Secure Flight, it is made up of the Selectee and No Fly components of the TSDB. In certain circumstances set out in the NPRM, broader components of the TSDB might be used. Only individuals who are known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism are included in the TSDB.

As stated in the Secure Flight NPRM, TSA will not disclose the names on the watch list, because this information is derived from classified and sensitive law enforcement and intelligence information. Releasing this information would hamper the Federal government's efforts to protect national security.

H. Consolidated User Guide/Aircraft Operator Implementation Plan (AOIP)

Comment: TSA received several comments requesting that TSA clarify the following questions regarding the interaction between CBP's APIS Pre-Departure program and Secure Flight: (1) Whether CBP's APIS Quick Query (AQQ) message and the SFPD message can be combined; (2) whether a ''result'' will still be received in response to an AQQ submission; and (3) whether an AQQ result can amend a Secure Flight result. The commenters suggest that DHS should also provide a single process for submitting data sets and receiving responses, given that DHS is providing a single window for data submission. Comments also request more clarity in defining data elements terminology referenced in the rule, and that additional data feeds and varying formats (from the APIS Pre-Departure final rule) not be included in the Secure Flight final rule. One commenter felt that additional programming burdens would be placed on covered aircraft operators to program for AQQ requirements to receive two results for an international itinerary that contains both travel into and out of the United States, while Secure Flight would only require a single result for the same transaction.

TSA Response: The Consolidated User Guide, which is Sensitive Security Information (SSI), offers much of the guidance and requirements that covered aircraft operators designing and/or modifying their systems to interact with DHS programs, such as AQQ and Secure Flight, will need. The Consolidated User Guide also offers answers to many of the comments above. The Consolidated User Guide provides more detailed information in support of the rule by describing the data elements required to satisfy AQQ and Secure Flight requirements. Additionally, the Consolidated User Guide draws attention to those areas that are unique to either program by flagging them with a ''TSA'' or ''CBP'' marker. Data submission requirements, which are necessary to comply with AQQ and Secure Flight, have been aligned wherever possible and can be combined. The data submitted to DHS will be transmitted via the same portal. Once received, the data required by each program are extracted from the submission by the portal. A single boarding pass printing result will be returned to the submitter. There should never be an occurrence where a submitter would receive a boarding pass printing result from more than one agency.

DHS has attempted to align the data submission process for these two programs wherever possible. There will, however, be some areas where the programs are just not compatible. One example would be when submitting data for a passenger that will be flying into and out of the U.S. on the same directional itinerary. While Secure Flight's result can persist for the entire directional itinerary, APIS data are required by law for each segment of a trip into or out of the United States for the purpose of border enforcement.

Comment: A commenter questioned the need to re-examine a previous Secure Flight result during Irregular Flight Operations (IRROP) when APIS Pre-Departure does not.

TSA Response: In most IRROPS situations, Secure Flight only requires an informational update. Details are spelled out in the Consolidated User Guide that defines when an informational update is required and when a new boarding pass printing result is required.

Comment: Several commenters provided comments on the technical guidance and requirements in the Consolidated User Guide.

TSA Response: TSA appreciates the comments on the Consolidated User Guide. The comments are not within the scope the Secure Flight NPRM. TSA will provide responses to the comments to the covered aircraft operators in conjunction with release of the updated Consolidated User Guide reflecting the Secure Flight program requirements in this final rule.

Comment: TSA received comments suggesting that the AOIP not be made a part of the Aircraft Operator Standard Security Program (AOSSP). Commenters believe that incorporating the implementation instructions to the program will make the AOIP subject to a lengthy process that is required for making changes to the AOSSP.

TSA Response: The AOIP describes how and when a covered aircraft operator or airport operator transmits passenger, flight, and non-traveler information to TSA, as well as other related matters. Because the AOIP contains requirements that covered aircraft operators must comply with, TSA has determined that it should be part of the covered aircraft operators' security programs. TSA disagrees that amending the AOSSP to incorporate the AOIP would be a lengthy process.

Although TSA is not amending 49 CFR 1560.103 to state that the AOIP is a specific element of foreign air carriers' security programs, TSA will incorporate the AOIP into covered foreign air

carriers' security programs through 49 CFR 1560.109.

Comment: TSA received a comment suggesting that the proposed Secure Flight program be amended to allow an airport, at its discretion, to develop its own AOIP, rather than adopt the AOIP of affected aircraft operators. This commenter indicated that aircraft operator plans do not address the particular data systems at the airport.

TSA Response: TSA will work with airport operators to develop an implementation plan as appropriate. TSA anticipates that the implementation plan for airport operators will be similar to the AOIP but will take into account the data systems of the airport.

I. Testing

Comment: A few commenters expressed concerns about and requested further clarification on the program's performance standards, as well as its methodology for measuring them for all testing phases, such as benchmark and parallel testing. Additionally, a commenter argued that covered aircraft operators should neither be subject to Secure Flight, nor should they incur various costs until the program is proven to work. Additionally, this commenter believes that the government should incur the cost for the test phase, not the covered aircraft operators.

TSA Response: TSA has separated the testing process into two different phases. First, benchmark testing will take place to test the Secure Flight watch list matching capability against the current results of a covered aircraft operator. TSA has requested voluntary participation in benchmark testing and appreciates those who have participated in this testing. From the benchmark testing, TSA will determine whether the Secure Flight program meets the standards required to successfully accomplish watch list matching.

Following benchmark testing, the second phase of Secure Flight testing will be mandatory parallel testing. During parallel testing, all covered aircraft operators will participate. It is necessary to involve each covered aircraft operator to ensure that all components—watch list matching, connectivity, etc.—successfully meet the standards established for TSA to assume the watch list matching responsibility from each covered aircraft operator. This is part of the set of regulatory requirements and must be borne by the covered aircraft operators. Therefore, TSA will not absorb the covered aircraft operators' costs for this initiative.

TSA appreciates the concerns regarding the response time standards. TSA has established a standard response of not more than four seconds for the system to process a boarding pass printing result using the interactive messages that will occur when a reservation is made or updated information is provided from 24 hours prior to and up to flight departure. One commenter stated that four seconds is not a sufficient response time. TSA believes that the 4-second standard is sufficient for the interactive period, especially when the transmission of a majority of the data will occur as early as 72 hours before departure, with the boarding pass printing results returned to the covered aircraft operator well in advance of the 24-hour period during which a boarding pass can be issued.

Comment: Some commenters suggested that TSA has underestimated the number of messages between TSA and the aircraft operators associated with the volume of passengers and have expressed concern that Secure Flight cannot process this volume.

TSA Response: TSA has taken into account the anticipated number of messages associated with the forecasted volume of passengers and will be conducting stress testing to ensure that the system is capable of handling the volume.

Comment: One commenter noted that DHS must certify to the Government Accountability Office (GAO) that the Secure Flight program has successfully tested the system before TSA can assume the watch list matching function from covered aircraft operators.

TSA Response: The 2006 DHS Appropriations Act requires DHS to certify and GAO to report to Congress that TSA meets ten conditions set forth in section 522(a) of the Department of Homeland Security Appropriations Act, 2005, Public Law 108–334 (Oct. 18, 2004), including several that relate to system testing, before it can implement Secure Flight.[26] As the President has instructed in his signing statement dated October 24, 2005, DHS treats this provision as advisory to the extent it purports to allow GAO to prevent implementation of the law unless GAO reports to Congress that DHS has met certain conditions. Upon due consideration, TSA does not plan to assume watch list matching from the covered aircraft operators until DHS makes the required certification and GAO reports to Congress.

[26] TSA may, however, implement Secure Flight on a test basis prior to the DHS certification and the GAO report.

Comment: One commenter believes that parallel testing should not e validated unless it has been approved by both TSA and the participating covered aircraft operator.

TSA Response: TSA recognizes that parallel testing must result in the successful exchange of data between covered aircraft operators and the Secure Flight program. Therefore, TSA will work with covered aircraft operators throughout parallel testing to ensure that it is successful before TSA assumes the watch list matching function from the covered aircraft operators.

Comment: One commenter suggested that the portal through which SFPD will be submitted may not need further testing if CBP has already performed testing on the same portal, which TSA and CBP will share.

TSA Response: TSA believes that complete end-to-end testing between the Secure Flight program and covered aircraft operators must be successfully completed before TSA assumes the watch list matching function from covered aircraft operators. While portal testing may have occurred with CBP, complete end-to-end testing of Secure Flight will ensure the successful exchange of data between Secure Flight and covered aircraft operators.

Comment: One commenter stated that it is necessary to determine by the final rule what data elements will be used.

TSA Response: TSA agrees with this commenter, and therefore, the Secure Flight data elements are clearly identified in this final rule.

J. Identification Requirements

Comment: A number of commenters expressed concerns that mandating travelers to present a VID to travel restricts citizens' ability and constitutional right to travel. Concerns were also raised that some individuals may not have and/or cannot afford an applicable VID.

TSA Response: TSA notes that VID requirements only apply to individuals who are potential matches to individuals on the Selectee or No Fly portions of the watch list. These individuals will be required to present a VID to resolve any misidentification. Individuals who are confirmed Selectee matches will be subject to enhanced screening. Individuals who are confirmed No Fly matches may not fly. Courts have consistently held that travelers do not have a constitutional right to travel by a single mode or the most convenient form of travel. The Secure Flight program would only regulate one mode of travel (aviation), and would not impose any restriction

on other modes of travel. Therefore, a restriction on an individual's ability to board an aircraft as a result of the Secure Flight program would not interfere with a constitutional right to travel.

Comment: One commenter states that travelers would be required to display their identification whenever TSA orders and that the order would be given to the covered aircraft operators in secret. The commenter raised the potential threat of an airline contractor committing identity theft.

TSA Response: Under the Secure Flight program, TSA will not arbitrarily require travelers to display identification. As detailed in the final rule, VID are required (1) when TSA is unable to distinguish a traveler from an individual on the watch list and needs additional information to help resolve the match and (2) when the covered aircraft operator has not received watch list matching results on an individual prior to check-in. This requirement does not change the other requirements currently in place requiring individuals to provide identification at the security screening checkpoint or to undergo enhanced screening. However TSA and CBP continue to work closely together to harmonize and streamline systems and procedures to maximize efficiency and benefit to the traveling public.

TSA recognizes the importance of protecting against identity theft for SFPD. As to the specific comment, TSA notes that covered aircraft operators are generally in possession of significant information that could be used for identity theft, including name, address, phone number, credit card numbers, and other information. It is the covered aircraft operators' responsibility to prevent unauthorized access to and use of personal information to commit identity theft.

Comment: Several commenters requested clarification on whether the requirement for covered aircraft operators to not issue a boarding pass or authorization to enter a sterile area or permit an individual to board an aircraft if the individual does not provide a VID when requested applies to cleared individuals. These commenters also requested clarification on the number of times and/or the location of security checkpoints travelers will be required to display identification.

TSA Response: Currently, aircraft operators must request that all passengers and non-travelers provide identification at the time of check-in. Additionally, TSA requires individuals to present appropriate identification at the screening checkpoint or to undergo enhanced screening under existing security directives. With the implementation of Secure Flight, if an individual has an ''inhibit'' boarding pass printing result, covered aircraft operators will not issue a boarding pass to the individual if he or she does not provide a VID when requested at the airport. Passengers for whom Secure Flight has not inhibited boarding pass issuance will not be required to present a VID. This does not change the other requirements currently in place requiring individuals to provide identification at the security screening checkpoint or to undergo enhanced screening.

Comment: Several commenters agree that travelers' identification should be verified, but do not agree that TSA should specify how and where it takes place, due to different airline operating procedures, roles and responsibilities, and the possibility of delays.

TSA Response: TSA only requires covered aircraft operators to request a VID at the airport pursuant to procedures in its security program, when TSA has not informed the covered aircraft operator of the results for watch list matching for an individual by the time the individual attempts to check-in, or when TSA informs the covered aircraft operator that an individual must be placed on inhibited status. This procedure is required for the security of all travelers, as well as airline personnel.

Comment: One commenter suggests that TSA be responsible for just screening passengers and their cargo and to have Federal agencies, such as the Federal Bureau of Investigations (FBI) and the Central Intelligence Agency (CIA), assume responsibility for watch list matching activity.

TSA Response: The Intelligence Reform and Terrorism Prevention Act (IRPTA) requires DHS to assume the function of pre-flight watch list matching activity from aircraft operators. In accordance with IRPTA, TSA has developed the Secure Flight program to implement this congressional mandate. Under this rule, TSA will receive passenger and certain non-traveler information, conduct watch list matching against the No Fly and Selectee lists, and transmit boarding pass printing results back to covered aircraft operators.

Comment: TSA received several comments regarding the difficulty for passengers and non-travelers to clarify who is authorized to ask for a VID.

TSA Response: TSA expects to complete the watch list matching process and permit covered aircraft operators to issue boarding passes to the vast majority of passengers through the Secure Flight fully-automated, initial comparison. However, for the instances where TSA is unable to complete the watch list matching process for an individual, covered aircraft operators must ask the individual to present a VID. This requirement is in alignment with current practices that require covered aircraft operators to request all passengers and non-travelers to provide identification at check-in or at the screening checkpoint.

Comment: One commenter requested clarification on how TSA would account for passengers who make reservations under a name or nickname that differs from what is listed on their VID.

TSA Response: Under § 1540.107(b), travelers must provide their full name at the time of reservation. The Secure Flight final rule defines ''full name'' as the name that matches the full name listed on the individual's VID. Therefore, individuals may not submit nicknames unless that nickname is the name on the VID.

Comment: TSA received several comments that addressed the fact that certain identification requirements under Secure Flight are already current practice.

TSA Response: TSA is aware that travelers currently present identification to check in luggage and to enter the checkpoint. Additionally, passengers who travel on international flights must present a passport or another acceptable travel document to board an aircraft. Presenting identification in these situations serves a different purpose than the requirement to present a VID under this final rule. The requirement to present a VID applies only to passengers for whom TSA has asked the covered operator to place on inhibited status. This requirement assists TSA in resolving potential matches to the watch list. While this final rule includes a separate requirement to present identification, this requirement will apply to only a limited number of individuals and serves an important step in the watch list matching process. Including the requirement in this final rule also informs the public of the process and the affected individuals will know that they need to have a VID when they go the airport.

K. Economic Comments

Comment: TSA received several comments stating that the estimated time for employees of airline reservations centers or travel agents to collect personal information data from those making flight reservations by telephone should be longer than 20 seconds, the time used in the NPRM.

These comments also suggested that 30 seconds was a more accurate estimate of the average data collection time.

TSA Response: Based on information received from subject matter experts and used to develop the NPRM estimates, TSA disagrees that on average this collection of personal information will take considerably longer than 20 seconds. Nonetheless, in the high estimate cost for the regulatory evaluation, TSA used 30 seconds as the cost to airline reservation centers, travel agents, and passengers themselves, who incur opportunity costs when this additional data collection requirement impinges on time that could have been used in other ways. Because of this, the regulatory evaluation contains estimates of the contribution to Secure Flight costs of a change in TSA's primary assumption on this matter. TSA recognizes that in some instances and for some reservations this data collection time could require additional time, but believes that in many if not most instances the additional data collection effort will be very modest. To balance these concerns, TSA will use a primary estimate of 25 seconds for the time required to collect personal information required by Secure Flight during the telephone reservation process.

Comment: TSA received a comment stating that messaging costs related to Secure Flight appear underestimated and that an average message cost of $0.20 should be assumed. This value would be consistent with the value used by CBP in the APIS regulatory evaluation.

TSA Response: TSA agrees with this comment. Both in the text of the NPRM evaluation and for the final rule TSA has used a per message value of $0.20, just as the CBP analysis in the APIS regulatory evaluation.

Comment: TSA received a comment that travel agencies using electronic profiles will be obliged to reprogram these profiles to accommodate the additional data fields required for reservations under Secure Flight, and that these costs should be included in the Secure Flight cost analysis. In addition, costs associated with updating agent scripts for taking passenger reservations should be included as a compliance cost.

TSA Response: TSA concurs with this comment and has relied on data provided by the commenter to estimate these costs in the final rule regulatory evaluation. TSA includes the updating of agent reservation scripts as part of this reprogramming activity.

Comment: TSA received a comment that travel agents would incur training costs to prepare agency employees for the new data collection requirements of Secure Flight, and that these costs should be included as a cost of compliance with Secure Flight.

TSA Response: TSA agrees that these training costs to travel agents are among the compliance costs for Secure Flight, and has included an estimate of these costs in the final rule regulatory evaluation.

Comment: TSA received a comment stating that as part of the costs of Secure Flight, TSA should include the costs of holding flights that are awaiting Secure Flight clearance, and should use the estimate of these costs used by CBP in its evaluation of the APIS rule.

TSA Response: The Secure Flight program addresses the issuance of boarding passes to passengers, and not the clearance of flight manifests or passenger lists. Additionally, since the process of clearing passengers already exists along with delays as described above, there is a fundamental difference in the baseline between the APIS and Secure Flight rules. When implemented, the program is required to improve over the current situation and thus either the same or better than existing delays. Therefore, the cost of holding a flight is not relevant for the workings of the Secure Flight program.

Comment: TSA received a comment regarding reservations for international air travel and the distribution of these reservations among airline call centers, brick and mortar travel agencies and online reservation services. The comment questioned whether reservation making is distributed for international travel in the same way as it is for domestic travel, and stated that historically travel agencies have been more prominent in providing reservation services for international itineraries. Because of this the commenter requested that travel agencies should be given a greater proportion of international travel reservations. The commenter also claimed that these international reservations handled by travel agencies are typically the more difficult and time-consuming reservation assignments.

TSA Response: Because of the significant changes that have occurred in airline ticket distribution in the past decade, with the rise of more direct and transparent distribution of tickets to passengers via the internet and the growing use of the internet in all aspects of public life, TSA believes that forecasting the future of airline ticket distribution channels is difficult at best. Given this great uncertainty, TSA does not think changing the current distribution used in the regulatory evaluation is justified. With respect to the greater difficulty or complexity of international reservations that are handled by travel agencies, the regulatory evaluation takes note only of the cost to reservation makers and passengers of the incremental time added to the reservation process by Secure Flight requirements, and this increment does not change with the complexity of the travel itinerary or related reservation details.

Comment: Numerous commenters stated that TSA had failed to consider the costs of delay to travelers and the airlines as the APIS rulemaking did.

TSA Response: In TSA's view, the effect of Secure Flight will be to improve the system-wide passenger clearing process, not reduce its effectiveness with increased delays. Any costs that may be imposed by Secure Flight should be measured as an increment from today's baseline, which itself already includes these types of consequential disruptions to travel plans. Numerous examples of how delays will be reduced were provided in the NPRM evaluation and there is no evidence that the centralized processing would increase the frequency or duration of associated delays. Furthermore, there are several material differences between Secure Flight and APIS implementation. The APIS rule had to consider that the screening and potential delays were being added to a baseline that did not already include those same delays. Additionally, the CBP rules were designed around giving a flight manifest a go/no-go decision for the whole flight. In this context, it is very prudent to consider the possibility of an entire flight being delayed. For Secure Flight, the screening process and delays already exist and the clearance is reservation by reservation. There is no reason to believe that air carriers would hold a flight for a single individual. TSA believes strongly, that if anything the calculation should have been a reduction and attributed as a benefit. Instead, TSA examined the federal published data on flight delays due to security causes. Using that data, TSA provided an example of what doubling those costs would look like. TSA does not believe the example is at all probable but included the information in the regulatory evaluation to assure the public TSA did not ignore the issue.

Comment: Numerous commenters stated that this rulemaking was an unfunded mandate.

TSA Response: Both the NPRM and final regulatory evaluations require application of the provisions of the Unfunded Mandates Reform Act

(UMRA). UMRA defines an unfunded mandate as one that ''may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year. * * *'' This final rule does not contain such a mandate on State, local, and tribal governments. The overall impact on the private sector does exceed the $100 million threshold in the aggregate.

Comment: Many commenters suggested that the private sector could not afford the program.

TSA Response: There are legislative mandates to implement federal passenger name matching. TSA has attempted to balance very real security needs with the appropriated funds provided to it and costs imposed on the rest of the economy.

Comment: A private citizen said the program should be judged by a terrorist's cost to defeat the program.

TSA Response: TSA is uncertain how such an approach could be presented. TSA's goal is to provide a program that is difficult for the terrorist to defeat by improving the multiple levels of security TSA uses. Strengthened security does increase the costs to the terrorist but not such that a useful comparison could be made for regulatory consideration.

Comment: A private citizen stated that GAO should review the costs.

TSA Response: There is considerable review outside TSA of both program costs and the evaluation for purposes of the rulemaking. GAO is not a part of the review at this stage.

Comment: At least one commenter felt being denied access to travel was detrimental to professional position.

TSA Response: One of the requirements and goals of Secure Flight is to reduce the current number of instances where individuals are inappropriately delayed or denied access. This rulemaking should improve over the status quo.

Comment: Numerous comments suggested TSA had inadequately addressed various travel agent costs.

TSA Response: TSA used much of the suggested data and process description in completing a final estimate that included considerably more expense for programming, training, and day to day implementation. Approximately $80 million in additional expenses was added to reflect these travel agent costs.

Comment: Air carrier comments generally stated that the rule cost too much and TSA had omitted some cost categories. In some cases the carrier comments speculated about what might be changed in the final rule.

TSA Response: TSA is not addressing the speculative comments; but where specific examples related to the final rule were provided TSA incorporated the information as appropriate. Specific examples are covered in other comment responses. TSA did identify and included slightly more than $800 million in additional air carrier expenses based upon the public input. TSA has considered cost and security as a delicate balancing process but must achieve the security needs of the country.

Comment: Numerous comments suggested opportunity costs were not fully understood. Numerous comments suggested flat rates or the addition of costs already presented as opportunity costs.

TSA Response: TSA reviewed these comments to verify that opportunity costs had in fact been included in the Regulatory Impact Analysis. These comments included concerns with opportunity costs for passengers making reservations and compensation costs to businesses associated with collecting new passenger data from those making reservations. Based on these comments, TSA increased the average time per reservation transaction for requesting and providing this Secure Flight passenger information from the 20 seconds used for the NPRM to 25 seconds in the regulatory evaluation for the final rule. This change affected costs to travel agents taking reservations by telephone and costs to airline telephone reservation centers. The change also affected opportunity costs for passengers making telephone reservations using either of these two channels for reservation making. TSA identified opportunity costs of time that are incurred by passengers making reservations, who must spend additional increments of time providing Secure Flight required information over the telephone or internet in the course of making an airline reservation. These spans of time were valued using the average passenger value of time developed for DOT and FAA regulatory guidelines. In TSA's view, which is consistent with customary practice in this type of analysis, it is more accurate to estimate average spans of time spent, and value these using a consensus value of time, rather than assigning a flat value per passenger.

Additionally, TSA verified that it fully assessed business costs that mirror passenger opportunity costs. For increased transactions times, this involves both estimating the additional labor costs borne by these firms, and using fully-burdened compensation rates to monetize these labor costs, because meeting the Secure Flight data collection requirements may necessitate additional staff for affected firms. In some cases, commenters indicated that Secure Flight requirements would lead to additional reaccommodation costs for travelers who were kept from boarding their intended flights. In TSA's view, the effect of Secure Flight will be to improve these matters, relative to the current baseline environment, rather than worsen them. Commenters suggested that businesses affected by Secure Flight must devote additional employee time for fulfilling Secure Flight information requirements or for assisting passengers whose travel itineraries are disrupted by factors related to Secure Flight. To assess time-related costs, such as the time associated with the solicitation and recording of additional data elements from passengers, TSA used hourly compensation rates from the Bureau of Labor Statistics. It is TSA's view that Secure Flight will improve the management of security-related passenger identity data.

Comment: Several air carriers stated that the estimates for the AOIP implementation were considerably low.

TSA Response: The rule describes the change from a carrier developed-AOIP to a TSA-developed AOIP. This substantial change could mean the cost estimate is now too high because the workload has been reduced for the carriers.

Comment: Numerous comments mentioned the impact and interaction of the Secure Flight and APIS rules.

TSA Response: TSA and CBP worked very hard to eliminate redundancies and minimize the combined impact of the rules. A Consolidated User Guide has been issued that outlined to the carriers the details showing that both agencies have adapted the process to satisfy security requirements while not causing unnecessary redundancy of work and expenses. Additionally, the costs related to that interaction were reviewed to avoid double counting in the final evaluation.

Comment: Several commenters provided feedback on the benefits and break-even analysis. One said that a reduction in false positives would be a benefit, but TSA needs to clean up the No Fly list. Two others noted that the benefits claimed were also claimed by CBP for the AQQ program, so they should not be double counted for Secure Flight. Several comments showed dissatisfaction with the concept of a break-even analysis.

TSA Response: The Federal government is constantly working to improve the quality of all matching lists.

A break-even analysis is not a traditional benefit-cost ratio. The qualitative description of benefits in both rules is appropriate as no assertion is made of an exact level. All DHS components are working hard to improve the methods of presenting security benefits in relationship to costs. The very nature of terrorism makes it impossible to assign traditional probabilities to events or to describe a risk as a specific probability. At present, the break-even analysis balances the need to present comparable methodologies among rules while not disclosing any highly sensitive intelligence.

Comment: Several comments addressed cost issues related to the Consolidated User Guide and that the government should pay the expenses imposed on the private sector.

TSA Response: TSA does not separately identify costs as Consolidated User Guide costs. Rather, TSA considers all of the known changes from the status quo and provides its best estimate of those costs in total. Status quo costs are the starting baseline for evaluating the rule, not an element TSA can add and reimburse the private sector.

Comment: One organization stated that the analyses required by constitutional and international law, the Airline Deregulation Act, the Privacy Act, and the Regulatory Flexibility Act must be conducted and published for additional comment before the proposed rules or any similar rules are finalized.

TSA Response: TSA has complied with analysis requirements for both the NPRM and final rule. The requirements of the Regulatory Flexibility Act are very clearly identified in the regulatory evaluations.

Comment: One public interest group stated that frequent flyer programs provide billions of dollars of benefits each year in exchange for the information they collect. Travelers will now be required to provide the information for free. This rule could have a significant impact on the frequent flyer programs—perhaps making them obsolete. The air carriers will now be able to collect the information and sell it or use it in marketing without compensation. TSA must account for those costs.

TSA Response: Air carriers have already begun to change their loyalty programs. TSA cannot speculate on the future of these programs, because expenses, such as fuel costs, are resulting in less end-user value. Some air carriers have stated that they did not have this information in other systems (such as frequent flyer programs) that would fully satisfy the data acquisition requirements. If TSA calculated a marketing sales value on the data, that value would be a benefit offsetting some of the carriers' costs. Based upon carrier comments, TSA believes the carriers would not agree that such sales would be beneficial.

Comment: According to the Small Business Administration's Office of Advocacy (SBA Office of Advocacy), TSA's statement in the NPRM that it was withholding RFA certification implied that TSA had already predetermined that the rule would not have a significant economic impact on a significant number of small entities. The SBA Office of Advocacy believed that TSA was not making a reasonable effort to explore all effects of the rule.

TSA Response: TSA's intent in the Initial Regulatory Flexibility Analysis (IRFA) was to convey that TSA had not made a determination on whether there was a significant economic impact on a significant number of small entities. TSA did not intend to imply that it had predetermined that the rule would not have a significant economic impact on a significant number of small entities. Unfortunately, the word choice conveyed the opposite meaning. TSA explored all effects of the rule and used economic information from all commenters to improve the final estimates throughout the evaluation. TSA expanded a sensitivity analysis in the Final Regulatory Flexibility Analysis (FRFA) to show that we examined the various degrees of impact. TSA concluded that the rule did not have a significant economic impact on a significant number of small entities in section 2.2.2. of the final regulatory evaluation.

Comment: SBA Office of Advocacy stated that TSA has underestimated the cost to small business and did not consider certain costs. These costs include the impact of flights that may be delayed waiting for TSA, which is an economic cost and could lead to loss of future business. Additionally, airlines may need additional staff to deal with unhappy customers. The SBA Office of Advocacy suggested that TSA should address the cost of negative customer satisfaction.

TSA Response: TSA reviewed the small business analysis and has presented a FRFA that TSA believes is representative of impacts and costs. Not all air carriers are regulated under this rule. After reviewing all comments, TSA became aware that some commenters had assumed that all carriers would be regulated under this rule.

Additionally, the SBA Office of Advocacy comments fail to recognize that many of the items identified as supposedly new impacts are actually in the existing baseline today. The evaluation presents the change, not the baseline plus change. In TSA's view, the effect of Secure Flight will be to improve the system-wide passenger clearing process, not reduce its effectiveness with increased delays. Any costs that may be imposed by Secure Flight should be measured as an increment from today's baseline, which itself already includes these types of consequential disruptions to travel plans. In the NPRM evaluation, TSA provided numerous examples of how delays will be reduced. There is no evidence that the centralized processing would increase the frequency or duration of associated delays. Additionally, the performance standards for final implementation require an improvement in overall service. TSA believes the clarification on baseline events cited as new and the strict implementation requirements provide a contrary conclusion to the SBA Office of Advocacy.

Comment: The SBA Office of Advocacy suggested that TSA should consider alternatives that commenters suggested.

TSA Response: TSA is unaware of the specific alternatives the SBA Office of Advocacy may be suggesting. TSA reviewed and considered all comments. TSA believes the final rule and evaluation reflect the viable alternatives.

Comment: The SBA Office of Advocacy and other commenters stated that TSA underestimated the impact on travel agents and that the impact is direct. They suggested that TSA should prepare a supplemental IRFA.

Response: The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) requires agencies to analyze the economic impact of regulatory changes on small entities that would be directly regulated by proposed rules. An agency is not required to prepare such an analysis, however, if the agency head certifies that the rule will not ''have a significant economic impact on a substantial number of small entities'' and supports the certification with a statement of the factual basis for the certification. 5 U.S.C. 605(b). This final rule does not directly regulate travel agents, because the final rule requires only covered aircraft operators, not travel agents, to collect and transmit SFPD to TSA. Although TSA proposed in the Secure Flight NPRM to require covered aircraft operators to collect passenger information at the time an individual makes a reservation for a flight, TSA has decided not to include

this requirement in this final rule. Instead, covered aircraft operators cannot transmit a SFPD to TSA for processing unless they have the individual's full name, date of birth, and gender. Thus, it is up to the covered aircraft operators to decide how and when it will collect passenger information, provided that the covered operator collects full name, date of birth, and gender for all reservations 72 hours prior to the scheduled time of flight departure.

TSA used much of the information from the comments to increase the costs that travel agents will incur by approximately $80 million. Even in the NPRM, TSA did not dismiss the costs to the travel agents; rather, as stated in the legal citations above, TSA believes it has made the appropriate presentation in the FRFA.

Comment: A commenter stated that TSA's count of small airlines is wrong particularly in the case of Alaska.

TSA Response: TSA worked from an exact list of regulated entities. TSA believes that many commenters assumed that TSA, through this rule, would regulate all air carriers.

Comment: A commenter argued that setting the threshold for determining whether an entity experienced an impact at 2 percent or higher of their revenue is too high.

TSA Response: TSA included a sensitivity table with different thresholds but TSA's intent was to convey no decision on the Regulatory Flexibility Act determination. TSA revised the analysis in the FRFA in section 2.2.2. of the final regulatory evaluation.

Comment: A commenter stated that the use of an internet portal is not practical for any operator other than the very smallest.

TSA Response: TSA is developing a software application to enable Secure Flight connectivity for the very smallest carriers. The use of the term ''internet portal'' was merely a way to label this alternative. TSA is developing this alternative system specifically with the small carriers' needs in mind. TSA also developed a system whereby air carriers may communicate directly with DHS and will be able to send SFPD to TSA and receive results through this system. TSA adjusted both the cost levels and distribution among the air carriers to better reflect costs.

Comment: A commenter stated that some small airlines do not participate in APIS and therefore will have first time programming costs to connect with Secure Flight.

TSA Response: TSA adjusted both the cost levels and distribution among the air carriers to better reflect costs that are reflected in the FRFA. TSA is unable to differentiate or provide relief separately to non-APIS carriers. TSA calculations did attempt to estimate the number in APIS versus original programming. This information, however, is not air carrier specific.

Comment: A commenter stated that this rule would affect small businesses in instances where individuals representing the small businesses would attempt to travel without proper documents.

TSA Response: Except under the limited circumstance in which a passenger must present a verifying identity document at the airport, the rule does not change the current requirements for presenting documents at the airport and does not impact passengers who do not need to present a verifying identity document. Section 1.6.6 of the final regulatory evaluation includes an analysis of the impact of passengers who must present a verifying identity document.

Comment: A commenter stated that there are several sections in the rule where Secure Flight appears to be in conflict with international law, specifically, article 12 of the International Covenant on Civil and Political Rights (ICCPR).

TSA Response: The commenter mischaracterized this issue as a small business issue. The relationship between Secure Flight and various international agreements has been discussed, as appropriate, in section III.A of this preamble. TSA does not consider this a comment on the IRFA or appropriate to address in the FRFA.

L. General Comments

TSA received numerous general comments on the Secure Flight NPRM as a whole without comment on any specific provision of the NPRM. TSA received several comments expressing general support for the Secure Flight program and its mission to enhance the security of commercial air travel through preflight comparisons of airline passenger information to Federal government watch lists for international and domestic flights. TSA also received several comments expressing general opposition to the Secure Flight NPRM without noting specific objections.

Comment: TSA received several comments stating that the Secure Flight NPRM fails to improve on the current process and/or flight safety. Other commenters similarly claim the increased bureaucracy and costs of Secure Flight are not warranted by the benefits of the program.

TSA Response: TSA disagrees that Secure Flight will fail to improve on current processes and/or flight safety. IRTPA requires DHS to assume from aircraft operators the function of conducting pre-flight comparisons of airline passenger information to Federal government watch lists for international and domestic flights. TSA has designed Secure Flight to implement this congressional mandate.

The Secure Flight program will streamline and simplify the watch list matching process by moving watch list matching responsibilities currently performed by dozens of air carriers to TSA. There are many benefits of the Secure Flight program. The program will create consistency for the traveler and help prevent passenger misidentification and will allow airlines to focus on other aspects of their operations. TSA will be able to prevent more effectively and consistently certain known or suspected terrorists from boarding aircraft where they may jeopardize the lives of passengers and others. Furthermore, TSA will be able to identify individuals who must undergo enhanced screening because they pose a threat to civil aviation. TSA will also be able to facilitate the secure and efficient travel of the vast majority of the traveling public by distinguishing them from individuals on the watch list, thereby minimizing the likelihood of a passenger being incorrectly identified as an individual on the watch list.

Comment: TSA received requests for an extension of the comment period due to the complexity and scope of the NPRM. There were requests to extend the comment period from October 22, 2007, to both December 21, 2007, and January 21, 2008.

TSA Response: TSA appreciates the concern and desire for additional time to provide substantive comments on the rule. TSA extended the comment period an additional 30 days (to November 21, 2007) in a notice published in the **Federal Register** on October 24, 2007.[27] TSA believes this provided a sufficient amount of time for commenters to fully understand and comment on the impacts and implications of the Secure Flight NPRM.

Comment: TSA received several comments expressing a concern that the Secure Flight program would increase the likelihood and length of delays at airports for passengers.

TSA Response: The covered aircraft operators will provide the majority of the requested passenger information and will receive boarding pass printing results in advance of a passenger's

[27] 72 FR 60307 (Oct. 24, 2007).

arrival at the airport. This process will reduce the need for passengers to go to the ticket counter to provide passenger information. For the majority of passengers, Secure Flight will not impact their ability to obtain a boarding pass in the manner that they currently do so. Additionally, DHS must certify that Secure Flight will not produce a significant number of misidentified passengers.[28] For many passengers who currently need to go to the ticket counter to obtain a boarding pass, Secure Flight will allow them to obtain their boarding passes in advance or at the airport kiosks. Therefore, TSA believes that the Secure Flight program will not cause additional airport delays.

Comment: A commenter requests that TSA coordinate with the aircraft operators during Secure Flight development.

TSA Response: TSA has been coordinating, and will continue to coordinate, with covered aircraft operators, as well as other affected parties, during development and implementation of Secure Flight.

Comment: One aircraft operator questions what TSA has done to address the issue of following a disciplined life cycle development approach outlined in the August 4, 2006, GAO Report on Secure Flight.

TSA Response: TSA has implemented processes and a program management organization to address the concerns identified in the GAO report on Secure Flight. These include the development of program goals and requirements, a detailed program schedule, cost estimates and tracking mechanisms, and system and data security programs. GAO continues to review Secure Flight progress in these areas. DHS will certify that TSA has followed a disciplined life cycle program for the Secure Flight program before TSA assumes responsibility for watch list matching.

Comment: TSA received several comments asking if TSA or DHS plans to launch a public awareness campaign to ensure that the traveling public understands the new requirements for providing additional personal information such as full name, date of birth and gender. Several of these commenters indicated they would support such a program. One commenter suggested that the definition of full name should simply be explained as matching the identity document of the individual and should become a focal point of the campaign.

TSA Response: TSA agrees that the full name provided by a passenger or non-traveler must match that which appears on their VID. Under §§ 1640.107(a) and 1560.3, passengers and non-travelers must provide their full name as it appears in their VID.

Additionally, TSA plans to launch a public awareness campaign to ensure the traveling public understands the new requirements for providing additional personal information such as full name and gender. The campaign is still being developed and will be described in further detail in the future.

M. Comments Beyond the Scope of the Rulemaking

Comment: TSA received one comment that expressed support for Secure Flight, but also requested that TSA mandate ''no movement between cabins out of the U.S., as well as into the U.S.'' In order to achieve this, the commenter proposes that a ''chain mesh curtain must be mandated.''

TSA Response: Restrictions on movement between cabins on flights into and out of the United States is outside of the scope of this final rule.

Comment: Several comments indicated support for the APIS Pre-Departure final rule and resulting changes in the definition of ''departure.'' Other commenters suggested changes to the APIS Pre-Departure final rule, including recommendations that CBP use the Cleared List in watch list matching.

TSA Response: The APIS Pre-Departure final rule and resulting changes, such as the change in the definition of ''departure,'' are outside of the scope of the Secure Flight final rule.

Comment: Several commenters suggested that DHS address other threats to our nation's security, for example, threats involving port security and border security.

TSA Response: Comments on other actions taken by DHS to ensure our nation's security, by means other than Secure Flight, are beyond the scope of this final rule.

Comment: TSA received several comments expressing concern that covered aircraft operators operating the first flight of a connecting flight would not be able to issue a boarding pass for the second flight until the covered aircraft operator received an appropriate boarding pass printing result from TSA. Some commenters requested that Secure Flight develop a standard for transmission and sharing of messages between covered aircraft operators to enhance the security process, with respect to connecting passengers.

TSA Response: The decision to share data between covered aircraft operators is beyond the purview of TSA's authority and outside of the scope of this final rule. While data sharing agreements between covered aircraft operators are decisions unique to the business of each carrier or carrier alliance, TSA acknowledges that such agreements would enhance the Secure Flight data transmission/security clearance process, particularly with respect to connecting passengers.

Comment: A commenter suggested that DHS ''sunset'' the 2007 APIS Pre-Departure final rule once Secure Flight takes over watch list matching for international flights. The commenter believes that the 2007 APIS Pre-Departure final rule is unnecessary once Secure Flight is in place for watch list matching.

TSA Response: TSA appreciates the commenters concerns related to ''One DHS Solution,'' however, any changes to the APIS Pre-Departure final rule are outside of the scope of this rulemaking.

Comment: TSA received one comment requesting information on what TSA's contingency plans are for accommodating passengers on another carrier in the event of a Secure Flight outage.

TSA Response: TSA will provide outage information to covered aircraft operators in the Consolidated User Guide. Rebooking airline passengers is outside the scope of the Secure Flight program.

Comment: A commenter suggested that TSA indemnify covered aircraft operators for any and all claims related to that information collection.

Response: While TSA understands the concern expressed in this comment, indemnification of covered aircraft operators is beyond the scope of this rulemaking and TSA's authority to implement.

IV. Rulemaking Analyses and Notices

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations.

This final rule contains new information collection activities subject to the PRA. Accordingly, TSA has submitted the following information requirements to OMB for its review.

[28] Section 522(a)(2) of the 2005 DHS Appropriations Act (Pub. L. 108–334, 118 Stat. 1298, Oct. 18, 2004).

TSA is establishing this information collection in accordance with 49 U.S.C. 44903(j)(2)(C), which requires TSA to assume the passenger matching function of comparing passenger information to Federal watch lists. In order to carry out effective watch list matching, TSA has determined that it must receive each individual's full name, gender, date of birth, and, to the extent available, Redress Number, Known Traveler Number (in the future), and passport information. Therefore, TSA is requiring covered aircraft operators to request this information from passengers or non-travelers seeking sterile area access on covered flights. The covered aircraft operator must then communicate this information, as well as message management information and itinerary information to TSA. The covered aircraft operator must also transmit relevant updates to the passengers' or non-travelers' information. Additionally, TSA may need the covered aircraft operators to obtain and communicate information from an individual's form of identification or a physical description (e.g., height, weight, hair color, or eye color) of the individual. TSA would use all of this information during watch list matching.

After the final rule is published, TSA will provide an Aircraft Operator Implementation Plan (AOIP) to each covered aircraft operator, outlining each covered aircraft operator's specific requirements for implementing Secure Flight. These requirements include the specific compliance dates on which each covered aircraft operator must begin testing and providing SFPD to TSA. Although the AOIP was described in the preamble of the NPRM as a reporting burden, under the final rule, TSA will provide the AOIP to covered aircraft operators. Therefore, the AOIP is now a recordkeeping requirement, and, as such, the covered aircraft operators must adopt the AOIP into their Aircraft Operator Standard Security Plan (AOSSP) upon finalization of the AOIP.

Under this final rule, TSA will provide authorization for non-travelers to enter a sterile area to accompany a traveling passenger (such as to escort a minor or assist a passenger with a disability). In the future, TSA plans to authorize non-travelers seeking authorization to enter a sterile area for other purposes, and TSA will collect information about those non-travelers. TSA is not able to estimate the information collection burden for this future aspect of the Secure Flight program and therefore has not included them in the burden estimates.

TSA is requiring covered aircraft operators to submit passenger information for covered flights and certain non-traveling individuals to TSA for the purpose of watch list matching. This information includes data elements that are already a part of the routine collection by the covered aircraft operators (e.g., name, itinerary info), as well as the additional information required in the Secure Flight final rule.

TSA assumes that the great majority of covered aircraft operators will use an automated transmission process to submit passenger information and information for non-traveling individuals. The transmission time for an automated system is instantaneous and, as such, TSA believes the additional time-related burden of transmission is too small to be significant. TSA has determined that the information that covered aircraft operators must collect or request from passengers (e.g., date of birth, gender, Redress Number (if available)) will take no more than 25 seconds per transaction to collect. TSA estimates that the annual hour burden for this activity is 548,843 hours. For the remaining 16 covered aircraft operators (see table 1.4.1.e of the Regulatory Analysis) who will potentially leverage the Web-based alternative data transfer mechanism, TSA has estimated the time required to build and transmit initial messages and updated messages to TSA at 4,013 total annual hours. Thus, TSA estimates the total annual hour burden for an annual 163 respondents to be 552,856 hours [548,843 + 4,013].

As a protection provided by the Paperwork Reduction Act, as amended, 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.

TSA received several comments generally on the information collection burden. Below is a summary of the comments and TSA responses to the comments.

Comment: One commenter noted that the additional passenger information that TSA is requiring covered aircraft operators to submit to TSA is already available to the aircraft operator. This additional information, however, still represents an additional transmission burden than that already required for APIS.

TSA Response: As part of its PRA analysis, TSA has recognized a transmission burden, but because for most aircraft operators the transmission is automated and therefore instantaneous, as stated above, TSA believes the additional time-related burden is too small to be significant. Also above, TSA has calculated an hour burden for the remaining 16 covered aircraft operators who will potentially leverage a Web-based alternative data transfer mechanism to transmit data to TSA.

Comment: With regard to specific data elements, a commenter expressed the view that with the exception of name and some flight information, no SFPD is routinely collected or contained within a passenger's reservation booking.

TSA Response: TSA recognizes that aircraft operators have different systems in which they maintain passenger information. TSA does not require that aircraft operators submit SFPD from their reservation systems. Aircraft operators may use any system in which the data resides to transmit the passenger information.

Comment: A commenter held the view that TSA did not consider costs other than transmission of the passenger data in its annual burden estimate, such as costs of collecting the SFPD, resource costs to meet new requirements, training costs, costs of responding to inhibited vetting responses, and the cost of delay to aircraft where TSA is unable to provide a vetting response in a timely manner.

TSA Response: Within the PRA analysis, TSA has not calculated a cost burden on aircraft operators for collecting SFPD from passengers that is separate from the cost of the hour burden to collect these data. The other additional costs are not part of the PRA cost analysis, but are considered in the regulatory evaluation. In its Information Collection Request (ICR) submitted to OMB as part of the NPRM, TSA did consider the costs to respondent covered aircraft operators to modify and maintain systems in order to accommodate the new communication requirements.

Comment: Another commenter asked how TSA derived its annual cost estimate to respondents of $129.2 million in the first three years to modify and maintain systems to accommodate the new communication requirements.

TSA Response: In the NPRM, TSA estimated that covered aircraft operators will incur $125,200,000 in capital startup costs in the first two years and $4,000,000 for operations and maintenance costs in the second and third years. The estimate of $129.2 million was the combination of these two cost amounts and represents the total cost for three years, not an annual cost. TSA estimated that the annual average costs will be approximately $43 million. For this final rule, TSA revised its estimates. TSA estimates that covered aircraft operators will incur $285,400,000 in capital startup costs in

the first two years and $9,400,000 for operations and maintenance costs in the second and third years. The estimate of $294.8 million is the combination of these two cost amounts and represents the total cost for three years, not an annual cost. TSA estimates that the annual average costs for the first three years will be approximately $98.3 million.

Comment: A commenter questioned TSA's time-related burden estimate for transmission of the information covered aircraft operators must collect or request from passengers, which TSA had estimated will take no more than 20 seconds per transaction to collect.

TSA Response: After considering this comment and reviewing the information concerning the collection of information, TSA is revising its estimate. TSA now estimates that it will take covered aircraft operators no more than 25 seconds per transaction to collect the information.

B. Regulatory Impact Analysis

1. Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. TSA has prepared a separate detailed analysis document, which is available to the public in the docket. Although the regulatory evaluation attempts to mirror the terms and wording of the regulation, no attempt is made to precisely replicate the regulatory language and readers are cautioned that the actual regulatory text, not the text of the evaluation, is binding. With respect to these analyses, TSA provides the following conclusions and summary information. Each of these findings is explained in the corresponding sections which follow:

• *Executive Order 12866 and Significance.* This rulemaking is an economically significant rule within the definition of E.O. 12866, as estimated annual costs or benefits exceed $100 million in any year. The mandatory OMB Circular A–4, Regulatory Analysis, accounting statement is included in the separate complete analysis and is not repeated here.

• *Final Regulatory Flexibility Analysis (FRFA).* TSA believes that it is unlikely the final rule has a significant economic impact on a substantial number of the small entities subject to this rulemaking. A detailed FRFA is provided in the separate full regulatory analysis.

• *International Trade Assessment.* TSA has assessed the potential effect of this final rule and has determined this rule would not have an adverse impact on international trade.

• *Unfunded Mandates.* This final rule does not contain such a mandate on State, local, and tribal governments. The overall impact on the private sector does not exceed the $100 million threshold in the aggregate.

2. E.O. 12866 Assessment

a. Benefits

Benefits of the rule will occur in two phases: the first during operational testing and the second post-implementation. During operational testing, Secure Flight will screen passengers in parallel with the airlines. Primary responsibility for watch list matching will remain with covered aircraft operators during this period, but Secure Flight may notify aircraft operators if its watch list matching technology enables it to detect a potential match the aircraft operator may have missed. Therefore, during the operational testing phase, benefits may include increased aviation security resulting from the detection of threats not identified by covered carriers participating in the testing.

Most of the rule's benefits occur post-implementation. Secure Flight standardizes the watch list matching process across domestic and foreign commercial airlines. Resulting benefits will include more accurate, timely, and comprehensive screening, and a reduction in false positives. This occurs because Secure Flight has access to more initial data with which to distinguish passengers from records in the watch lists than is currently available to airlines. Further, the airlines will be relieved of watch list matching responsibilities, and TSA will be relieved of distributing the watch lists. Together, these factors contribute to the overall objective of focusing resources on passengers identified as potential threats to aviation security.

This benefit is further augmented by the requirement that covered airlines must print on boarding passes a code generated by the Secure Flight system that is unique for each watch list result returned. Depending on the final implementation method, this requirement will, at a minimum, allow checkpoint personnel to verify that a boarding or gate pass has been processed by the Secure Flight system. This will prevent individuals from passing through the checkpoint with a boarding or gate pass that has not originated in an airline system.

By transferring responsibility for watch list matching of international passengers from the CBP system to TSA, the final rule consolidates passenger prescreening operations within DHS, thereby reducing redundancies between similar programs and facilitating better governance. The rule enables CBP to focus its resources on its mission of protecting U.S. borders while permitting TSA to apply its expertise in watch list matching consistently across all commercial air traffic within and overflying the United States. DHS expects that reducing overlap between these agencies' missions will improve national security through more efficient and targeted use of national resources.

Other benefits include increased security due to the watch list matching of non-traveling individuals who request access to a sterile area. Also, TSA anticipates it may allow airports to authorize non-traveling individuals to enter the airport sterile area. As a result, the final rule establishes requirements related to airports' transmission of data from non-traveling individuals to Secure Flight for watch list matching. These requirements only apply to airports that request and receive authorization from TSA to grant non-traveling individuals access to the airport sterile area.

Once TSA assumes primary responsibility for watch list matching, airlines will be relieved of their passenger watch list matching responsibilities. For the purpose of the estimates in this analysis, TSA assumed that domestic implementation will be completed in the first year of the rule and international implementation will be completed in the second year. However, the actual date the carriers will be completely relieved is unknown and is contingent on several factors, such as the impact of budgetary constraints and the results of operational testing. Prior to full implementation, operational testing will have to demonstrate that Secure Flight does not produce a large number of false positives, processes all matching requests in an efficient and accurate manner, and interfaces with a redress system for passengers who believe they have been incorrectly delayed or denied boarding as a result of Secure Flight matching. Elimination of their watch list matching responsibilities enables airlines to reallocate to other tasks some of their operational resources currently dedicated to comparing passenger information to the watch lists and will offset some costs imposed by the regulation. Due to the difference in resources used by each airline for watch list matching and uncertainty regarding the actual date each will be relieved of watch list duties, TSA was unable to quantify these cost savings.

Further, while TSA conducted significant testing using previously

collected passenger name record (PNR) data, no testing has been completed in a live environment using all of the passenger information requested by this proposed rule. The operational testing phase provides TSA the opportunity to work with the airlines and other stakeholders to refine Secure Flight to achieve optimal results while the airlines continue to have primary responsibility for watch list matching.

TSA has included a rough break-even analysis which indicates the tradeoffs between program cost and program benefits (in the form of impact on baseline risk of a significant aviation-related terror attack) that would be required for Secure Flight to be a cost beneficial undertaking.

b. Costs

All costs in the following summary are discounted present value costs using a 7 percent discount rate over ten years unless noted otherwise. The table below provides totals in constant 2005 dollars as well as totals discounted at 7 percent and 3 percent. Cost tables in section 1.6 of the full regulatory evaluation present year-by-year costs in constant 2005 dollars. Both in this summary and the economic evaluation, descriptive language conveys the consequences of the regulation.

Given the global nature of commercial aviation and the prevalence of airline partnerships, TSA was unable to divide the incidence of the estimated costs between the domestic and foreign economies. Thus, the table below presents the aggregate costs attributable to the Secure Flight final rule. TSA has divided its discussion within each of the cost sections in the regulatory evaluation between domestic and international operations, reflecting the scope and phasing of the rule. However, this distinction between costs accruing to domestic and international operations should not be confused with costs to the domestic and foreign economies.

TABLE B–1—TOTAL AND AVERAGE COSTS

[Millions]

Cost category	Average annual costs, undiscounted (Low–High)	Average annual costs, discounted 3% (Low–High)	Average annual costs, discounted 7% (Low–High)	10 Year total costs, discounted 3% (Low–High)	10 Year total costs, discounted 7% (Low–High)
Air Carrier Reprogramming Costs	$36.2–$63.5	$38.6–$66.3	$41.8–$70.0	$329.5–$565.3	$293.8–$491.8
Airline Collection Costs	10.5–15.7	10.4–15.5	10.3–15.3	88.6–132.4	72.2–107.8
Travel Agency Costs	26.1–39.4	26.0–39.3	26.0–39.3	221.9–278.8	182.4–276.1
Federal Costs	137.0–167.5	135.9–166.2	134.4–164.5	1,159.3–1418	943.9–1,155.7
Outlay Subtotal Costs	209.8–286.1	210.9–287.3	212.5–289.2	1,799.3–2,451.0	1,492.4–2,031.3
Passenger Opportunity Costs	79.4–96.2	78.7–95.3	77.8–94.3	671.3–813.1	546.5–662.0
Total Costs	289.2–382.2	289.6–382.7	290.3–383.5	2,470.5–3,264.1	2,038.9–2,693.3

TSA estimated a range of possible costs to reflect uncertainty in TSA's assumptions about the additional time the rule adds to the airline reservation process. The summary table above presents the minimum and maximum of this range. TSA did not have sufficient information from industry, however, to determine a likely cost distribution; therefore, the minimum and maximum should be taken as extremes, with the actual cost falling somewhere in between.

TSA estimated the cost impacts of this rulemaking will total from $2.039 billion to $2.693 billion over ten years, discounted at 7 percent. At the 7 percent discount rate, air carriers will incur total costs of $366.0 million to $599.6 million, and travel agents will incur costs of $182.4 to $276.1 million. TSA projected Federal government costs will be from $943.9 million to $1.156 billion. The total cost of outlays by all parties, discounted at 7 percent, will be from $1.492 billion to $2.031 billion. Additionally, the opportunity costs to individuals (value of time), discounted at 7 percent, will be between $546.5 and $662.0 million. The following paragraphs discuss these costs.

Air carriers will incur costs to comply with requirements of this rulemaking. Over the 10-year period from 2008 to 2017, TSA estimated air carriers will incur average annual costs of $41.8 to $70.0 million, discounted at 7 percent, to reprogram their computer systems to accommodate the additional data fields required by the rule and achieve two-way connectivity with TSA and the recurring costs to operate and maintain system modifications. Because the rule requires air carriers to request additional information from passengers, additional time will be required for airline call centers to complete reservations. TSA estimated these costs will be between $10.3 and $15.3 million per year. Together, the air carriers' discounted average annual costs will range from $52.1 to $85.3 million.

The rule does not directly regulate travel agents. However, the rule requires aircraft operators to ensure that travel agencies request the additional passenger information. Therefore, travel agents, like covered aircraft operators, must spend additional time to complete airline reservations. TSA estimated the average annual cost to travel agents, discounted at 7 percent, will range from $26.0 to $39.3 million.

The Federal government incurs several costs as a result of the rule. These costs include network infrastructure to enable communication between TSA and covered aircraft operator data systems, hardware and software procurement, operations and maintenance, and general support for implementation. The government further incurs costs to complete adjudication of name similarities or watch list matches and also for redress activities. Finally, the government incurs costs to implement a system at checkpoints to verify the codes that the Secure Flight system will issue and the covered aircraft operators will print on boarding and gate passes. The government's estimated average annual cost, discounted at 7 percent, will be from $134.4 million ($137.0 million, undiscounted) to $164.5 million ($167.5 million, undiscounted).

The final rule also impacts individuals. Time is a valuable economic resource, like labor, capital, and other factors of production, which may be used for work or relaxation. The loss of time imposes an opportunity cost on individuals. TSA attempted to quantify opportunity costs to individuals based on the incremental additional time required to make a reservation. TSA estimated the average annual cost to individuals, discounted at 7 percent, will range from $77.8

($79.4 million, undiscounted) to $94.3 million ($96.2 million, undiscounted).

Due to program refinements and information gleaned from public comments, these cost estimates differ in some respects from those reported in the Secure Flight NPRM. The table below identifies these cost differences and their origins, by the entity bearing the cost.

CHANGES IN SECURE FLIGHT COST ESTIMATES FROM NPRM COST ESTIMATES

Cost component	Undiscounted 10 year total costs ($millions)			Notes
	NPRM	Final rule	Difference	
Reprogramming Costs to Carriers	$318.5	$498.8	$180.3	In response to public comments, carrier reprogramming costs for Secure Flight were increased.
Airline Data Collection Costs	104.8	130.7	25.9	In response to public comments, average data collection time for obtaining Secure Flight data elements during telephone reservations was increased from 20 seconds to 25 seconds.
Travel Agency Reprog/Training Costs	n/a	16.7	16.7	In response to public comments, first year costs for travel agent training and reprogramming costs for larger travel agencies were included.
Travel Agency Data Collection Costs	249.0	310.7	61.7	In response to public comments, average data collection time for obtaining Secure Flight data elements during telephone reservations was increased from 20 seconds to 25 seconds.
Federal Costs	1,670.3	1,427.5	(242.8)	Program costs revised based on recent Congressional appropriations; costs change principally in Implementation, Operations Planning and Service Center cost areas.
Total Cash Outlay	2,342.6	2,384.4	41.8	
Passenger Opportunity Costs	787.3	877.9	90.5	In response to public comments, average time to provide Secure Flight data elements during telephone reservations was increased from 20 seconds to 25 seconds; added complexity risk.
Total Program Costs	3,129.9	3,262.3	132.4	

3. Final Regulatory Flexibility Analysis (FRFA)

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. Although TSA does not believe the final rule will have a significant impact on a substantial number of small entities, the agency has prepared a Final Regulatory Flexibility Analysis (FRFA).

Section 1: Reasons for and Objectives of the Final Rule

2.1.1 Reason for the Final Rule

Section 4012(a) of the Intelligence Reform and Terrorism Prevention Act requires the Transportation Security Administration (TSA) to assume from aircraft operators the function of conducting pre-flight comparisons of airline passenger information to Federal Government watch lists.

2.1.2 Objective of the Final Rule

This rule allows TSA to begin implementation of the Secure Flight program, under which TSA will receive passenger and non-traveler information, conduct watch list matching, and transmit gate and boarding pass printing instructions back to aircraft operators indicating whether individuals should be cleared to enter the sterile area, marked as selectees, or prohibited from receiving a boarding or gate pass.

Section 2: Affected Small Business Population and Estimated Impact of Compliance

2.2.1 Aircraft Operator Small Business Population

The final Secure Flight rule affects all aircraft operators conducting flight operations under a full security program per 49 CFR 1544.101(a). In general, these aircraft operators are the major passenger airlines that offer scheduled and public charter flights from commercial airports. Specifically, the covered carriers are those performing scheduled service or public charter passenger operations either with an aircraft having a passenger seating configuration of 61 or more seats or having 60 or fewer seats if the aircraft enplanes from or deplanes into a sterile area.

Of the 66 aircraft operators that are covered by the final rule, TSA estimated that 24 of these can be identified as small business entities. This is based on the Small Business Administration (SBA) Office of Size Standards' size standard of ''fewer than 1,500

employees'' for small businesses within NAICS Code 481111, Scheduled Passenger Air Transportation, and those within NAICS Code 481211, Nonscheduled Chartered Passenger Air Transportation.[29] For this analysis, air carrier employee counts were developed from publicly available information and from carrier filings with the U.S. Department of Transportation's Bureau of Transportation Statistics (BTS) and Federal Aviation Administration (FAA).

In the Secure Flight regulatory evaluation, TSA divided covered carriers into four ''cost groups'' based on the nature of their reservations systems and BTS size classification (i.e., major, national, large regional, etc.).[30] These groupings correspond to the estimated costliness of reprogramming airline reservation systems to comply with the Secure Flight requirements. Implementation Group 1 represents all legacy marketing carriers and their affiliates utilizing an older Global Distribution System (GDS) or host Airline Reservation System (ARS). Legacy airlines, those flying prior to the Airline Deregulation Act of 1978, are all major airlines and have the oldest computer systems. Accordingly, TSA assumed this group incurs the highest compliance costs. Implementation Group 2 includes marketing carriers utilizing a newer GDS or host ARS, as well as national carriers subscribing to an older GDS. Implementation Group 3 represents carriers with independently maintained reservation systems TSA determined were capable of receiving a direct connection to Secure Flight, as well as regional, commuter, and small airlines subscribing to an older GDS or host ARS. Airlines with very simple or no computerized reservation systems form Group 4. Rather than requiring Group 4 carriers to establish complex systems capable of connecting directly with Secure Flight, TSA allows them to transmit passenger information through a secure Internet portal.

In Groups 1 and 2, smaller airlines often use the reservation systems of larger airlines. For example, a passenger may book a reservation with a large, marketing airline, but the flight may be operated by a smaller airline owned by or contracting with the marketing airline (an affiliate). In such cases, TSA assumed in its regulatory evaluation that the marketing airline bears the cost of changes to the reservation system and designated those carriers as ''points of implementation.'' Section 1.4.1 of the regulatory evaluation describes this distinction in greater detail.

In the discussion below, TSA relaxes this assumption and treats affiliate carriers as if they are marketing carriers. Since no Group 1 affiliate carriers are major airlines, they were re-categorized as Group 3 carriers (regional, commuter, or small carriers using an older GDS). Specifically, these are Carriers 3, 4, 8, and 9 in the tables.[31] Although this method ensures a potential cost is estimated for all small business carriers, TSA notes that it likely overstates the actual cost that will be incurred. Thus, for this small business analysis, TSA considers ten carriers under Implementation Groups 2 and 3. The remaining 14 carriers belong to Group 4.

Table 2.2.1.a reports annual 2005 employment and operating revenues or sales[32] TSA gathered for these 24 airlines (in one case the financial data are from 2002). These small air carriers are active in different areas of the passenger air transportation marketplace. Some provide scheduled passenger service in small niche markets, often as part of the larger route system of an established hub and spoke carrier; others provide charter transportation services to tour groups or organizations such as professional sports teams. Some of those that provide scheduled passenger services use reservation systems hosted by one of the existing ARS providers, while others handle phone reservations or receive reservations from travel agents. All of these small airlines are subject to the rule, however, due to the size of aircraft they use and/or because of the airport environments in which they operate. Thus, these airlines will collect more information from passengers, but TSA will take over their current requirement to compare passenger manifests to the watch lists.

TABLE 2.2.1.A—SECURE FLIGHT SMALL BUSINESS AIR CARRIERS

[2005 Data]

Small business carrier ID No.	Employees (total full- and part-time)	Annual operating revenues	Enplanements	Share of total covered carrier enplanements (percent)
Aircraft Operators in Implementation Groups 2 and 3				
1	914	$204,000,000	1,266,293	0.199
2	893	80,300,000	1,132,207	0.178
3	546	78,100,000	838,959	0.051
4	545	60,000,000	440,865	0.069
5	400	45,100,000	636,768	0.100
6	380	42,800,000	570,291	0.090
7	255	18,600,000	49,242	0.008
8	230	39,600,000	355,607	0.056
9	220	24,000,000	141,252	0.022
10	50	5,000,000	48,221	0.008
Aircraft Operators in Implementation Group 4				
11	964	$74,300,000	208,120	0.033
12	826	76,392,000	344,741	0.054
13	739	137,900,000	506,292	0.080
14	600	68,600,000	91,571	0.014

[29] Small Business Administration. Table: ''Small Business Size Standards matched to North American Industry Classification System.'' Available at *http://www.sba.gov/size/sizetable2002.html.* Accessed May 4, 2006.

[30] For more information, please see section 1.4.1.

[31] Since in some cases the reported revenue data are proprietary, TSA substituted an ID number in place of company names.

[32] In cases for which annual revenues were not available, carrier filings of total annual sales were used as a proxy for revenue.

TABLE 2.2.1.A—SECURE FLIGHT SMALL BUSINESS AIR CARRIERS—Continued

[2005 Data]

Small business carrier ID No.	Employees (total full- and part-time)	Annual operating revenues	Enplanements	Share of total covered carrier enplanements (percent)
15	593	132,500,000	836,409	0.132
16	549	33,400,000	329,418	0.052
17	411	105,266,000	82,529	0.013
18	220	6,330,000	18,707	0.003
19	212	35,649,000	329,083	0.052
20	159	12,000,000	35,788	0.006
21	75	14,230,000	22,511	0.004
22	19	930,000	[a]	[a]
23	[a]	[a]	38,471	0.006
24	[a]	[a]	17,521	0.003

[a] Unavailable.

2.2.2 Estimated Impact to Aircraft Operator Small Businesses

TSA determined that the rule does not cause a significant economic impact for a substantial number of these small business entities based on several considerations. First, under the current procedures, these small airlines must devote effort to matching passenger identification information to TSA watch lists but are not able to establish staff and back office activities that are dedicated to these security functions due to the small scale of their operations. Instead, the existing security responsibilities are fulfilled by airline personnel who may have other unrelated duties. These scale considerations suggest that the benefits of changing the current responsibilities by implementing the rule may be weighted toward these smaller airlines, when considered on a per enplanement basis.

In addition, given the variety of business activities pursued by the small carriers under consideration—scheduled passenger operations or charter operations, operations that collaborate with a larger hub and spoke carrier or that are independent of larger carriers, and operations that do or do not make use of an existing ARS host for processing reservations-it is difficult to estimate the costs that are incurred by these small carriers when the rule is implemented. In order to evaluate the possible economic impact of the rule on small aircraft operators, TSA utilized two calculation methods: one for carriers in Groups 2 and 3 and a second for carriers in Group 4.

Since reprogramming and data collection costs have already been presented in the aggregate for Groups 2 and 3 in sections 1.6.2 and 1.6.3 of the regulatory evaluation, TSA used the same techniques to calculate the potential impact to small business carriers in these two groups. Table 2.2.2.a below shows the outcome of these calculations.

TSA first assigned an estimated initial reprogramming cost to each small business carrier based on whether it belonged to Group 2 or 3 (column B). The initial reprogramming cost was used since this is the highest expenditure in any one year. Each carrier will also experience an increase in the time required to collect passenger data during reservations, as discussed in section 1.6.3. To arrive at the maximum annual collection cost (column D), TSA annualized the total High Scenario Airline Collection Costs from Table 1.6.3.a. These airline collection costs are a function of reservations and TSA assumed an airline's share of reservations is proportional to its share of enplanements. Thus, TSA multiplied the total annual collection cost by each carrier's share of enplanements (column C) to arrive at its proportion of the annual collection cost (column E). Adding the collection cost to the initial reprogramming cost yielded a per-carrier estimated cost of compliance (column F). TSA divided these estimated compliance costs by each carrier's reported revenue to determine the percent of revenue that will be expended on Secure Flight (column G).

Although there is no hard and fast definition for ''significant economic impact,'' agencies frequently use 2 percent of an entity's revenue as a threshold. As can be seen in the table, in one case the estimated compliance cost exceeds 2 percent of the carriers' reported 2005 revenues and in one case it exceeds 8 percent. After reviewing the relevant information, however, TSA determined the threshold may not be applicable in this particular case. This is because the percentage is extremely sensitive to the estimated reprogramming cost (column B). TSA's estimated reprogramming costs for these carriers are based on assumptions about limited data and may overstate the costs to smaller carriers. This consideration is especially true of carrier ten. This carrier maintained its own reservation system until August 2005, when it began subscribing to a GDS. Consequently, its reprogramming costs may be significantly lower than projected here. Further, these carriers have the option to use the Secure Flight Web interface rather than reprogram their reservation systems if they determine reprogramming to be too costly.

Based on these considerations, TSA determined the estimated compliance cost likely does not meet the requirements of a significant economic impact under the RFA.

TABLE 2.2.2.A—ESTIMATED SMALL BUSINESS IMPACT, CARRIER GROUPS 2 AND 3

Small business carrier ID No.	2005 annual operating revenues (000) (A)	Estimated carrier re-program costs (000) (B)	Share of total covered carrier enp (percent) (C)	Annualized airline collection costs* (000) (D)	Share of airline collection costs* (000) (E) = C*D	Estimated total compliance cost* (000) (F) = B+E	Compliance cost as % of revenues* (G) = F/A
1	$204,000	$850	0.20	$11,690	$23	$873	0.43
2	80,300	425	0.18	11,690	21	446	0.56
3	78,100	425	0.13	11,690	15	440	0.56
4	60,000	425	0.07	11,690	8	433	0.72
5	45,100	425	0.10	11,690	12	437	0.97
6	42,800	425	0.09	11,690	11	436	1.02
7	18,600	425	0.01	11,690	1	426	2.29
8	39,600	425	0.06	11,690	7	432	1.09
9	24,000	425	0.02	11,690	2	427	1.78
10	5,000	425	0.01	11,690	1	426	8.52

*Reflect totals from the high case scenario presented in the regulatory evaluation.

As discussed in section 1.6.2 of the regulatory evaluation, TSA assumed Group 4 carriers will not have any reprogramming costs associated with implementation of Secure Flight but that 13 of the 16 Group 4 carriers will spend $100,000 in the first year of the program on staff retraining and customer outreach. TSA did not have sufficient information, however, to reliably estimate costs incurred by these carriers due to changes in their reservation process. For the purpose of discussion, TSA here calculates a unit compliance cost per enplanement in order to illustrate the average impact of the rule. The results of this calculation are shown in Table 2.2.2.b.

TSA chose to use a broad assumption in developing its unit cost and therefore included the annual costs related to the entire reservations process for air transportation providers. As reported in Tables 1.6.3.a and 1.6.4.a, costs associated with the reservations process include airline and travel agency costs to make available privacy notices and request additional passenger information. In TSA's high scenario, these two categories total to approximately $34.2 million in fiscal year 2008. This value can be normalized to a per enplanement basis using the reservations forecast reported in Table 1.4.1.a, which totals 672.1 million in 2008. This normalized cost per enplanement equals $34.2/672.1, or about $0.05 per enplanement (column B).

Multiplying this normalized value by each carrier's 2005 annual enplanements total (column B) and adding in the implementation expenditure where applicable (column A), TSA estimated the cost to each of the small business entities identified (column D). As column F of Table 2.2.2.b indicates, this estimate for costs never exceeds 2 percent of 2005 annual revenues for these small carriers. Note further that the annual enplanements value is unadjusted for round trip itineraries or for reservations that may have been generated as part of a marketing carrier's reservations process. Thus, the estimated values in Table 2.2.2.b are very likely to be overstatements of the impact of the rule on these small carriers.

Finally, as noted previously, DHS will make available a Secure Flight Internet portal for the transmittal of passenger and other itinerary data from Group 4 small airlines to TSA. The availability of this interface simplifies the transition to the environment that will prevail once the rule is implemented, while providing greater assurance regarding the provision of the relevant security data to TSA for comparison to the watch lists.

TABLE 2.2.2.B—ILLUSTRATIVE SMALL BUSINESS IMPACT, CARRIER GROUP 4

Small business carrier ID No.	Assumed start-up outlay (A)	FY 2005 enplanements (B)	Maximum unit compliance cost per enplanement (C)	Compliance cost (D) = A+B*C	2005 Annual operating revenues (E)	Compliance cost as % of 2005 revenues (F) = D/E
11	$100,000	208,120	$0.05	$110,400	$74,300,000	0.15
12	100,000	344,741	0.05	117,200	76,392,000	0.15
13	100,000	506,292	0.05	125,300	137,900,000	0.09
14	100,000	91,571	0.05	104,600	68,600,000	0.15
15	100,000	836,409	0.05	141,800	132,500,000	0.11
16	100,000	329,418	0.05	116,500	33,400,000	0.35
17	100,000	82,529	0.05	104,100	105,265,872	0.10
18	100,000	18,707	0.05	100,900	6,330,280	1.59
19	100,000	329,083	0.05	116,500	35,649,201	0.33
20	100,000	35,788	0.05	101,800	12,000,000	0.85
21	100,000	22,511	0.05	101,100	14,229,510	0.71
22	0	0*	0.05	0	930,000	(**)
23	0	38,471	0.05	1,900	0	(**)
24	0	17,521	0.05	900	0	(**)

*Carrier had not yet begun reporting enplanements to BTS.
**Data not available.

The estimates provided in Table 2.2.2.b show how Group 4 small businesses would be impacted by Secure Flight were their operations comparable to those of airlines in Groups 1 through 3. As has been noted above, however, this is not the case. Consequently, the costs Group 4 airlines actually incur to comply with Secure Flight may diverge significantly from the estimates presented. Nevertheless, the table illustrates that these costs would have to increase dramatically before they would constitute a significant economic impact.

2.2.3 Travel Agency Small Business Population

The Small Business Administration (SBA) classifies any travel agency as a small business if it has revenues of less than $3.5 million annually.[33] The SBA data provided in Table 2.2.3.a indicate that in 2003 more than 98 percent of travel agencies had annual revenues less than $5 million. Although the division of the SBA revenue categories do not allow for a precise count of the number of small businesses, the average revenue per firm of $1.9 million for the $1 million to $5 million category indicates that many of the firms in this category have revenues below the $3.5 million threshold. Consequently, the discussion of small businesses in the travel agency industry will be a discussion about the vast number of firms.

TABLE 2.2.3.A—DISTRIBUTION OF TRAVEL AGENCIES (NAICS 561510) BY REVENUE, 2003[34]

	Total	$0–$99,999	$100,000–$499,999	$500,000–$999,999	$1,000,000–$4,999,999	Total <$5,000,000	Total >$5,000,000
Number of Firms	14,838	6,125	6,627	1,098	714	14,564	274
Percent of Total	100.00	41.28	44.66	7.40	4.81	98.15	1.85

Tables 2.2.3.b through 2.2.3.d below reflect the recent story of the travel agent industry. The first two tables are based on 2002 data provided by the Airlines Reporting Corporation (ARC) to the National Commission to Ensure Consumer Information and Choice in the Airline Industry (the Commission).

When the Commission prepared its report ''Upheaval in Travel Distribution: Impact on Consumers and Travel Agents, Report to Congress and the President'' (Commission Report), the SBA had just increased the small business revenue threshold from $1 million to $3 million for travel agents. Consequently, the Commission used $5 million in total revenue (approximately $2.5 million in commission and fee revenue) as a proxy threshold for small businesses when creating Tables 2.2.3.b and 2.2.3.c below. Although these tables do not capture the full universe of travel agency small businesses, they nevertheless illustrate general trends affecting these entities.

As can be seen in Tables 2.2.3.b and 2.2.3.c, the number of travel agencies whose sales are less than $5 million per year declined steadily through 2001. Correspondingly, the share of industry sales by these smaller firms also fell. At the same time, however, the largest firms increased both their share of industry sales and the dollar value of their sales.

TABLE 2.2.3.B—NUMBER OF TRAVEL AGENCIES BY SIZE CATEGORY[35]

Agency size	1995	1997	1999	2001
$2M or Less	19,851	19,226	17,855	15,253
$2M–$5M	2,356	2,803	2,482	1,770
$5M–$50M	1,059	1,277	1,236	1,015
Greater than $50M	77	107	117	117
Total	23,343	23,413	21,690	18,425

TABLE 2.2.3.C—SHARE OF TRAVEL AGENT SALES BY SIZE CATEGORY[36]

[Percent]

Agency size	1995	1997	1999	2001
$2M or Less	25.3	20.6	16.9	14.2
$2M–$5M	13.5	12.8	10.7	8.4
$5M–$50M	24.8	24.5	22.5	20.1
Greater than $50M	36.4	42.1	49.9	57.2

Table 2.2.3.d shows aggregate monthly statistics released by the Airlines Reporting Corporation indicating that the travel agent industry continued to contract and consolidate through 2005. Corresponding revenue data, however, were not available.

[33] Small Business Administration. Table: ''Small Business Size Standards matched to North American Industry Classification System.'' Available at *http://www.sba.gov/size/sizetable2002.html.* **Note**: The SBA size standard for travel agencies is based on ''total revenues, excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.''

[34] Small Business Administration. Table: ''All Industries by NAICS codes, 2003.'' See TXT file ''2003'' available at *http://www.sba.gov/advo/research/data.html.*

[35] Commission Report, p. 114.

[36] Ibid.

TABLE 2.2.3.D—TRAVEL AGENCIES ACCREDITED BY THE AIRLINES REPORTING CORPORATION [37]

	2001	2002	2003	2004	2005
Retail Locations	27,633	24,679	22,244	20,729	19,871
Home Offices	1,651	1,368	1,203	1,118	1,041
Independent/Single Entities	15,057	13,206	11,670	10,578	9,874
Branch	6,696	6,171	5,695	5,474	5,451
Restricted Access	862	950	1,039	1,120	1,205
On-site branch	3,367	2,984	2,637	2,439	2,300
Satellite Ticket Providers	6,347	4,693	3,204	2,413	1,975
Corporate Travel Departments	108	150	172	182	197
TOTAL LOCATIONS	34,088	29,522	25,620	23,324	22,043
Change over previous year (percent)	N/A	−13.39	−13.22	−8.96	−5.49
TOTAL ENTITIES*	17,678	15,674	14,084	12,998	12,317
Change over previous year (percent)	N/A	−11.34	−10.14	−7.71	−5.24

*Sum of Home Offices, Independent/Single Entities, Restricted Access, and Corporate Travel Departments.

2.2.4 Estimated Impact to Travel Agency Small Businesses

While not directly regulated, small travel agencies will certainly be affected by the implementation of Secure Flight. TSA anticipated the most significant burden on these entities results from the increased time to collect additional passenger information. Small travel agencies may also incur incremental costs due to retraining of staff and reaching out to clients in order to update customer profiles prior to their next trip.

In section 1.6.4 of the regulatory evaluation, TSA estimated a cost that is borne by non-Internet (brick-and-mortar) travel agencies as a result of the requirements. Detailed industry data did not exist, however, that would allow TSA to determine the portion of that cost that is borne by small travel agencies. In lieu of such information, TSA chose to calculate a minimum number of airline reservations the smallest travel agency size category would have to process in order for the requirements of the rule to result in a ''significant economic impact.'' This calculation corresponds to the high estimate scenario and depends on a number of assumptions:

1. The average hourly wage of small business travel agents is $20.69 (including benefits).
2. In TSA's highest cost scenario, an additional 30 seconds per airline reservation is needed to collect additional passenger information.
3. The additional time to collect passenger information will be incurred for every airline reservation booked through a travel agency.
4. The average revenue of the smallest travel agency firms (revenues between $0 and $99,999) is $47,204.[38]
5. Two percent of a small travel agency's revenue constitutes a ''significant economic impact.''

Accepting these assumptions, 2 percent of the smallest firm revenue would constitute an impact of $942 ($47,204 × 0.02). Reversing the calculations used in section 1.6.4, this total must be converted into the additional reservation time it represents. This is accomplished by dividing $942 by the travel agent hourly wage, which yields 45.5 hours ($942 ÷ $20.69/hour). This cumulative 45.5 hours can then be broken down into individual reservations by dividing by the total incremental time per reservation, which is 0.008 hours (30 incremental seconds ÷ 3600 seconds/hour). Thus, 45.5 hours represent approximately 5,690 airline reservations (45.5 hours ÷ 0.008 hours/reservation). Under the most burdensome scenario, then, on average the smallest travel agencies would need to book 5,690 airline reservations in a year in order to potentially incur a significant economic impact as a result of the final rule.

Table 2.2.4.a presents this threshold number of reservations for the range of data collection times presented in the Secure Flight regulatory evaluation. Alternatively, the table also presents the number of airline reservations a travel agency would have to process to meet 2 percent of the SBA small business threshold for travel agents.

These estimates below should be considered as a range of ''worst case scenarios.'' For example, reservations made for clients for whom a travel agency already has the requested Secure Flight information saved in a profile will not incur the additional data collection time.

TABLE 2.2.4.A—AIRLINE RESERVATIONS THRESHOLD FOR SMALL BUSINESS TRAVEL AGENCIES

	Revenue class $0–$99,999			SBA small business threshold		
Firm Revenue (A)	$47,120			$3,500,000		
2% of Revenue (B)	$942			$70,000		
Average Agent Hourly Wage (C)	$20.69			$20.69		
Total Incremental Hours (D) = B/C	45.5			3,383.5		
Estimate Scenario	High	Primary	Low	High	Primary	Low
Additional Hours per Reservation (E)	0.008 (30 sec.)	0.006 (20 sec.)	0.003 (10 sec.)	0.008 (30 sec.)	0.006 (20 sec.)	0.003 (10 sec.)

[37] ''End of Year Reporting and Settlement Results,'' Airlines Reporting Corporation press release, December 2002, December 2003, December 2004, December 2005. Available at *http://www.arccorp.com/regist/news_sales_doc_stats.jsp.*

[38] Small Business Administration. Table: ''All Industries by NAICS codes, 2003.'' See TXT file ''2003'' available at *http://www.sba.gov/advo/research/data.html.* Estimated receipts divided by number of firms, revenue class 0–99,999.

Estimate Scenario	High	Primary	Low	High	Primary	Low
Reservations (F) = D/E	5,690	7,580	15,170	422,900	563,900	1,127,800

Section 3: Significant Alternatives Considered

The final rule provides small business carriers the flexibility of either reprogramming their reservation systems to interface directly with the Secure Flight system or to transmit passenger and non-traveler information to Secure Flight through a secure Internet interface. Thus, small business carriers identified in Groups 2 and 3 have the option of joining Group 4 and using the Internet portal if they determine reprogramming their systems to communicate directly with Secure Flight is too costly. Similarly, small business carriers TSA has identified in this analysis as scheduled to use the Secure Flight Internet portal have the option to reprogram their systems to communicate directly with Secure Flight if they determine using the portal is too burdensome on their business processes.

While either method imposes some costs on small businesses, TSA determined that exempting these carriers from the requirements of the rule would fail to meet the mandate within the IRTPA that TSA assume the watch list matching function. Taking this into consideration, TSA determined the options described above would effectively minimize the impact to small businesses.

Section 4: Identification of Duplicative or Overlapping Federal Rules

TSA is aware that other Federal agencies, such as the Centers for Disease Control and Prevention (CDC) and Customs and Border Protection (CBP), collect data concerning aviation passengers and may conduct or will conduct watch list matching for these passengers. TSA is working with other agencies, including the CDC and CBP, to develop ways to eliminate unnecessary duplication of comparable screening efforts and thereby reduce governmental and private sector costs. Therefore, the rule allows TSA to relieve covered aircraft operators of the requirement to transmit passenger information if TSA determines that the U.S. government is conducting watch list matching for a passenger on a particular flight that is comparable to the screening conducted pursuant to part 1560. TSA will work with each covered aircraft operator to establish the specific procedures and times for these transmissions as it develops its Aircraft Operator Implementation Plan.

Section 5: Final Determination of No Significant Impact

Based on the considerations above, TSA believes that it is unlikely the final rule has a significant economic impact on a substantial number of the small entities subject to this rulemaking. In conducting this analysis, TSA acknowledges that the ability of carriers to share the incidence of security costs with their customers has been limited.

While not required by the RFA, TSA has also considered the potential impact to small business travel agencies, as these entities are likely to be indirectly impacted by the rule given their role in the airline reservation process. TSA does not believe the final rule will have a significant economic impact on a substantial number of these small business travel agencies.

C. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as security, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general benefits and desirability of free trade, it is the policy of TSA to remove or diminish, to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States. TSA has assessed the potential effect of this rulemaking and has determined that it does not create barriers to international trade.

D. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of this Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. Such a mandate is deemed to be a ''significant regulatory action.'' This final rule does not contain such a mandate on State, local, and tribal governments. The overall impact on the private sector does exceed the $100 million threshold in the aggregate. The full regulatory evaluation documents the costs, alternatives, and TSA accommodation of the public comments.

E. Executive Order 13132, Federalism

TSA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore, does not have federalism implications.

F. Environmental Analysis

TSA has analyzed this final rule under the Department of Homeland Security (DHS) Management Directive 5100.1, ''Environmental Planning Program'' (see also 71 FR 16790, April 4, 2006), which guides TSA compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). TSA has determined that this final rule is categorically excluded from further NEPA analysis under the following categorical exclusions (CATEXs) listed in MD 5100.1, Appendix A, Table 1:

- Administrative and Regulatory Activities:
- CATEX A3 (Promulgation of rules, issuance of rulings or interpretations and the development and publication of policies that implement, without substantive change, statutory or regulatory requirements);
- CATEX A4 (Information gathering, data analysis and processing, information dissemination, review, interpretation and development of documents).
- Operational Activities:
- CATEX B3 (Proposed activities and operations conducted in an existing structure that would be compatible with and similar in scope to ongoing functional uses).
- Unique Categorical exclusions for TSA:

• CATEX H1 (Approval or disapproval of security plans required under legislative or regulatory mandates unless such plans would have a significant effect on the environment).

Additionally, TSA has determined that no extraordinary circumstances exist (see MD 5100.1, Appendix A, paragraph 3.B.(1)–(3)) which would limit the application of a CATEX with regard to these activities.

G. Energy Impact

The energy impact of this action has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

H. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is TSA's policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. TSA has determined that there are no ICAO Standards and Recommended Practices that correspond to the regulatory standards established by this final rule. TSA has assessed the potential effect of this rulemaking and has determined that it does not create barriers to international trade.

However, when TSA reviewed the impact of foreign carrier overflights, the conclusion is not clear. The right of airlines from one country to overfly another country in the course of traveling to the destination country is the first of the well known ''freedoms of the air.'' This technical freedom has been engrained in international aviation since the Chicago Convention of 1944, qualified, however, by the right of countries to regulate the airspace over their territory. How countries might react to the new conditions being placed on the fulfillment of this freedom is uncertain. International trade in travel and international shipping may be negatively impacted should foreign countries choose to respond in a retaliatory manner. One response by foreign carriers might be to avoid overflying the U.S. entirely, thereby lengthening flight routes and the costs of operation to those carriers. These re-routings would change airline costs and thus contribute to fare increases, which would affect trade between the departure and arrival countries, even though it would not directly affect trade involving the U.S. If the foreign carrier response is to reroute, it is not clear that such a change would eliminate all risks, since aircraft skirting the boundaries of U.S. airspace could be redirected into U.S. airspace by hijackers or terrorists.

List of Subjects

49 CFR Part 1540

Air carriers, Aircraft, Airports, Civil aviation security, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1544

Air carriers, Aircraft, Aviation safety, Freight forwarders, Incorporation by reference, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 1560

Air carriers, Aircraft, Reporting and recordkeeping requirements, Security measures.

The Amendments

■ For the reasons set forth in the preamble, the Transportation Security Administration amends Chapter XII, of Title 49, Code of Federal Regulations to read as follows:

Subchapter C—Civil Aviation Security

PART 1540—CIVIL AVIATION SECURITY: GENERAL RULES

■ 1. The authority citation for part 1540 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

■ 2. Revise § 1540.107 to read as follows:

Subpart B—Responsibilities of Passengers and Other Individuals and Persons

§ 1540.107 Submission to screening and inspection.

(a) No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter.

(b) An individual must provide his or her full name, as defined in § 1560.3 of this chapter, date of birth, and gender when—

(1) The individual, or a person on the individual's behalf, makes a reservation for a covered flight, as defined in § 1560.3 of this chapter, or

(2) The individual makes a request for authorization to enter a sterile area.

(c) An individual may not enter a sterile area or board an aircraft if the individual does not present a verifying identity document as defined in § 1560.3 of this chapter, when requested for purposes of watch list matching under § 1560.105(c), unless otherwise authorized by TSA on a case-by-case basis.

PART 1544—AIRCRAFT OPERATOR SECURITY: AIR CARRIERS AND COMMERCIAL OPERATORS

■ 3. The authority citation for part 1544 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44905, 44907, 44913–44914, 44916–44918, 44932, 44935–44936, 44942, 46105.

■ 4. Amend § 1544.103 by adding new paragraph (c)(22) to read as follows:

Subpart B—Security Program

§ 1544.103 Form, content, and availability.

* * * * *

(c) * * *

(22) The Aircraft Operator Implementation Plan (AOIP) as required under 49 CFR 1560.109.

■ 5. Add a new part 1560, to read as follows:

PART 1560—SECURE FLIGHT PROGRAM

Subpart A—General

Sec.
1560.1 Scope, purpose, and implementation.
1560.3 Terms used in this part.

Subpart B—Collection and Transmission of Secure Flight Passenger Data for Watch List Matching

1560.101 Request for and transmission of information to TSA.
1560.103 Privacy notice.
1560.105 Denial of transport or sterile area access; Designation for enhanced screening.
1560.107 Use of watch list matching results by covered aircraft operators.
1560.109 Aircraft Operator Implementation Plan.
1560.111 Covered airport operators.

Subpart C—Passenger Redress

1560.201 Applicability.
1560.203 Representation by counsel.
1560.205 Redress process.
1560.207 Oversight of process.

Authority: 49 U.S.C. 114, 40113, 44901, 44902, 44903.

Subpart A—General

§ 1560.1 Scope, purpose, and implementation.

(a) *Scope.* This part applies to the following:

(1) Aircraft operators required to adopt a full program under 49 CFR 1544.101(a).

(2) Foreign air carriers required to adopt a security program under 49 CFR 1546.101(a) or (b).

(3) Airport operators that seek to authorize individuals to enter a sterile area for purposes approved by TSA.

(4) Individuals who seek redress in accordance with subpart C of this part.

(b) *Purpose.* The purpose of this part is to enhance the security of air travel within the United States and support the Federal government's counterterrorism efforts by assisting in the detection of individuals identified on Federal government watch lists who seek to travel by air, and to facilitate the secure travel of the public. This part enables TSA to operate a watch list matching program known as Secure Flight, which involves the comparison of passenger and non-traveler information with the identifying information of individuals on Federal government watch lists.

(c) *Implementation.* Each covered aircraft operator must begin requesting the information described in § 1560.101(a)(1) and have the capability to transmit SFPD to TSA in accordance with its Aircraft Operator Implementation Plan (AOIP) as approved by TSA. Each covered aircraft operator must begin transmitting information to TSA as required in § 1560.101(b) on the date specified in, and in accordance with, its AOIP as approved by TSA. TSA will inform each covered aircraft operator 60 days prior to the date on which TSA will assume the watch list matching function from that aircraft operator.

§ 1560.3 Terms used in this part.

In addition to the terms in §§ 1500.3 and 1540.5 of this chapter, the following terms apply to this part:

Aircraft Operator Implementation Plan or *AOIP* means a written procedure describing how and when a covered aircraft operator or airport operator transmits passenger and flight information and non-traveler information to TSA, as well as other related matters.

Airport code means the official code, designated by the International Air Transport Association (IATA), for an airport.

Consolidated User Guide means a document developed by the Department of Homeland Security (DHS) to provide guidance to aircraft operators that must transmit passenger information to one or more components of DHS on operational processing and transmission of passenger information to all required components in a unified manner. The Consolidated User Guide is part of the covered aircraft operator's security program.

Covered aircraft operator means each aircraft operator required to carry out a full program under 49 CFR 1544.101(a) or a security program under 49 CFR 1546.101(a) or (b).

Covered airport operator means each airport operator that seeks to authorize non-traveling individuals to enter a sterile area for a purpose permitted by TSA.

Covered flight means any operation of an aircraft that is subject to or operates under a full program under 49 CFR 1544.101(a). *Covered flight* also means any operation of an aircraft that is subject to or operates under a security program under 49 CFR 1546.101(a) or (b) arriving in or departing from the United States, or overflying the continental United States. *Covered flight* does not include any flight for which TSA has determined that the Federal government is conducting passenger matching comparable to the matching conducted pursuant to this part.

Date of birth means the day, month, and year of an individual's birth.

Department of Homeland Security Traveler Redress Inquiry Program or *DHS TRIP* means the voluntary program through which individuals may request redress if they believe they have been:

(1) Denied or delayed boarding transportation due to DHS screening programs;

(2) Denied or delayed entry into or departure from the United States at a port of entry; or

(3) Identified for additional (secondary) screening at U.S. transportation facilities, including airports, and seaports.

Full name means an individual's full name as it appears on a verifying identity document held by the individual.

Inhibited status means the status of a passenger or non-traveling individual to whom TSA has instructed a covered aircraft operator or a covered airport operator not to issue a boarding pass or to provide access to the sterile area.

Itinerary information means information reflecting a passenger's or non-traveling individual's itinerary specified in the covered aircraft operator's AOIP. For non-traveling individuals, itinerary information is the airport code for the sterile area to which the non-traveler seeks access. For passengers, itinerary information includes the following:

(1) Departure airport code.

(2) Aircraft operator.

(3) Scheduled departure date.

(4) Scheduled departure time.

(5) Scheduled arrival date.

(6) Scheduled arrival time.

(7) Arrival airport code.

(8) Flight number.

(9) Operating carrier (if available).

Known Traveler Number means a unique number assigned to an individual for whom the Federal government has conducted a security threat assessment and determined does not pose a security threat.

Non-traveling individual or *non-traveler* means an individual to whom a covered aircraft operator or covered airport operator seeks to issue an authorization to enter the sterile area of an airport in order to escort a minor or a passenger with disabilities or for some other purpose permitted by TSA. The term *non-traveling individual* or *non-traveler* does not include employees or agents of airport or aircraft operators or other individuals whose access to a sterile area is governed by another TSA requirement.

Overflying the continental United States means departing from an airport or location outside the United States and transiting the airspace of the continental United States en route to another airport or location outside the United States. Airspace of the continental United States includes the airspace over the lower 48 states of the United States, not including Alaska or Hawaii, and the airspace overlying the territorial waters between the U.S. coast of the lower 48 states and 12 nautical miles from the continental U.S. coast. *Overflying the continental United States* does not apply to:

(1) Flights that transit the airspace of the continental United States between two airports or locations in the same country, where that country is Canada or Mexico; or

(2) Any other category of flights that the Assistant Secretary of Homeland Security (Transportation Security Administration) designates in a notice in the **Federal Register**.

Passenger means an individual who is traveling on a covered flight. The term *passenger* does not include:

(1) A crew member who is listed as a crew member on the flight manifest; or

(2) An individual with flight deck privileges under 49 CFR 1544.237 traveling on the flight deck.

Passenger Resolution Information or *PRI* means the information that a covered aircraft operator or covered airport operator transmits to TSA for an individual who TSA places in an inhibited status and from whom the covered aircraft operator or covered airport operator is required to request additional information and a Verifying Identity Document. *Passenger*

Resolution Information includes, but is not limited to, the following:

(1) Covered aircraft operator's agent identification number or agent sine.

(2) Type of Verifying Identity Document presented by the passenger.

(3) The identification number on the Verifying Identity Document.

(4) Issue date of the Verifying Identity Document.

(5) Name of the governmental authority that issued the Verifying Identity Document.

(6) Physical attributes of the passenger such as height, eye color, or scars, if requested by TSA.

Passport information means the following information from an individual's passport:

(1) Passport number.

(2) Country of issuance.

(3) Expiration date.

(4) Gender.

(5) Full name.

Redress Number means the number assigned by DHS to an individual processed through the redress procedures described in 49 CFR part 1560, subpart C.

Secure Flight Passenger Data or *(SFPD)* means information regarding a passenger or non-traveling individual that a covered aircraft operator or covered airport operator transmits to TSA, to the extent available, pursuant to § 1560.101. *SFPD* is the following information regarding a passenger or non-traveling individual:

(1) Full name.

(2) Date of birth.

(3) Gender.

(4) Redress number or Known Traveler Number (once implemented).

(5) Passport information.

(6) Reservation control number.

(7) Record sequence number.

(8) Record type.

(9) Passenger update indicator.

(10) Traveler reference number.

(11) Itinerary information.

Self-service kiosk means a kiosk operated by a covered aircraft operator that is capable of accepting a passenger reservation or a request for authorization to enter a sterile area from a non-traveling individual.

Sterile area means ''sterile area'' as defined in 49 CFR 1540.5.

Terrorist Screening Center or *TSC* means the entity established by the Attorney General to carry out Homeland Security Presidential Directive 6 (HSPD–6), dated September 16, 2003, to consolidate the Federal government's approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in screening processes.

Verifying Identity Document means one of the following documents:

(1) An unexpired passport issued by a foreign government.

(2) An unexpired document issued by a U.S. Federal, State, or tribal government that includes the following information for the individual:

(i) Full name.

(ii) Date of birth.

(iii) Photograph.

(3) Such other documents that TSA may designate as valid verifying identity documents.

Watch list refers to the No Fly and Selectee List components of the Terrorist Screening Database maintained by the Terrorist Screening Center. For certain flights, the ''watch list'' may include the larger set of watch lists maintained by the Federal government as warranted by security considerations.

Subpart B—Collection and Transmission of Secure Flight Passenger Data for Watch List Matching

§ 1560.101 Request for and transmission of information to TSA.

(a) *Request for information.* (1) Each covered aircraft operator must request the full name, gender, date of birth, and Redress Number for passengers on a covered flight and non-traveling individuals seeking access to an airport sterile area. For reservations made 72 hours prior to the scheduled time of departure for each covered flight, the covered aircraft operator must collect full name, gender, and date of birth for each passenger when the reservation is made or at a time no later than 72 hours prior to the scheduled time of departure of the covered flight. For an individual that makes a reservation for a covered flight within 72 hours of the scheduled time of departure for the covered flight, the covered aircraft operator must collect the individual's full name, date of birth, and gender at the time of reservation. The covered aircraft operator must include the information provided by the individual in response to this request in the SFPD.

(i) Except as provided in paragraph (a)(1)(ii) of this section, each covered aircraft operator must begin requesting the information described in paragraph (a)(1) of this section in accordance with its AOIP as approved by TSA.

(ii) An aircraft operator that becomes a covered aircraft operator after the effective date of this part must begin requesting the information on the date it becomes a covered aircraft operator.

(2) Beginning on a date no later than 30 days after being notified in writing by TSA, each covered aircraft operator must additionally request the Known Traveler Number for passengers on a covered flight and non-traveling individuals seeking access to an airport sterile area. The covered aircraft operator must include the Known Traveler Number provided by the passenger in response to this request in the SFPD.

(3) Each covered aircraft operator may not submit SFPD for any passenger on a covered flight who does not provide a full name, date of birth and gender. Each covered aircraft operator may not accept a request for authorization to enter a sterile area from a non-traveling individual who does not provide a full name, date of birth and gender.

(4) Each covered aircraft operator must ensure that each third party that accepts a reservation, or accepts a request for authorization to enter a sterile area, on the covered aircraft operator's behalf complies with the requirements of this section.

(5) If the covered aircraft operator also has an operation of an aircraft that is subject to 49 CFR 1544.101(b) through (i), the covered aircraft operator may submit SFPD for passengers on these operations for watch list matching under this part, provided that the covered aircraft operator—

(i) Collects and transmits the SFPD for the passengers in accordance with this section;

(ii) Provides the privacy notice to the passengers in accordance with 49 CFR 1560.103; and

(iii) Complies with the requirements of 49 CFR 1560.105 and 1560.107.

(b) *Transmission of Secure Flight Passenger Data to TSA.* Beginning on the date provided in a covered aircraft operator's AOIP, the covered aircraft operator must electronically transmit SFPD to TSA, prior to the scheduled departure of each covered flight, in accordance with its AOIP as approved by TSA.

(1) To the extent available, each covered aircraft operator must electronically transmit SFPD to TSA for each passenger on a covered flight.

(2) Each covered aircraft operator must transmit SFPD to TSA prior to the scheduled flight departure time, in accordance with its AOIP as approved by TSA.

(c) *Transmission of non-traveler information to TSA.* Beginning on the date provided in a covered aircraft operator's AOIP, the covered aircraft operator must electronically transmit SFPD to TSA for each non-traveling individual, prior to authorizing access to an airport sterile area.

(d) *Retransmission of information.* Each covered aircraft operator must retransmit to TSA updates to the information listed in paragraphs (b) and

(c) of this section to reflect most recent changes to that information, as specified in its AOIP as approved by TSA.

§ 1560.103 Privacy notice.

(a) *Electronic collection of information*—(1) *Current electronic collection of information*. Prior to collecting information through a Web site or self-service kiosk from a passenger or non-traveling individual in order to comply with § 1560.101(a), a covered aircraft operator must make available the complete privacy notice set forth in paragraph (b) of this section.

(2) *Other electronic collection of information*. If a covered aircraft operator collects information directly from a passenger or non-traveling individual in order to comply with § 1560.101(a) through an electronic means not described in paragraph (a)(1) of this section, the covered aircraft operator must make available the complete privacy notice set forth in paragraph (b) of this section.

(3) *Third party Web site*. Each covered aircraft operator must ensure that each third party that maintains a Web site capable of making a reservation for the covered aircraft operator's reservation system, make available on its Web site the complete privacy notice set forth in paragraph (b) of this section prior to collecting information through the Web site.

(b) *Privacy notice*. The covered aircraft operator may substitute its name for the word ''us,'' but the complete privacy notice otherwise must be identical to the following paragraph unless TSA has approved alternative language:

The Transportation Security Administration of the U.S. Department of Homeland Security requires us to collect information from you for purposes of watch list screening, under the authority of 49 U.S.C. section 114, and the Intelligence Reform and Terrorism Prevention Act of 2004. Providing this information is voluntary; however, if it is not provided, you may be subject to additional screening or denied transport or authorization to enter a sterile area. TSA may share information you provide with law enforcement or intelligence agencies or others under its published system of records notice. For more on TSA Privacy policies, or to view the system of records notice and the privacy impact assessment, please see TSA's Web site at *www.tsa.gov*.

§ 1560.105 Denial of transport or sterile area access; Designation for enhanced screening.

(a) *Applicability*. (1) This section applies to each covered aircraft operator beginning on the date that TSA assumes the watch list matching function for the passengers and non-traveling individuals to whom that covered aircraft operator issues a boarding pass or other authorization to enter a sterile area. TSA will provide prior written notification to the covered aircraft operator no later than 60 days before the date on which it will assume the watch list matching function from that covered aircraft operator.

(2) Prior to the date that TSA assumes the watch list matching function from a covered aircraft operator, the covered aircraft operator must comply with existing watch list matching procedures for passengers and non-traveling individuals, including denial of transport or sterile area access or designation for enhanced screening for individuals identified by the covered aircraft operator or TSA.

(b) *Watch list matching results*. Except as provided in paragraph (b) of this section, a covered aircraft operator must not issue a boarding pass or other authorization to enter a sterile area to a passenger or a non-traveling individual, and must not allow that individual to board an aircraft or enter a sterile area, until TSA informs the covered aircraft operator of the results of watch list matching for that passenger or non-traveling individual, in response to the covered aircraft operator's most recent SFPD submission for that passenger or non-traveling individual.

(1) *Denial of boarding pass*. If TSA sends a covered aircraft operator a boarding pass printing result that says the passenger or non-traveling individual must be placed on inhibited status, the covered aircraft operator must not issue a boarding pass or other authorization to enter a sterile area to that individual and must not allow that individual to board an aircraft or enter a sterile area.

(2) *Selection for enhanced screening*. If TSA sends a covered aircraft operator a boarding pass printing result that says the passenger has been selected for enhanced screening at a security checkpoint, the covered aircraft operator may issue a boarding pass to that individual and must identify the individual for enhanced screening, in accordance with procedures approved by TSA. The covered aircraft operator must place a code on the boarding pass that meets the requirements described in the Consolidated User Guide. If TSA sends a covered aircraft operator a boarding pass printing result that says the non-traveling individual has been selected for enhanced screening at a security checkpoint, the covered aircraft operator must not issue an authorization to enter a sterile area to that individual.

(3) *Cleared for boarding or entry into a sterile area*. If TSA sends a covered aircraft operator a boarding pass printing result that instructs a covered aircraft operator that a passenger or non-traveling individual is cleared, the covered aircraft operator may issue a boarding pass or other authorization to enter a sterile area to that individual, unless required under another TSA requirement to identify the passenger or non-traveling individual for enhanced screening or to deny entry into the sterile area. The covered aircraft operator must place a code on the boarding pass or authorization to enter the sterile area that meets the requirements described in the Consolidated User Guide.

(4) *Override by a covered aircraft operator*. No covered aircraft operator may override a TSA boarding pass printing result that instructs a covered aircraft operator to place a passenger or non-traveling individual in an inhibited status or to identify a passenger or non-traveling individual for enhanced screening, unless explicitly authorized by TSA to do so.

(5) *Updated SFPD from covered aircraft operator*. When a covered aircraft operator sends updated SFPD to TSA under § 1560.101(d) for a passenger or non-traveling individual for whom TSA has already issued a boarding pass printing result, all previous TSA results concerning the passenger or non-traveling individual are voided. The covered aircraft operator may not issue a boarding pass or grant authorization to enter a sterile area until it receives an updated result from TSA authorizing the issuance of a boarding pass or authorization to enter a sterile area. Upon receiving an updated result from TSA, the covered aircraft operator must acknowledge receipt of the updated result, comply with the updated result, and disregard all previous boarding pass printing results.

(6) *Updated boarding pass printing results from TSA*. After TSA sends a covered aircraft operator a result under paragraph (b)(1), (b)(2), or (b)(3) of this section, TSA may receive additional information concerning the passenger or non-traveling individual and may send an updated boarding pass printing result concerning that passenger or non-traveling individual to the covered aircraft operator. Upon receiving an updated boarding pass printing result from TSA, the covered aircraft operator must acknowledge receipt of the updated result, comply with the updated result, and disregard all previous results.

(7) *Boarding pass issuance for covered flights to or overflying the United States*. Covered aircraft operators may permit another aircraft operator to issue a boarding pass for a covered flight

departing from a foreign location to the United States or overflying the United States without regard to the requirements in paragraphs (b)(1) through (b)(6) of this section provided that—

(i) Before allowing the individual to board the aircraft for a covered flight, the covered aircraft operator confirms that it has received a boarding pass printing result from DHS for individuals who are issued boarding passes under paragraph (b)(7) of this section;

(ii) Before allowing the individual to board an aircraft for a covered flight, the covered aircraft operator applies the measures in its security program to prevent an individual for whom DHS has returned an inhibited status boarding pass printing result under paragraph (b)(1) of this section from boarding the aircraft; and

(iii) The covered aircraft operator applies the measures in its security program, as provided in 49 CFR part 1544, subpart B or 49 CFR part 1546, subpart B, to ensure that an individual for whom DHS returns a Selectee result under paragraph (b)(2) of this section undergoes enhanced screening pursuant to the covered aircraft operator's security program prior to that individual boarding the aircraft.

(c) *Request for identification*—(1) *In general.* If TSA has not informed the covered aircraft operator of the results of watch list matching for an individual by the time the individual attempts to check in, or informs the covered aircraft operator that an individual has been placed in inhibited status, the aircraft operator must request from the individual a verifying identity document pursuant to procedures in its security program., as provided in 49 CFR part 1544, subpart B or 49 CFR part 1546, subpart B. The individual must present a verifying identity document to the covered aircraft operator at the airport.

(2) *Transmission of Updated Secure Flight Passenger Data.* Upon reviewing a passenger's verifying identity document, the covered aircraft operator must transmit the SFPD elements from the individual's verifying identity document to TSA.

(3) *Provision of Passenger Resolution Information.* If requested by TSA, the covered aircraft operator must also provide to TSA the individual's Passenger Resolution Information as specified by TSA.

(4) *Exception for minors.* If a covered aircraft operator is required to obtain information from an individual's verifying identity document under this paragraph (c), and the individual is younger than 18 years of age and does not have a verifying identity document, TSA may, on a case-by-case basis, authorize the minor or an adult accompanying the minor to state the individual's full name and date of birth in lieu of providing a verifying identity document.

(d) *Failure to obtain identification.* If a passenger or non-traveling individual does not present a verifying identity document when requested by the covered aircraft operator, in order to comply with paragraph (c) of this section, the covered aircraft operator must not issue a boarding pass or give authorization to enter a sterile area to that individual and must not allow that individual to board an aircraft or enter a sterile area, unless otherwise authorized by TSA.

§ 1560.107 Use of watch list matching results by covered aircraft operators.

A covered aircraft operator must not use any watch list matching results provided by TSA for purposes other than those provided in § 1560.105 and other security purposes.

§ 1560.109 Aircraft Operator Implementation Plan.

(a) *Content of the Aircraft Operator Implementation Plan (AOIP).* Each covered aircraft operator must adopt and carry out an AOIP that sets forth the following:

(1) The covered aircraft operator's test plan with TSA.

(2) When the covered operator will begin to collect and transmit to TSA each data element of the SFPD for each covered flight.

(3) The specific means by which the covered aircraft operator will request and transmit information under § 1560.101, the timing and frequency of transmission, and any other related matters, in accordance with the Consolidated User Guide.

(b) *Adoption of Aircraft Operator Implementation Plan (AOIP).* Each covered aircraft operator must adopt an AOIP pursuant to the procedures set forth in this paragraph (b).

(1) TSA notifies each covered aircraft operator in writing of a proposed AOIP, fixing a period of not less than 30 days within which the covered aircraft operator may submit written information, views, and arguments on the proposed AOIP.

(2) After considering all relevant material, TSA's designated official notifies each covered aircraft operator of its AOIP. The AOIP becomes effective not less than 30 days after the covered aircraft operator receives the notice of its AOIP, unless the covered aircraft operator petitions the Assistant Secretary or designated official to reconsider no later than 15 days before the effective date of the AOIP. The covered aircraft operator must send the petition for reconsideration to the designated official. A timely petition for reconsideration stays the effective date of the AOIP.

(3) Upon receipt of a petition for reconsideration, the designated official either amends the AOIP or transmits the petition, together with any pertinent information, to the Assistant Secretary or designee for reconsideration. The Assistant Secretary or designee disposes of the petition within 30 days of receipt by either directing the designated official to withdraw or amend the AOIP, or by affirming the AOIP.

(4) TSA may, at its discretion, grant extensions to any schedule deadlines, on its own initiative or upon the request of a covered aircraft operator.

(c) *Incorporation into Security Program.* Once an AOIP is approved, the AOIP becomes part of the covered aircraft operator's security program as described in 49 CFR part 1544, subpart B, or 49 CFR part 1546, subpart B, as appropriate, and any amendments will be made in accordance with the procedures in those subparts.

(d) *Handling of Aircraft Operator Implementation Plan (AOIP).* An AOIP contains sensitive security information (SSI) and must be handled and protected in accordance with 49 CFR part 1520.

§ 1560.111 Covered airport operators.

(a) *Applicability.* This section applies to a covered airport operator that has a program approved by TSA through which the covered airport operator may authorize non-traveling individuals to enter a sterile area.

(b) *Requirements.* A covered airport operator must adopt and carry out an AOIP in accordance with § 1560.109. Each covered airport operator must comply with the procedures required of covered aircraft operators in §§ 1560.101(a), (c), and (d), 1560.103, and 1560.107 of this part and any other applicable TSA requirements when authorizing non-traveling individuals to enter a sterile area.

Subpart C—Passenger Redress

§ 1560.201 Applicability.

This subpart applies to individuals who believe they have been improperly or unfairly delayed or prohibited from boarding an aircraft or entering a sterile area as a result of the Secure Flight program.

§ 1560.203 Representation by counsel.

A person may be represented by counsel at his or her own expense during the redress process.

§ 1560.205 Redress process.

(a) If an individual believes he or she has been improperly or unfairly delayed or prohibited from boarding an aircraft or entering a sterile area as a result of the Secure Flight program, the individual may seek assistance through the redress process established under this section.

(b) An individual may obtain the forms and information necessary to initiate the redress process on the DHS TRIP Web site at *http://www.dhs.gov/trip* or by contacting the DHS TRIP office by mail. Individuals should send written requests for forms to the DHS TRIP office and include their name and address in the request. DHS will provide the necessary forms and information to individuals through its Web site or by mail.

(c) The individual must send to the DHS TRIP office the personal information and copies of the specified identification documents. If TSA needs additional information in order to continue the redress process, TSA will so notify the individual in writing and request that additional information. The DHS TRIP Office will assign the passenger a unique identifier, which TSA will recognize as the Redress Number, and the passenger may use that Redress Number in future correspondence with TSA and when making future travel reservations.

(d) TSA, in coordination with the TSC and other appropriate Federal law enforcement or intelligence agencies, if necessary, will review all the documentation and information requested from the individual, correct any erroneous information, and provide the individual with a timely written response.

§ 1560.207 Oversight of process.

The redress process and its implementation are subject to review by the TSA and DHS Privacy Offices and the TSA and DHS Offices for Civil Rights and Civil Liberties.

Issued in Arlington, Virginia, on October 20, 2008.

Kip Hawley,

Assistant Secretary.

[FR Doc. E8–25432 Filed 10–27–08; 8:45 am]

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Federal Register

Tuesday,
October 28, 2008

Part III

Environmental Protection Agency

40 CFR Part 63

NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Waste Combustors: Reconsideration; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2004–0022; FRL–8733–1]

RIN 2050–AG35

NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Waste Combustors: Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; reconsideration.

SUMMARY: On October 12, 2005, EPA promulgated national emission standards for hazardous air pollutants (NESHAP) for new and existing sources at hazardous waste combustion facilities (the final rule). Subsequently, the Administrator received four petitions for reconsideration of the final rule. On March 23, 2006 and September 6, 2006, EPA granted reconsideration with respect to eight issues raised by the petitions. After evaluating public comments submitted in response to these reconsideration notices, we are taking final action regarding the eight issues raised in the petitions for reconsideration. EPA also re-opened the rule to consider comments relating to a post-promulgation decision of the United States Court of Appeals for the District of Columbia Circuit, and is responding in this proceeding to the comments received on that notice, published on September 27, 2007. As a result of this reconsideration process, we are revising the new source standard for particulate matter for cement kilns and for incinerators that burn hazardous waste. We are also making amendments to the particulate matter detection system provisions and revisions to the health-based compliance alternative for total chlorine of the final rule. Finally, we are also issuing several corrections and clarifications to the final rule.

DATES: The final rule is effective on October 28, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2004–0022. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the HQ EPA Docket Center, Docket ID No. EPA–HQ–OAR–2004–0022, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The HQ EPA Docket Center telephone number is (202) 566–1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For more information on this final rule, contact Frank Behan at (703) 308–8476, or *behan.frank@epa.gov*, Office of Solid Waste (MC: 5302P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Outline. The **SUPPLEMENTARY INFORMATION** in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document?
C. Judicial Review
II. Background
A. What Is the Source of Authority for the Reconsideration Action?
B. What Is the Background on the NESHAP for Hazardous Waste Combustors?
III. Final Action on Issues for Which EPA Granted Reconsideration
A. Subcategorization of Liquid Fuel Boilers by Heating Value
B. Correcting Total Chlorine (TCl) Data to 20 ppmv
C. Use of PS–11 and Procedure 2 as Guidance for Extrapolating the Alarm Set-Point of a Particulate Matter Detection System (PMDS)
D. Tie-Breaking Procedure for New Source Standards
E. New Source Particulate Matter Standard for New Cement Kilns
F. Beyond-the-Floor Analyses To Consider Multiple HAP That Are Similarly Controlled
G. Dioxin/Furan Standard for Incinerators With Dry Air Pollution Control Devices
H. Provisions of the Health-Based Compliance Alternative
IV. Response to Comments to the September 27, 2007 Notice
A. Standards for Particulate Matter
B. Standards for Semivolatile Metals and Low Volatile Metals
C. Standards for Total Chlorine
D. Standards for Dioxins/Furans
E. Standards for Non-Dioxin/Furan Organic HAP
F. Standards for Mercury
G. Normalization
V. What Other Rule Provisions Are Being Amended or Clarified?
A. What corrections are we making?
B. Clarification of the PM Standard for Cement Kilns
VI. Summary of Environmental, Energy, and Economic Impacts
A. What facilities are affected by the final amendments?
B. What are the air quality impacts?
C. What are the water quality, solid waste, energy, cost and economic impacts?
VII. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review

I. General Information

A. Does this action apply to me?

The regulated categories and entities affected by this final action include:

Category	NAICS code [a]	Potentially affected entities
Petroleum and coal products manufacturing	324	Any entity that combusts hazardous waste as defined in the final rule.
Chemical manufacturing	325	
Cement and concrete product manufacturing	3273	
Other nonmetallic mineral product manufacturing	3279	
Waste treatment and disposal	5622	

Category	NAICS code [a]	Potentially affected entities
Remediation and other waste management services	5629	

[a] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this action. To determine whether your facility is affected by this action, you should examine the applicability criteria in 40 CFR 63.1200, ''Who is subject to these regulations?''. If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in § 63.13 of the General Provisions to part 63 (40 CFR part 63, subpart A).

B. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of the final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control. This action is also available at the following address: *http://www.epa.gov/hwcmact.*

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by December 29, 2008. Under section 307(d)(7)(B) of the CAA, only an objection to these final rules that was raised with reasonable specificity during the period for public comment can be raised during judicial review. This section also provides a mechanism for EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of this rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20004, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Moreover, under section 307(b)(2) of the CAA, the requirements established by these final rules may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

II. Background

A. What Is the Source of Authority for the Reconsideration Action?

EPA is reconsidering several aspects of its final rule for hazardous waste combustors under sections 112(d) and 307(d)(7)(B) of the Clean Air Act (CAA) as amended (42 U.S.C. 7412(d) and 7607(d)(7)(B)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

B. What Is the Background on the NESHAP for Hazardous Waste Combustors?

Section 112 of the CAA requires that we establish NESHAP for the control of hazardous air pollutants (HAP) from both new and existing major sources. Major sources of HAP are those stationary sources or groups of stationary sources that are located within a contiguous area under common control that emit or have the potential to emit considering controls, in the aggregate, 10 tons per year (tpy) or more of any one HAP or 25 tpy or more of any combination of HAP. For major sources, the CAA requires the NESHAP to reflect the maximum degree of reduction in emissions of HAP that is achievable.[1] This level of control is commonly referred to as MACT (for Maximum Achievable Control Technology). See CAA section 112(d)(2).

The minimum control level for major sources is defined under section 112(d)(3) of the CAA, and is referred to, informally, as ''the MACT floor.'' The MACT floor ensures that the standards are set at a level that assures that all major sources perform at the level of control at least as stringent as that already achieved by the best-performing sources in each source category or subcategory. Specifically, for new major sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing major sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory for which the Administrator has emissions information (where there are 30 or more sources in a category or subcategory; floors for existing sources in categories or subcategories with fewer than 30 sources are to be based on the average emission limitation achieved by the best performing five sources).

EPA also must consider more stringent ''beyond-the-floor'' control options. When considering beyond-the-floor options, EPA must consider not only the maximum degree of reduction in emissions of HAP, but must take into account costs, energy, and non-air quality health environmental impacts. See CAA section 112(d)(2).

We proposed NESHAP for hazardous waste combustors on April 20, 2004 (69 FR 21198), and we published the final rule on October 12, 2005 (70 FR 59402). The hazardous waste combustor NESHAP is codified in subpart EEE of 40 CFR part 63. Following promulgation of the hazardous waste combustor final rule, the Administrator received four petitions for reconsideration, pursuant to section 307(d)(7)(B) of the CAA, from Ash Grove Cement Company, the Cement Kiln Recycling Coalition (CKRC), the Coalition for Responsible Waste Incineration (CRWI), and the Sierra Club.[2] Under this section of the

[1] Section 112(d)(4) gives the Administrator the authority to establish health-based emission standards in lieu of the MACT standards for HAP for which a health threshold has been established. In the final rule promulgated on October 12, 2005, EPA established health-based compliance alternatives for total chlorine as an alternative to the MACT technology-based emission standards, which alternative standards are applicable to all hazardous waste combustors, with the exception of hydrochloric acid production furnaces. 70 FR at 59478–486.

[2] These petitions are included in the docket for this rule. See items EPA–HQ–OAR–2004–0022–

Continued

CAA, the Administrator must initiate reconsideration proceedings with respect to provisions that are of central relevance to the rule at issue if the petitioner shows that it was impracticable to raise an objection to a rule within the public comment period or that the grounds for the objection arose after the public comment period but within the period for filing petitions for judicial review.

Of the twenty or so issues raised in the four petitions for reconsideration, we decided to grant immediate reconsideration of one of the issues included in the petitions of Ash Grove Cement Company and CKRC. On March 23, 2006, EPA published a proposed rule granting reconsideration of the particulate matter standard for new cement kilns. 71 FR 14665. Also on March 23, 2006, EPA granted a three-month administrative stay while the particulate matter standard was under reconsideration. 71 FR 14655. The administrative stay was issued pursuant to section 307(d)(7)(B) of the CAA and was in effect from March 23, 2006 to June 23, 2006. Approximately a dozen public comment letters were submitted in response to the March 2006 proposed rule, including a request to extend the comment period by two weeks that EPA granted in a subsequent notice on April 13, 2006. 71 FR 19155. On October 25, 2006, EPA issued a final rule amending the effective date of the particulate matter standard for new cement kilns. 71 FR 62388. That amendment suspended the obligation of new cement kilns to comply with the particulate matter standard set forth in § 63.1220(b)(7)(i) until we take final action on the March 2006 proposal to revise the standard. Today's rule announces our final action regarding Ash Grove Cement Company and CKRC's petitions for reconsideration of the particulate matter standard for new cement kilns that was first proposed on March 23, 2006.

On August 22, 2006, EPA issued letters to the Ash Grove Cement Company, the CKRC, and the Sierra Club explaining our rationale to deny reconsideration on several issues.[3] On September 6, 2006, we announced our reconsideration of and requested public comment on seven issues raised in the petitions of the Ash Grove Cement Company, the CKRC, and the Sierra Club. 71 FR 52624. In addition to requesting comment on the reconsideration issues, we also sought comment on several other proposed amendments to various compliance and monitoring provisions in the hazardous waste combustor NESHAP. Eleven commenters submitted responses to this reconsideration notice. In addition to addressing the PM standard for new cement kilns, today's rule announces our final decision regarding the seven petition for reconsideration issues and the other compliance and monitoring amendments included in the September 2006 proposed rule.

On September 27, 2007, EPA issued a **Federal Register** notice discussing each of the standards in the rule in light of the DC Circuit's decision in *Sierra Club* v. *EPA*, 479 F. 3d 875 (2007) (''Brick MACT''). The specific focus of this analysis was whether the MACT floors for each standard were consistent with the requirements of section 112(d)(2) and (d)(3) of the Act. EPA also sought comment on amending the record to make clear that it was no longer relying on certain rationales which appeared inconsistent with the *Brick MACT* opinion. EPA solicited and received comment on this analysis and is responding to those comments in this notice.

III. Final Action on Issues for Which EPA Granted Reconsideration

EPA granted reconsideration of eight issues raised in the petitions of the Ash Grove Cement Company, the Cement Kiln Recycling Coalition, the Coalition for Responsible Waste Incineration, and the Sierra Club. Accordingly, we requested comment on the eight issues in two notices published on March 23, 2006 (71 FR 14665) and September 6, 2006 (71 FR 52624). We discuss below our final action regarding the eight issues raised in the four petitions for reconsideration and include our response to the major comments received on these issues.

A. Subcategorization of Liquid Fuel Boilers by Heating Value

In the October 12, 2005 final rule, we divided the liquid fuel boiler subcategory into two separate boiler subcategories based on the heating value of the hazardous waste they burn for purposes of establishing emission standards for metals and total chlorine (TCl): Those that burn waste with a heating value below 10,000 Btu/lb, and those that burn hazardous waste with a heating value of 10,000 Btu/lb or greater. See 70 FR at 59422. Sources would shift from one subcategory to the other depending on the heating value of the hazardous waste burned at the time. *Id.* at 59476.

Sierra Club petitioned for reconsideration stating that EPA developed this subcategorization approach after the period for public comment and, thus, did not provide notice and opportunity for public comment.[4] We subsequently granted reconsideration of this provision. See 71 FR at 52627–28 (September 6, 2006). Although we granted reconsideration, we did not propose to change the approach.

This issue has now become moot because EPA has determined that the standard for the high heating value subcategory requires revision because it only applied to HAP in hazardous waste, not to all HAP input to the boiler (for example, HAP that may be present in fossil fuels or other non-waste inputs), which is contrary to the DC Circuit's decisions in *Brick MACT*, 479 F. 3d at 882–83. (MACT standards must apply to all HAP regardless of source of input). Moreover, once the high heating value subcategory is eliminated, there is no basis for a low heating value subcategory since the whole basis for differentiation no longer exists. Accordingly, EPA now agrees with the petitioner that the subcategorization scheme it adopted for liquid fuel boilers is not appropriate, and EPA intends to amend these standards. See also preamble sections IV.B and IV.F below (responding to comments on EPA's September 27, 2007 notice).

B. Correcting Total Chlorine (TCl) Data to 20 ppmv

In the October 12, 2005 final rule, we corrected all the total chlorine (TCl) measurements in the data base that were below 20 ppmv to account for potential systemic negative biases in the Method 0050 data. See 70 FR at 59427–29.[5] Sierra Club petitioned for reconsideration stating that EPA corrected the TCl measurements in response to comments on the proposed rule—after the period for public comment—and used the corrected data to revise the TCl emission standards.[6]

0516 thru 0519. EPA also received petitions from Ash Grove Cement Company and the CKRC, Continental Cement Company, and Giant Cement Holding, Inc. requesting that we stay the effective date of the particulate matter standard for new cement kilns. See items EPA–HQ–OAR–2004–0022–0521 and 0523.

[3] A copy of each letter is included in the docket to this rulemaking. See docket items EPA–HQ–OAR–2004–0022–0558 through 0560. A summary of the issues for which we denied reconsideration can also be found in the September 6, 2006 proposed rule. 71 FR at 52627.

[4] See letter from James Pew to Stephen Johnson, dated December 12, 2005, Section II, docket item EPA–HQ–OAR–2004–0022–0517.

[5] See also USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' Section 5.5, September 2005.

[6] See letter from James Pew to Stephen Johnson, dated December 12, 2005, Section IV, docket item EPA–HQ–OAR–2004–0022–0517.

We granted reconsideration of our approach to account for these method biases to assess the true performance of the best performing sources. Reconsideration was appropriate because, as Sierra Club stated, we decided to correct the TCl data after the period for public comment on the proposed rule, and correcting the data significantly impacted the development of the TCl emission standards.

To account for the bias in the analytic method, we corrected all TCl emissions data that were below 20 ppmv to 20 ppmv. We accounted for within-test condition emissions variability for the corrected data by imputing a standard deviation that is based on a regression analysis of run-to-run standard deviation versus emission concentration for all data above 20 ppmv. This approach of using a regression analysis to impute a standard deviation is similar to the approach we used to account for total variability (i.e., test-to-test and within-test variability) of particulate matter emissions for sources that use fabric filters.

1. Summary of the Final Action

The comments to the reconsideration notice did not provide a basis for us to conclude that it was inappropriate to correct all TCl emissions data that were below 20 ppmv to 20 ppmv to account for potential systemic negative biases in the Method 0050 data. Therefore, we reaffirm our approach of correcting the TCl measurements at promulgation and are making no changes to the October 12, 2005 final rule.

2. What Are the Responses to Major Comments?

Comment: Sierra Club (represented by Earthjustice) states that: (1) Establishing floor emission levels based on measurements below 20 ppmv that are corrected to 20 ppmv is impermissible because, even assuming bias in the analytic method, the corrected measurements do not reflect the performance of the best performing sources; (2) projecting the variability of emissions for the average of the best performing sources considering the variability of emissions for sources that are not best performing sources is inappropriate; (3) the ''statistical imputation'' methodology used to calculate emissions variability is inappropriate because EPA admits it overestimates variability; and (4) to the extent EPA relied on achievability as a reason to change the TCl standard, the Agency acted unlawfully.

Response: We respond to each issue in turn:

a. *Corrected Measurements Do Not Reflect Performance of the Best Performing Sources.* The best performing sources are those with measurements below 20 ppmv. We determined, however, and Sierra Club does not dispute, that those measurements are likely to be affected by a systemic negative bias in Method 0050 which collected these data so that the measured level of performance is biased low and therefore cannot credibly be deemed to reflect these sources' actual level of performance. 71 FR at 52629–30. Because measurements below 20 ppmv may not (indeed, likely do not) represent the performance of a source, we corrected the measurements to 20 ppmv, the only value of which there is any reasonable certainty. The corrected data thus are our best projection of the performance (not considering emissions variability) of those sources with the lowest measured TCl emissions, accounting for the bias in measurement.

We note that the Clean Air Act requires EPA ''to make a reasonable estimate of the performance of the top 12 percent of units.'' *CKRC* v. *EPA*, 255 F.3d 855, 862 (D.C. Cir. 2001), *citing Sierra Club* v. *EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) (interpreting 42 U.S.C. 7429(a)(2), which requires that ''emissions standards for existing units in a category * * * shall not be less stringent than the average emissions limitation achieved by the best performing 12 percent of units in the category''). The court has made clear that EPA has authority to devise the means of deriving this estimate, provided the method the Agency selects ''allow[s] a reasonable inference as to the performance of the top 12 percent of units.'' *Id.* Most importantly, though, EPA must show not only that it believes its methodology provides an accurate picture of the relevant sources' actual performance, but also why its methodology yields the required estimate. *Id.* We have explained the basis for the negative bias in the analytic method, the existence of which is not in dispute. The issue then becomes how best to estimate the performance of the best performing sources given that their measured performance reflects the bias of the analytic method. We believe that correcting potentially biased measurements to 20 ppmv is appropriate because Method 0050 itself states that the method is not acceptable for demonstrating compliance with HCl emission standards less than 20 ppm.[7,8] TCl emission levels greater than 20 ppmv would be reported by Method 0050 without significant bias (and therefore are reliable measurements), while measurements reported to be below 20 ppmv may actually have been as high as 20 ppmv and cannot be reliably assessed below that number.

Sierra Club does not suggest alternative approaches to correct the potentially biased measurements to project the performance of those sources, but rather implies that the uncorrected measurements should be used to establish the floor emission level. This would be arbitrary and inappropriate because those data almost certainly (no absolute certainty is possible) do not represent the performance of those sources due to analytic bias, and moreover, fail to account for emissions variability of the best performers.

b. *Projecting Emissions Variability Considering Sources Other Than the Best Performing Sources.* We explained that, after correcting measurements below 20 ppmv to 20 ppmv, the corrected emission levels for the best performing sources naturally reflected little variability—corrected data for the best performing sources were generally the same values, on the order of 20 ppmv. 71 FR 52630/2. This had the effect of understating the variability associated with these data—i.e., these sources' performance. These sources' performance over time thus would not be assessed correctly, so some different type of estimate must be made. To address this problem, we performed a linear regression on the data base—including both best performing sources and other sources—charting standard deviation against emissions, and extrapolated the regression downward to the emission level for each best performing source to impute a standard deviation.

Sierra Club states that it is inappropriate to use emissions variability for sources that are not best performing sources to project emissions variability for the best performing sources. We disagree here because we believe this is the best means of estimating the best performing sources' variability and hence their actual performance. See *Sierra Club* v. *EPA*, 479 F.3d 875, 882 (D.C. Cir. 2007) (EPA may consider variability of performers other than best if there is ''a demonstrated relationship between the two''). First, Sierra Club is not correct

[7] See Method 0050, Section 1.2. Also, see equivalent Method 26A, Section 13.1.

[8] As further evidence of the Method 0050 bias, the updated, equivalent method to Method 0050—Method 26A—states that that method has a possible measurable negative bias below 20 ppm HCl.

that EPA is using variability of non-best performers as a proxy for the variability of the best performers. As just stated, EPA imputed the regression curve downward after examining all data and it is reasonable to do so because the relative standard deviation (i.e., variability of performance normalized for emission concentration) [9] of the test condition runs of the better performing sources (i.e., sources with lower emissions) here was not significantly different from the relative standard deviation of the test condition runs of the worse performing sources.[10] EPA reasonably assumed that this same relationship (i.e., the shape of the regression curve) would be the same at lower levels. The actual level of variability of the best performing sources resulting from this imputed regression curve shape is less for the best performing sources than for non-best sources. See generally, memorandum from Lucky Benedict, EERGC, to Bob Holloway, USEPA, entitled ''Analysis of Total Chlorine Data above 20 ppmv,'' dated March 21, 2007.

We have (uncorrected) variability results for several sources that performed close to the best performing sources—four sources emitted between 21 ppmv and 25 ppmv, and seven sources emitted between 21 ppmv and 28 ppmv. We considered using the variability of these sources as a surrogate for the variability for the best performers (i.e., those at 20 ppmv) but were concerned that this may overstate best performers' variability and hence result in a standard which is too high (i.e., insufficiently stringent).[11] Rather, we used variability results for all sources, irrespective of emission level, to develop a variability/emissions regression curve. This curve regressed variability [12] versus emissions through the low emitting sources that performed close to the best performers (e.g., including sources with emissions of 21 ppmv and 24 ppmv, only slightly higher than the 20 ppmv for the best performers). We then extrapolated the curve down to the 20 ppmv emission level to impute a standard deviation for the best performers.[13] As noted above, we determined that there is no significant difference in relative standard deviation for low emitting sources (e.g., sources emitting 21 ppmv to 38 ppmv) compared to high emitting sources (e.g., sources emitting 130 ppmv to 920 ppmv), and hence that it is reasonable to use all of the available data to derive a best fit shape of the regression curve.[14] This similarity confirms that data on all sources' variability can reasonably be considered—by means of imputing the shape of the regression curve at the low end—in estimating the variability of the best performing sources.

This approach does not substitute variability from non-best performers for variability of best performers. Rather, it uses all of the data to estimate how variability may change as performance improves to derive a best estimate of the variability of the best performers.[15]

c. *Statistical Imputation Is Inappropriate Because It Overstates Variability*. Sierra Club mistakenly believes that we used statistical imputation to project variability of the corrected data. As just discussed in section B.2.b., we used a linear regression analysis specifically because an alternative approach that we used to project variability of data sets containing nondetects—statistical imputation—would overstate variability of the corrected data. 71 FR at 52630. We explained that the statistical imputation approach for correcting data below 20 ppmv without dampening variability would involve imputing a value between the reported value and 20 ppmv because the ''true'' value of the biased data would lie in this interval. This approach would be problematic, however, given that many of the reported values (based on the biased analytic method) were much lower than 20 ppmv; the statistical imputation approach would tend to overestimate the run-to-run variability (leading to a standard higher than the one we are adopting) and hence we rejected its use in this context.

d. *Achievability of a Floor Emission Level*. Sierra Club states that it is unlawful to consider whether a floor emission level is achievable. But the issue here is assessing sources' performance over time. If a best performing source on whose performance a MACT floor is based cannot itself comply with that floor standard, then that source's performance over time has been improperly assessed. Put another way, that source's variability (i.e., performance over time) has not been adequately accounted for. *Mossville Environmental Action Now* v. *EPA*, 370 F. 3d 1232, 1241–42 (D.C. Cir. 2004). Since the standard must be met ''every day and under all operating conditions,'' it is imperative that the emission data used to represent the performance of the best performing sources truly represent the performance of those sources over time by, notably, accounting for emissions variability. *Id.* at 1242.

C. Use of PS–11 and Procedure 2 as Guidance for Extrapolating the Alarm Set-Point of a Particulate Matter Detection System (PMDS)

In its reconsideration petition, CKRC asked that EPA reconsider its references to Performance Specification 11 (PS–11) and Procedure 2 in the particulate matter detection system (PMDS) provisions of the October 12, 2005 final rule. We granted reconsideration because we developed the procedures for extrapolating the alarm set-point for PMDS that included references to PS–11 and Procedure 2, in response to comments on the proposed rule and after the period for public comment. 71 FR at 52630–31.

CKRC also stated that the reference to PS–11 for particulate matter Continuous Emissions Monitoring Systems (40 CFR Part 60, Appendix B) and Procedure 2 (Appendix F, Part 60) for use as guidance to implement provisions to extrapolate the alarm set-point of a PMDS may effectively prevent its members from utilizing this option due to significant technical difficulties and excessive costs.[16] CKRC further stated that PS–11 and Procedure 2 contain a number of problems as they would apply to cement kilns, and that it has

[9] Relative standard deviation is calculated as the standard deviation times 100 divided by the average, and is expressed as a percentage.

[10] As should be apparent from the following discussion, EPA is not using information on emission levels of worse performing sources to estimate the best performers' emission levels (the fact pattern of the *Cement Kiln Recycling Coalition* case and *Brick MACT* cases; see 255 F.3d at 865 and *Brick MACT*, 479 F.3d at 881–82).

[11] For example, the variability (i.e., standard deviation) of test condition runs generally increases as emission concentrations increase.

[12] We repeat that variability is measured as standard deviation.

[13] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 8–1.

[14] See memorandum from Lucky Benedict, EERGC, to Bob Holloway, USEPA, entitled ''Analysis of Total Chlorine Data above 20 ppmv,'' dated March 21, 2007.

[15] As it happens, if EPA were erroneously including information on variability of higher emitting sources in this analysis, it would result in a more stringent standard because the shape of the regression slope would be steeper and would cross the 20 ppmv point at a lower point (because less variability would be imputed at lower emission concentrations). See Figure 1 in the memorandum cited in the preceding footnote. In fact, because (as explained in the text above) relative standard deviations of higher emitting sources do not increase as emissions increase, EPA does not believe it committed this type of error.

[16] See letter from David P. Novello to Stephen L. Johnson regarding ''Petition for Reconsideration of Certain Provisions of Hazardous Waste Combustor MACT Replacement Standards Rule,'' dated December 9, 2005, p. 9, docket item EPA–HQ–OAR–2004–0022–0520.

filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit challenging EPA's final rule adopting PS–11 and Procedure 2, which case is being held in abeyance.

Finally, CKRC stated that use of a regression analysis approach to extrapolate the alarm set-point is not justified or necessary to establish an approximate correlation between the particulate matter detector system response and particulate matter concentrations. CKRC suggested that an alternative approach would be based on a linear relationship passing through zero and the mean of the PM comprehensive performance test results.

When we reviewed the procedures in the final rule for establishing the set-point in light of CKRC's concerns regarding use of a regression analysis to extrapolate the set-point and use of PS–11 and Procedure 2 as guidance, we identified several shortcomings of the final rule. Consequently, we proposed to revise the provisions for establishing the alarm set-point by extrapolation by: (1) Adding procedures to establish the alarm set-point for operations under the Documentation of Compliance; (2) revising procedures to extrapolate the alarm set-point for operations under the Notification of Compliance; and (3) providing specific rather than generic references to PS–11 and Procedure 2 provisions that must be followed to extrapolate the alarm set-point. 71 FR at 52631–33.

We also determined that the final rule was silent on what operators must do when the PMDS (or bag leak detection system (BLDS)) is malfunctioning (e.g., when it is out of control or inoperable). We explained in the reconsideration proposal that it is reasonable to require that operations when the PMDS or BLDS is unavailable be considered the same as operations that exceed the alarm set-point given that there would be no information to conclude otherwise. Thus, we proposed to require sources to correct the malfunction or minimize emissions, and require that the duration of the malfunction be added to the time when the PMDS or BLDS exceeds the alarm set-point. If the time of PMDS or BLDS malfunction and exceedance of the alarm set-point exceeds 5 percent of the time during any 6-month block time period, the source would have to submit a notification to the Administrator within 30 days of the end of the 6-month block time period that describes the causes of the exceedances and PMDS or BLDS malfunctions and the revisions to the design, operation, or maintenance of the combustor, air pollution control equipment, or PMDS (or BLDS) it is taking to minimize exceedances.

1. Summary of the Final Action

We are today promulgating: (1) Revised procedures to extrapolate the PMDS alarm set-point which are less prescriptive than those we proposed in the reconsideration notice; (2) with respect to the excessive exceedance notification for the PMDS if the set-point is exceeded for more than five percent of the time during any 6-month block time period, a requirement, as proposed in the reconsideration notice, to also include the time the PMDS malfunctions (while the combustor is operating), as well as the time the PMDS set-point is exceeded; and (3) revised PMDS general requirements to clarify that, if the alarm set-point is exceeded or if the PMDS malfunctions, the source must take the corrective measures it specifies in its operating and maintenance plan required under § 63.1206(c)(7).

We discuss below the revised procedures to extrapolate the PMDS alarm set point. We discuss the other provisions—PMDS and BLDS malfunctions and clarification of general PMDS requirements—in the response to major comments below. Please note that the revised provisions are effective immediately, and today's final rule does not change the October 14, 2008 compliance date for existing sources established by the October 12, 2005 final rule. Sources can readily comply with the revised provisions promulgated today on the compliance time line established by the October 12, 2005 final rule.

The revised procedures to extrapolate the PMDS alarm set point address four aspects: (1) Establishing the set-point for operations under the Documentation of Compliance; (2) establishing the set-point for operations under the initial Notification of Compliance; (3) PMDS quality assurance procedures; and (4) revising the set-point subsequent to periodic comprehensive performance testing and other testing, such as for quality assurance. See § 63.1206(c)(9)(ii) through (v). In addition, please note that the final rule no longer references PS–11 or Procedure 2. We have concluded that the Relative Response Audit provisions of Procedure 2, and applying the correlation curve statistical parameters in PS–11, may not be appropriate in some situations. Accordingly, the final rule requires sources to recommend for approval site-specific procedures for PMDS quality assurance and to determine, as additional data pairs become available, when and how to evaluate correlation models that may better represent the relationship between reference method measurements and PMDS responses than a linear model.

a. *Documentation of Compliance Set-Point.* To establish the set-point for the Documentation of Compliance (DOC), the source must obtain a minimum of three reference method and PMDS data pairs, as proposed. 71 FR at 52631/3. As proposed, a source: (1) May use existing data obtained within 60 months of the DOC; (2) must approximate the correlation of the reference method data to the PMDS data; (3) may assume a linear correlation; and (4) may use a zero-point. A source must request approval from the regulatory authority (in the continuous monitoring system test plan) of their determination whether multiple correlation curves will be necessary considering the design and operation of its combustor and PMDS (e.g., cement kilns equipped with an in-line raw mill and that use a light-scattering detector may need to establish separate correlation curves with the mill on and mill off).[17] We are including this provision in the final rule in light of comments indicating that multiple correlation curves may be needed to appropriately correlate reference method and PMDS responses in some situations.[18] As proposed, a source must establish the alarm set-point as the PMDS response that corresponds to a PM concentration that is 50% of the PM emission standard or 125% of the highest PM concentration used to develop the correlation, whichever is greater. The PM emission concentration used to extrapolate the alarm set-point must not exceed the PM emission standard, however.

b. *Initial Notification of Compliance Set-Point.* To establish the set-point for operations under the initial Notification of Compliance, a source must request approval from the regulatory authority (in the continuous monitoring system test plan) of procedures they will use to establish an approximate correlation curve considering the three pairs of Method 5 or 5I data, the PMDS response data from the comprehensive performance test, and any additional data pairs, as warranted (e.g., data pairs during as-found operations; data pairs used for the Documentation of Compliance correlation curve). As

[17] USEPA, ''Current Knowledge of Particulate Matter (PM) Continuous Emissions Monitoring,'' September 8, 2000, p. 7–3.

[18] See letter from David P. Novello to Stephen L. Johnson regarding ''Petition for Reconsideration of Certain Provisions of Hazardous Waste Combustor MACT Replacement Standards Rule,'' dated December 9, 2005, p. 20, docket item EPA–HQ–OAR–2004–0022–0520.

proposed, the final rule: (1) Requires sources to use a least-squares regression methodology to correlate PM concentrations to PMDS responses for data pairs; (2) allows sources to assume that a linear regression model approximates the relationship between PM concentrations and PMDS responses; and (3) requires sources to establish the alarm set-point as the PMDS response that corresponds to a PM concentration that is 50% of the PM emission standard or 125% of the highest PM concentration used to develop the correlation, whichever is greater. The emission concentration used to extrapolate the PMDS response must not exceed the PM emission standard. 71 FR at 52632–33.

In addition, a source must request approval from the regulatory authority (in the continuous monitoring system test plan) of their determination whether multiple correlation curves are needed, considering the design and operation of the combustor and PMDS for reasons discussed above. If multiple correlation curves are needed, a source must request approval of the number of data pairs needed to establish those correlation curves and explain how the data will be obtained.

We are not promulgating the proposed requirement to obtain three data pairs under as-found operations in addition to the performance test data pairs because the additional data may not significantly improve the assumed linear correlation model in all cases.[19] Having three as-found data pairs would still result in too few data pairs to perform statistical analyses to identify the most appropriate correlation curve.[20] Additional as-found data pairs may be warranted, however, in situations such as those where the extrapolated alarm set-point correlates to a PM concentration close to the PM emission standard, or where a single correlation curve may be reasonable even though multiple curves may better represent the correlation. We conclude that it is more appropriate to make these determinations on a site-specific basis rather than mandate universal testing that may not be particularly useful.

c. *PMDS Quality Assurance*. For PMDS quality assurance, a source must request approval from the regulatory authority (in the continuous monitoring system test plan) of the quality assurance procedures that will reasonably ensure that PMDS response values below the alarm set-point do not correspond to PM emission concentrations higher than the value that correlated to the alarm set-point.[21]

Today's final rule requires a source to establish site-specific quality assurance measures rather than comply with the Relative Response Audit (RRA) provisions of Procedure 2 that apply to PM CEMS, which was required under the October 12, 2005 final rule and contemplated in the reconsideration proposal.[22] For PM CEMS, a RRA is comprised of three pairs of reference method and PM CEMS responses at as-found operating conditions. For PMDS, the RRA would involve obtaining three pairs of reference method and PMDS responses. We now conclude, however, that all of the quality assurance provisions established for PM CEMS may not be appropriate for PMDS given that PMDS responses will only be approximately correlated to PM concentrations rather than direct measures of such; therefore PMDS correlations will not be subjected to the statistical criteria applicable to PM CEMS under section 13.2 of PS–11.

For example, one criterion under Procedure 2 for passing the RRA, section 10.4(6)(iii), as we considered adopting it for PMDS, would require that at least two of the three sets of PMDS and reference method measurements must fall within a specified area on a graph of the correlation regression line. The specified area on the graph of the correlation regression line is defined by two lines parallel to the correlation regression line, offset at a distance of ±25 percent of the numerical emission limit value from the correlation regression line. In retrospect, and in light of comments on the reconsideration notice, we have determined that this criterion would be inappropriate for a PMDS. The correlation regression line for a PMDS would generally comprise six data pairs when the alarm set-point is established in the initial Notification of Compliance, while the correlation regression line for a PM CEMS would comprise 15 data pairs initially, and if a Reference Correlation Audit, which requires 12 data pairs, had been performed, a total of 27 data pairs. Consequently, the PMDS correlation curve would not be as well defined as the PM CEMS correlation curve—6 data pairs versus 15 to 27 data pairs—and, thus, the RRA criterion for PM CEMS under section 10.4(6)(iii) would not be appropriate.

Please note that a less precise correlation is appropriate for PMDS because they will be used for compliance assurance (i.e., as an indicator for reasonable assurance that an emission standard is not exceeded) rather than compliance monitoring (i.e., as an indicator of continuous compliance with an emission standard). As such, exceedance of a PMDS response that appears to correlate to a PM emission level exceeding the PM standard is not evidence of a violation of the emission standard. 70 FR at 59490–91.

In the interim until more definitive guidance is available, we recommend that sources consider whether some of the RRA provisions of Procedure 2 may be appropriate for PMDS.

d. *Revising the Initial Notification of Compliance Set-Point*. To revise the set-point subsequent to periodic comprehensive performance testing and other testing, such as for quality assurance, a source must propose to the regulatory authority for approval (in the continuous monitoring system test plan) an approach for how it will periodically revise the alarm set-point, considering the additional data pairs.

We are promulgating a site-specific approach to revise the set-point rather than the prescriptive approach proposed in the reconsideration notice (i.e., using the statistical parameters applicable to PM CEMS to identify the most appropriate correlation model). 71 FR at 52633/2. At proposal, we assumed that a minimum of 13 data pairs would be available for applying the PM CEMS statistical parameters, and that the parameters could be applied to as few as 13 data pairs. Under today's final rule, there could be as few as six data pairs[23] (plus perhaps a zero-point)

[19] For example, additional as-found data pairs would not likely improve compliance assurance for sources that extrapolate the alarm set-point to a response that correlates to only 50% of the PM emission standard.

[20] Even with three as-found data pairs, there would be only nine data pairs available to establish the correlation curve—three data pairs from the DOC, three data pairs from the comprehensive performance test, and the three as-found data pairs. (There would be 10 data pairs if a zero—point were used.) Procedure 2 for PM CEMS (Appendix F, Part 60) requires a minimum of 12 data pairs for a relative correlation audit. See Section 10.3(8).

[21] Please note that the rule also requires quality assurance procedures for sources that elect to establish the alarm set-point without extrapolation. In that situation, a source must request approval from the regulatory authority of the quality assurance procedures that reasonably ensure that PMDS response values below the alarm set-point do not correspond to PM emission concentrations higher than those demonstrated during the comprehensive performance test.

[22] Section 10.3(6) explains how a RRA is performed for a PM CEMS, Section 10.4(6) establishes the criteria for passing a RRA for a PM CEMS, and Section 10.5 establishes procedures for PM CEMS that fail the RRA.

[23] A minimum of three data pairs are needed for the Documentation of Compliance, and an

available prior to any quality assurance testing that may be approved or required by the regulatory authority. Consequently, it would be appropriate to continue to apply the new data pairs obtained from quality assurance testing and periodic comprehensive performance testing to the linear correlation model until enough data pairs are available to warrant applying statistical parameters to determine if there is a more appropriate correlation model (e.g., logarithmic, exponential). In addition, the number of data pairs needed for meaningful statistical analysis will depend on factors including the range of the data. For example, if much of the data are representative of the high end of the range of normal operations (or only two modes of operation—normal within a narrow range and high-end), statistical analysis may not help identify the most appropriate correlation model. Thus, we conclude that these determinations should be made on a site-specific basis.

We note that sources can consider adding newly obtained data pairs to the pool of existing data pairs and continue to apply a linear correlation model to extrapolate the alarm-set-point until it obtains enough data representative of a range of PM concentrations that would warrant statistical analysis to identify the most appropriate correlation model. After a source obtains enough of these data pairs (e.g., 12 to 15), the statistical parameters that they should consider to identify the best correlation model include: The confidence interval half range percentage, the tolerance interval half range percentage, and the correlation coefficient. PS–11 provides definitions of these statistical parameters and other information that may be useful when evaluating correlation models.

2. What Are the Responses to Major Comments?

Comment: CKRC states that eliminating general references to PS–11 and Procedure 2 while including references to specific provisions of those procedures does not address their fundamental problem—PS–11 and Procedure 2 are problematic in a number of ways for cement kilns. CKRC believes it is unnecessary to include or even refer to specific procedures to be used when extrapolating the set-point. Instead, the facility and regulatory authority can and should be encouraged to develop appropriate procedures on a case-by-case basis. CKRC states that other extrapolation procedures may become available, and should not be excluded or precluded.

Response: This is not the appropriate forum for addressing CKRC's challenges to PS–11 and Procedure 2. In response to comments received, however, the final rule no longer references PS–11 or Procedure 2. As discussed above, we have concluded that the RRA provisions of Procedure 2, and applying the correlation curve statistical parameters in PS–11, may not be appropriate in some situations. Accordingly, the final rule requires sources to recommend for approval site-specific procedures for PMDS quality assurance and to determine, as additional data pairs become available, when and how to evaluate correlation models that may better represent the relationship between reference method measurements and PMDS responses than a linear model.

Comment: CKRC states that it is inappropriate to sum times when the alarm set-point is exceeded and times that the PMDS is malfunctioning (and the source continues to operate). If the sum of these times exceeds 5 percent of the operating time in a 6-month block time period, the source would be required to submit an excess exceedance report to the regulatory authority. This would create unnecessary burdens and imply incorrectly that PM emissions may be excessive.

Response: We explained in the reconsideration notice that it is reasonable to require that operations when the PMDS is unavailable be considered the same as operations that exceed the alarm set-point given that there would be no information to conclude otherwise. We maintain this view, and the commenter did not provide a basis for us to conclude that this requirement is inappropriate. In filing the excess exceedance report, however, the source is free to identify the portion of the exceedance time that was due to the PMDS malfunctioning.

Comment: CKRC states that it is possible to improperly interpret § 63.1206(c)(9)(ii)(C) in the October 12, 2005 final rule to require compliance with the alarm set-point, implying that an exceedance of the alarm set-point is a violation of the operating requirements.

Response: We agree, and have revised the requirement to clarify that, if the alarm set-point is exceeded, the corrective measures specified in the operation and maintenance plan must be followed. See revised § 63.1206(c)(9)(i)(G) through (I) and 63.1206(c)(9)(vii).

D. Tie-Breaking Procedure for New Source Standards

The petition of the Coalition for Responsible Waste Incineration (CRWI) sought reconsideration of the tie-breaking procedure used to identify the single best performing source in cases where the MACT floor methodology identified multiple sources with the same single best System Removal Efficiency (SRE)/Feed aggregated scores.[24] In the rare instances when a tie occurred, we selected the source with the lowest emissions (of the tied sources) as the criterion to break the tie. See 70 FR at 59447 and 71 FR at 52634. As noted in CRWI's petition, this occurred for the mercury and low volatile metals new source standards for incinerators. Noting that EPA did not discuss the concept of selecting the source with the lowest emissions as the criterion to break ties (because this unusual situation did not occur at proposal), the CRWI argued in its petition that EPA had provided no opportunity to comment on the tie-breaking procedure. Pursuant to section 307(d)(7)(B) of the CAA, we granted the CRWI's petition for reconsideration.

As stated in the September 6, 2006 notice announcing reconsideration of this issue, the arguments the CRWI presented in its petition for reconsideration did not initially persuade us that our tie-breaking procedure—selecting the source (of the tied sources) with the lowest emissions as the single best performing source—was erroneous or inappropriate. 71 FR at 52634. However, because we did not discuss the concept of selecting the source with the lowest emissions as the criterion to break ties in the proposed rule, we decided to grant reconsideration on this issue and provide an opportunity for public comment on the tie-breaking procedure for new sources.

In the notice of reconsideration, we requested comment on our decision to select the source (of all tied sources) with the lowest emissions as the single best performing source for purposes of new source floor determinations. We also specifically requested comment on alternative tie-breaking criteria including (1) using the single source (of the tied sources) with the best SRE; (2) selecting the single source (of the tied sources) with worst SRE; and (3) using some other form of averaging (e.g., the

additional three data pairs are needed for the initial Notification of Compliance (i.e., obtained during the comprehensive performance test).

[24] System removal efficiency is a measure of the percentage of HAP that is removed prior to being emitted relative to the amount fed to the unit from all inputs (e.g., hazardous waste, raw materials). For additional discussion of the SRE/Feed methodology, see 70 FR at 59441–447.

99th percentile upper prediction limit) of the tied sources.

1. Summary of the Final Action

The comments to the reconsideration notice did not provide a basis for us to conclude that the tie-breaking procedure used in the final rule was incorrect, impermissible, or otherwise flawed. Therefore, we reaffirm the validity of the determination made at promulgation and are making no changes to the final rule. Because we are retaining the same tie-breaking procedure as promulgated in the October 12, 2005 rule, the new source incinerator emission standards promulgated for mercury and low volatile metals under § 63.1219(b)(2) and (b)(4) remain unchanged.

2. What Are the Responses to Major Comments?

In response to the notice of reconsideration, we received four comment letters on this issue. These comment letters are available in the official public docket.[25] A summary of major comments received on this reconsideration issue and EPA's responses to those comments are provided below.

Comment: Three commenters state that EPA misconstrues the language of section 112(d)(3) of the CAA, especially the phrase ''best controlled similar source.'' These commenters argue that section 112(d)(3) does not preclude the possibility that more than one source could be considered ''best.'' Moreover, EPA is not required to select the single best performing source in instances where EPA's floor methodology identifies more than one best performing source. Instead of applying a tie-breaking procedure, these commenters state that EPA should establish the floor at a level that all can meet (e.g., the highest emissions achieved among the tied sources).

Response: We disagree with the commenters' interpretation of section 112(d)(3). As we explained in the reconsideration notice, we believe that the tie-breaking procedure adopted in the final rule is a reasonable interpretation of section 112(d)(3)'s language (it is, at the least, reasonable to interpret section 112(d)(3) to base the new source floor on the performance of a single source, since the provision refers to ''source'' singular, not plural). 71 FR at 52634. The commenter cites legislative history in support of its interpretation. H. Rep. No. 101–490 at 328. That legislative history refers to ''similar sources'' after describing standards for new and existing sources, and the commenter views this language as supporting its view that the floor standard for new sources can be based on more than one best performing source. It is not clear that this passage is referring to new source standards, or whether instead that the plural reference is only meant to apply to existing sources. It is also not certain that the legislative history is even applicable, since it interprets a version of section 112(d)(3) not identical to the final version, and one which may have allowed consideration of costs at the floor level of control. See H. Rep. No. 101–490 at 328 (''In addition, EPA has to consider the above statutory factors, including costs, in determining stringency and similarity''). In any case, EPA is not aware of any compelling policy reason to adopt the commenter's interpretation. As explained in the reconsideration notice, basing the floor standard on the performance of a single source having the lowest emissions is an entirely reasonable means of selecting the best performing source among sources with best feedrate and system removal. 71 FR at 52634.

Comment: These same commenters state that EPA is inconsistent in its application of the tie-breaking procedure to other standards. Two new source standards are cited by commenters as instances where EPA did not select a single best performing source among MACT pool sources. Specifically, the commenters refer to the total chlorine standards for new incinerators and the total chlorine standards for new liquid fuel boilers (for the category of sources that burn hazardous waste with an as-fired heating value less than 10,000 Btu/lb).

Response: Both standards cited by the commenters are cases where nearly all available total chlorine data reflect the revised data handling procedure to account for method bias for total chlorine measurements below 20 ppmv. (See related discussion in section III.B above on this issue.) In these instances, we corrected all total chlorine measurements that were below 20 ppmv to 20 ppmv to establish the total chlorine floors.[26] For incinerators, all 25 runs of total chlorine emissions data from the sources that comprise the MACT pool were corrected to 20 ppmv, and, in the case of liquid fuel boilers (low heating value subcategory), 17 of 18 runs were corrected to 20 ppmv. Given that both MACT pools of best performing sources (incinerators and liquid fuel boilers) comprised sources with the same level of performance from an emissions perspective (because nearly all of the best performing sources' emissions were adjusted to the same emissions level to account for bias in the analytic method), the case is not analogous to where performance among sources differ. The commenter's point also is without practical significance since an identical new source standard would have been promulgated regardless of source selected (given identical performance by the best performing sources).

Comment: Three commenters state that the tie-breaking procedure is not reasonable because it is based on a method that produces arbitrary results and is impermissible under the statute. The commenters argue that breaking the tie based on emissions levels (of the tied sources for the mercury and low volatile metals standards) is inappropriate because such standards would arbitrarily reflect HAP levels in raw materials and fossil fuels. In addition, the tie-breaking procedure is impermissible because it imposes what amounts to beyond-the-floor standards without consideration of the beyond-the-floor factors (e.g., the floors identified by EPA would require one or more of the tied source having to install upgraded air pollution control equipment to achieve the floor) including costs, energy, and non-air health and environmental impacts.

Response: We disagree with the commenters' statement that the mercury and low volatile metals standards represent *de facto* beyond-the-floor standards. In EPA's view, a purported floor standard which forces the best performer on whose performance the floor standard is based to change its practices is a *de facto* beyond-the-floor new source standard (or, put another way, has mis-assessed the source's performance). This is not the case for the mercury and low volatile metals standards for new incinerators. These standards reflect the performance of a combination of front end control (limiting the feedrate of mercury in the hazardous waste) and back end control (performance of a control technology such as particulate matter control). Sources have the ability to control emissions of mercury (and low volatile metals) by either of these control techniques as did the single best performing source as identified by our tie-breaking procedure (of the tied

[25] See comments 0565, 0567, 0569, and 0573 in the docket (EPA–HQ–OAR–2004–0022).

[26] In addition, to address run-to-run variability given that nearly all runs for these data sets were corrected to 20 ppmv, we imputed a run standard deviation based on a regression analysis of run standard deviation versus total chlorine concentration for sources with total chlorine measurements greater than 20 ppmv. Thus, emissions at the upper prediction limit at a 99th percentile confidence level from these sources are identical.

sources). Thus, we have not improperly estimated the performance of the best performing source since that source is capable of replicating its own performance.

E. New Source Particulate Matter Standard for New Cement Kilns

In the October 12, 2005 final rule, we based the particulate matter standard for new cement kilns on emissions data from the Ash Grove Cement Company kiln located in Chanute, Kansas (Ash Grove Chanute) and promulgated a standard of 0.0023 gr/dscf.[27] The petitions of the Ash Grove Cement Company and the Cement Kiln Recycling Coalition requested that EPA reconsider the 0.0023 gr/dscf standard for new cement kilns.[28] The petitioners stated that the 0.0023 gr/dscf standard was not properly noticed because we did not discuss using the emissions data from Ash Grove Chanute as part of the new source MACT cement kiln floor analysis in the April 20, 2004 proposed rule.[29] However, the particulate matter data from Ash Grove Chanute was considered (in fact, it was the single best performing source upon which the 0.0023 gr/dscf standard was based) in the particulate matter MACT floor analysis in the final rule. 70 FR at 59419.

Pursuant to section 307(d)(7)(B) of the CAA, we granted reconsideration of the new source particulate matter standard for new cement kilns. 71 FR 14665. Reconsideration of the standard was appropriate because we adopted the calculation using particulate matter emissions data from the Ash Grove Chanute plant after the period for public comment on the proposed rule. In addition, the petitioners argued that the particulate matter standard of 0.0023 gr/dscf was derived using unrepresentative test data from Ash Grove Chanute, resulting in a standard that the source itself could not achieve. To support their position, petitioners provided additional particulate matter performance data from the Ash Grove Chanute plant.

In the notice of reconsideration, we stated that ''it appears that the promulgated new source standard for particulate matter for cement kilns is overly stringent in that it does not fully reflect the variability of the best performing source over time (the ''emission control that is achieved in practice,'' using the language of section 112(d)(3)).'' 71 FR at 14668. Incorporating the newly submitted particulate matter data from the Ash Grove Chanute plant into the MACT floor analysis, we proposed a revised particulate matter standard for new cement kilns of 0.0069 gr/dscf. 71 FR at 14669–70. We also proposed revisions to the particulate matter standards for new incinerators and liquid fuel boilers (*Id.*). As discussed in the reconsideration notice, the MACT floor methodology for particulate matter includes a ''universal variability factor'' to address long-term variability in particulate matter emissions of sources using fabric filters. 71 FR at 14668 and 70 FR at 59440.[30] When we included the newly submitted Ash Grove Chanute data in the universal variability factor analysis, the long-term variability relationship changed, which led to the proposed (small) changes to the incinerator and liquid fuel boiler new source particulate matter standards.

1. Summary of the Final Action

We are today promulgating revised new source standards for particulate matter for cement kilns and incinerators that burn hazardous waste. The revised particulate matter standards for new cement kilns and new incinerators are 0.0069 gr/dscf and 0.0016 gr/dscf, corrected to 7 percent oxygen, respectively. These amendments revise 40 CFR 63.1219(b)(7) and 63.1220(b)(7)(i).

We are not, however, revising the particulate matter standard for new liquid fuel boilers as proposed. In the March 23, 2006 reconsideration notice, we proposed to revise the particulate matter standard to 0.0088 gr/dscf (20 mg/dscm) from 0.0087 gr/dscf (20 mg/dscm) as a result of a minor change in the universal variability factor relationship. 71 FR at 14670. In a subsequent action, we decided to express all particulate matter standards in the same format used in the October 12, 2005 final rule. See 73 FR at 18973 (April 8, 2008). In the case of liquid fuel boilers, this would be in the units of mg/dscm. Since the standard promulgated in the October 2005 rule and the standard calculated in the reconsideration proceedings are identical—20 mg/dscm—no change in the standard is necessary.

As proposed, we are amending the compliance date requirements under 40 CFR 63.1206 to require that new cement kilns (i.e., sources that commenced construction or reconstruction after April 20, 2004, the date of the rule proposing the full set of MACT standards for cement kilns) comply with the revised particulate matter standard by the later of October 28, 2008 or the date the source starts operations. 71 FR at 14671. See amendments to 40 CFR 63.1206(a)(1)(ii)(B). In addition, we are not amending the compliance date requirements for new incinerators for reasons discussed in the proposed rule (*Id.*).

2. What Are the Responses to Major Comments?

We received fifteen comment letters in response to the notice of reconsideration. These comment letters are available in the official public docket. A summary of major comments received on this reconsideration issue and EPA's responses to those comments are provided below.

Comment: One commenter points out that EPA characterized the newly submitted data by Ash Grove Chanute as ''normal'' in the March 2006 reconsideration notice and states that it is arbitrary and capricious to include any emissions data characterized as other than ''compliance test'' (e.g., ''normal'' or ''in-between'' data) in the MACT floor analysis for particulate matter.[31] According to the commenter, EPA's established methodology for particulate matter only considers data characterized as ''compliance test.'' As an example, the commenter cites the incinerator analysis included in the October 2005 rule as evidence that EPA inappropriately departed in the reconsideration notice from the established MACT floor methodology for particulate matter. In addition, the commenter states that it is inappropriate to include in the MACT floor analysis data rated as other than ''compliance test'' due to regulatory oversight and statistical variability considerations.

[27] See USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Appendix F, Table ''APCD–CK–PM.'' The Ash Grove Chanute test data were from performance testing conducted in December 2001 and March 2002.

[28] The petitions for reconsideration for the Ash Grove Cement Company and the Cement Kiln Recycling Coalition are included in the docket (EPA–HQ–OAR–2004–0022). See docket items 0516 and 0520, respectively.

[29] In the 2004 proposed rule, we stated that it was not appropriate to use the Ash Grove Chanute data for the MACT floor analysis for existing sources. 69 FR at 21217 n. 35. While the proposed rule was thus clear that available particulate matter data from Ash Grove Chanute would not be used in the MACT floor analysis for existing sources, we did not state whether or not these data would be evaluated in the new source floor analysis. Thus, no revision of the standard is necessary.

[30] The universal variability factor relationship is not developed for each source category, but is based on relevant data from all hazardous waste combustor source categories. See ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Sections 5.3 and 7.4.

[31] We classified emissions data of each test condition for each pollutant in one of four ways: ''compliance test,'' ''normal,'' ''in between,'' and ''not applicable.'' 69 FR at 21218–19.

Finally, the commenter states that other source categories should also be afforded the same opportunity to submit ''normal'' emissions data for inclusion in the floor analyses.

Response: While it is true that we do not consider ''normal'' emissions data for some MACT floors, we disagree with the commenter that the particulate matter standards are based solely on data rated as ''compliance test.'' The MACT floor standards for particulate matter are identified using the Air Pollution Control Technology (APCD) methodology. See 70 FR at 59447; see also Section III.A of September 27, 2007 notice (72 FR at 54878). For reasons discussed in the technical support document, the APCD approach only considers ''compliance test'' emissions data for sources not equipped with fabric filters. However, for fabric filter equipped sources, all available valid emissions data, including those rated as ''normal'' (i.e., day-to-day, as opposed to compliance test data) are included in floor analysis for particulate matter.[32] [33] Given that Ash Grove Chanute uses a fabric filter to control emissions of particulate matter, it is appropriate to include in the MACT floor analysis available emissions data rated as ''normal,'' which we did in the reconsideration notice. Therefore, we disagree with the commenter that we deviated from the established APCD approach methodology in the March 2006 reconsideration notice.

We also note that the commenter is incorrect in stating that the incinerator MACT floor standards for particulate matter are based only on ''compliance test'' data. Eleven fabric filter-equipped sources comprise the MACT pool for incinerators. When evaluating the floor for particulate matter, available emissions data from all sources but one (source no. 3000) included either ''normal'' or ''in between'' data in the analysis.[34]

Finally, we disagree that it is inappropriate to include ''normal'' and ''in between'' emissions data from fabric filter-equipped sources in the APCD approach analysis. As discussed in the October 12, 2005 rule, particulate matter emissions from fabric filter-equipped sources are more difficult to maximize (compared to other control equipment) during compliance testing because particulate matter emissions are relatively insensitive to fabric filter inlet loadings and operating conditions.[35] As a result, in addition to ''compliance test'' data, we also used ''normal'' and ''in between'' rated emissions data from fabric filter-equipped sources. We did this not only for cement kilns, but also for other source categories with best performing sources equipped with fabric filters. Given that the particulate matter floor analysis was applied equally to all source categories, the commenter's suggestion of revising the MACT floor standards for other source categories is without merit.

Comment: One commenter states that it is arbitrary for EPA to revise the particulate matter MACT floor standard based on the selective use of new data from one source (i.e., the data submitted by Ash Grove Chanute). According to the commenter, EPA must collect data from all cement kiln sources. The commenter also states that it was arbitrary and capricious for EPA to accept the newly submitted data (showing higher emissions of particulate matter) for the Ash Grove Chanute kiln while refusing to consider or collect other emissions data from other newly constructed cement kilns that may refute the claim that new baghouses inevitably deteriorate.

Response: First, the commenter's belief that the proposed revision was based entirely on ''new'' data—data for periods after EPA closed the data information record—is not correct. The most salient data indicating that the source's performance over time had been mischaracterized comes from 2003, within the period for which EPA accepted performance data. The data showed the Ash Grove Chanute test average over two tests to be 0.0062 gr/dscf (without any statistical adjustment for variability), higher than its predicted maximum performance of 0.0023 gr/dscf.[36] These data would have been presented to EPA and included in the data base for the promulgated rule had EPA provided proper notice, and would have necessarily changed the estimate of the performance of the Ash Grove Chanute kiln.

Second, the remaining information was presented to EPA in the context of reconsideration, and EPA had no choice but to consider it. Nor was EPA's consideration of the new information arbitrary. EPA did not selectively seek new information to alter a standard, nor did an industry group selectively present data to EPA which it could have presented during the rulemaking. Nor did EPA review only ''cherry-picked'' data on the performance of the relevant source. Rather, EPA has reasonably considered all of the information on the performance of the source characterized as ''best controlled'', which source's performance formed the sole basis for the new source standard at issue.

Comment: Two commenters state that the particulate matter standard of 0.0023 gr/dscf (the standard promulgated in the October 12, 2005 rule) is readily achievable by cement kilns and should not be revised. These commenters state that it is arbitrary and capricious for EPA to use the new Ash Grove Chanute data because the higher emission levels seen with the 2003–2005 data may be the result of other factors besides normal deterioration of a new baghouse after the initial break-in period. The commenters suggest other explanations for the higher emissions including: (1) Ash Grove Chanute had no regulatory incentive to optimize the kiln's performance in subsequent tests because the source was subject to an emission standard that is less stringent than 0.0023 gr/dscf; and (2) Ash Grove Chanute does not use a baghouse leak detection system with its baghouse that would have allowed it to detect and fix smaller leaks. Therefore, according to the commenters, the possibility that Ash Grove Chanute allowed the kiln's performance to deteriorate by failing to install testing equipment and conduct necessary maintenance is at least as plausible as normal degradation of a new baghouse after the initial break-in period.

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[32] See USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 7.4, and also Section 5.3. Valid emissions data includes those characterized as ''compliance test,'' ''normal,'' and ''in between.''

[33] We concluded in the October 12, 2005 rule that normal emissions data from fabric filter-equipped sources should also be included in the particulate matter floor analysis because particulate matter emissions are relatively insensitive to baghouse inlet loading and operating conditions. 70 FR at 59424.

[34] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Appendix F, Table APCD–INC–PM. For example, the single best performing source was source no. 341, whose valid particulate matter performance data include both ''compliance test'' data (condition C10) and ''in between'' data (condition C12). Another best performing incinerator in the MACT pool was source 3010 that included a total of nine valid test conditions (one ''compliance test,'' five ''normal,'' and three ''in between''). Individual test condition ratings can be found in the hazardous waste combustor database. See docket item EPA–HQ–OAR–2004–0022–0433.

[35] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards,'' September 2005, Section 5.3.

[36] Incidentally, these data are yet another instance where performance tests failed to accurately characterize a source's performance (despite the commenter's reiterated assertions that such tests account for all variability because they are conducted under so-called worst-case conditions). Indeed, in this instance, even the EPA-predicted level of 0.0023 gr/dscf (which is a value reflecting statistical adjustment to account for both short-term and long-term variability) did not adequately account for the source's long-term variability.

Response: We disagree with the comment that a particulate matter standard of 0.0023 gr/dscf represents the performance of the best performing source, considering performance variability, for new cement kilns, based on available data and information. The MACT floor standard is to be based on actual performance data (accounting for variability), not as the commenter would have it on what could be achieved by using other control methods not in use at the best performing source (e.g., a bag leak detection system at Ash Grove Chanute).[37] The question of what the best performer would do if it were equipped differently is legally irrelevant in establishing a floor for new sources since it does not relate to the best performing source's actual performance. The Ash Grove Chanute data from 2003–2005 show that the source we identified as the single best performer in the October 12, 2005 rule—Ash Grove Chanute—cannot achieve the 0.0023 gr/dscf standard promulgated in that rule when it operates under the operation and maintenance practices that were required and otherwise appropriate for the source.[38] In other words, the promulgated standard demonstrably did not account for the source's legitimate operating variability—its performance over time when operated and maintained properly.

We also disagree that Ash Grove Chanute allowed its kiln's performance to deteriorate during subsequent testing in 2003–2005 because there was no regulatory incentive to optimize the kiln's performance. The commenters speculate that because Ash Grove Chanute operated at particulate matter levels so far below allowable levels in 2001–2002, Ash Grove could have been less concerned with tuning, optimizing and maintaining the baghouse for the 2003–2005 testing. The applicable regulations require the kiln to be properly operated and designed. Thus, Ash Grove Chanute required to maintain good air pollution control practices for minimizing emissions during the 2003–2005 testing (e.g., see §§ 63.6(e)(1) and 63.1206(c)(7)).

The emission data themselves do not support the commenters' claim and support that the source was properly operated. First, the kiln's performance did not ''deteriorate'' over time. The kiln had lower emission levels when tested in 2005 (and 2004) than it did during the 2003 tests.[39] When the kiln was tested on successive days in 2005, the nine test runs conducted over a consecutive three day period show that average emissions of particulate matter decrease from the previous day: Day one emissions averaged 0.0060 gr/dscf, day two averaged 0.0035 gr/dscf, and emissions on day three averaged 0.0017 gr/dscf.[40] These test results showing ''improved'' performance combined with Ash Grove Chanute's statements that there were no changes in the maintenance of the air pollution control equipment during the three days of testing do not support the commenter's argument that Ash Grove Chanute's 2003–2005 data reflect an ineffective ongoing maintenance program. Indeed, the day three results are among the lowest emissions achieved by the source in our data base.[41] Thus, neither the claimed lack of a regulatory incentive to maintain levels achieved in 2001–2002 nor failure to maintain the air pollution control system would explain why particulate matter emissions ''improved'' over this three day period, or ''improved'' between 2003 and 2005. The obvious explanation is that these varying results illustrate the source's normal operating variability.

Comment: One commenter claims that Ash Grove Chanute's 2003–2005 emissions data resulted from tests that were not conducted under the same operating conditions as the initial tests in late 2001 and early 2002. According to the commenter, varying combustion gas flow rates and process conditions explain the higher particulate matter emissions in the 2003–2005 data.

Response: Hazardous waste combustor sources are subject to site-specific operating requirements that must be maintained in order to ensure continued compliance with the hazardous waste combustor MACT standards, including the particulate matter standard. These operating requirements are established during a compliance test when sources generally operate under conditions that are at the extreme high end of the range of normal operations. Sources do this to provide themselves operating flexibility for day-to-day operations while complying with the rule's standards and operating requirements. While operating conditions may vary among the available Ash Grove Chanute data, the 2003–2005 data were generated while operating within the limits established during the compliance test. Therefore, we reject the suggestion that the data are not reflective of Ash Grove Chanute's performance over time.

Comment: The same commenter states that EPA based the proposed standard of 0.0069 gr/dscf on a cement kiln source (Giant Cement Company, SC) that ceased operations in 2005. The commenter notes that this is inappropriate and inconsistent with the approach discussed in the October 12, 2005 final rule whereby EPA concluded that MACT floor standards should be based only on the performance of sources that actually are operating (i.e., burning hazardous waste). 70 FR at 59419.

Response: We agree with the commenter that this source ceased operations in 2005. While we continue to believe that the approach to exclude ''no longer operating sources'' from the MACT floor analysis is appropriate, we believe this situation is different given that the vast majority of standards are not at issue in these reconsideration proceedings. We also note that the MACT floor standard for new cement kilns would increase slightly (the commenter evidently assumed a decrease) to 0.0071 gr/dscf if we were to make the data base change the commenter suggests.

F. Beyond-the-Floor Analyses to Consider Multiple HAP That Are Similarly Controlled

The petition of the Sierra Club sought reconsideration of several beyond-the-floor determinations, including beyond-the-floor analyses to consider multiple HAP that are controlled by a single control mechanism. One of the concerns was whether EPA had adequately complied with public notice and comment requirements regarding the beyond-the-floor evaluations included in the October 12, 2005 final rule. Noting that EPA had included a new revised beyond-the-floor analysis (in response to the petitioner's comments to the April 20, 2004 proposed rule) in the final rule, the Sierra Club argued that EPA had provided no opportunity to comment on the revised beyond-the-floor analysis. Pursuant to section 307(d)(7)(B) of the CAA, we granted the Sierra Club's petition for reconsideration with respect to beyond-the-floor analyses to consider multiple

[37] In fact, and as acknowledged by the commenters, no cement kilns are currently using a bag leak detection system with their kiln baghouse.

[38] At the time of testing, the fabric filter performance was maintained by compliance with an opacity standard.

[39] The data were: One test condition conducted in December 2003 averaged 0.0062 gr/dscf; a second test condition conducted in September 2004 averaged 0.0015 gr/dscf, and three test conditions conducted in November 2005 averaged 0.0060, 0.0035, and 0.0017 gr/dscf, respectively. These are actual measurements, and do not include adjustments for run-to-run variability, or application of the Universal Variability Factor.

[40] We note that the day three particulate matter results are only slightly higher than levels achieved in 2002: 0.0017 gr/dscf vs. 0.0013 gr/dscf.

[41] See docket item EPA–HQ–OAR–2004–0022–0546.1, page 9.

HAP that are controlled by a single control mechanism.[42]

In the notice of reconsideration, we requested comment on a revised beyond-the-floor analysis whereby we evaluated the achievability, within the meaning of section 112(d)(2) of the CAA, of beyond-the-floor standards for all HAP for each source category or subcategory. 71 FR at 52635. We called this analysis the ''comprehensive beyond-the-floor analysis'' (or comprehensive analysis). *Id.* In general, the comprehensive analysis was an evaluation of beyond-the-floor control options that would achieve emission reductions of all HAP, based on what we consider reasonable assumptions of performance of each control method, from levels achieved at the MACT floor. Evaluated control methods included techniques such as activated carbon injection or carbon beds, improved or new particulate matter control equipment, and acid gas scrubbing devices.

Given that some control methods are capable of achieving reductions of multiple HAP, we apportioned the costs of a specific control method (e.g., an activated carbon injection system) among the HAP that it would control. Control method costs are apportioned on a source-by-source basis to those HAP requiring emission reductions to achieve the beyond-the-floor standard. We did this because some control methods are more achievable (within the meaning of section 112(d)(2)) than other methods. In addition, apportioning costs of control to each HAP allowed us to determine that beyond-the-floor standards are warranted for a subset of HAP for a given category or subcategory in cases where adopting beyond-the-floor standards for all HAP (the comprehensive analysis) was not justified. For example, based on the results of the comprehensive analysis at proposal for the existing source solid fuel boiler category, we tentatively rejected setting beyond-the-floor standards for all HAP because we judged the suite of standards as unachievable.[43] However, based on our proposed methodology to apportion control costs, we judged the beyond-the-floor standard for particulate matter as achievable.[44]

1. Summary of the Final Action

After careful consideration of the comments, we are reaffirming most of the beyond-the-floor determinations made at promulgation of the October 12, 2005 final rule and initially determined not to change in the subsequent reconsideration notice. That is, we continue to conclude that several beyond-the-floor standards are achievable, namely the beyond-the-floor standards for particulate matter for existing and new solid fuel boilers. However, because we have determined for independent reasons not to defend the dioxin/furan standards for liquid fuel boilers (see section IV.D below), that issue has become moot. These beyond-the-floor standards were promulgated in the October 12, 2005 final rule. In addition, we are concluding that beyond-the-floor standards for the remaining standards (of those EPA is defending) are not warranted.[45] Therefore, we are making no changes to the final rule as a result of reconsideration of the beyond-the-floor standards.

2. What Are the Responses to Major Comments?

In response to the notice of reconsideration, we received seven comment letters on this issue. These comment letters are available in the official public docket.[46] A summary of major comments received on this reconsideration issue and EPA's responses to those comments are provided below.

Comment: Regarding EPA's rejection of several beyond-the-floor analyses that included a cost-effectiveness evaluation of the beyond-the-floor standard, one commenter states that the CAA requires that EPA's standards must reflect the ''maximum'' degree of reduction that is achievable considering the ''cost of achieving such emission reduction'' and any non-air quality health and environmental impacts and energy requirements. According to the commenter, the only relevant factors regarding the cost measures are (1) whether it is too costly to be ''achievable;'' and (2) whether it would yield additional reductions, so that EPA's standard would not reflect the ''maximum'' achievable degree of reduction without it. The commenter further states that cost-effectiveness is not relevant to either of these questions and that cost-effectiveness is not a metric for cost.

Response: We disagree with the commenter's interpretation. We addressed a comment similar to this one in a recent final rule for the Portland Cement Manufacturing NESHAP. 71 FR at 76534 (December 20, 2006). For readers' convenience, our response is repeated below:

The statute requires that EPA consider ''the cost of achieving such emission reduction''(section 112 (d)(2)) in determining the maximum emission reduction achievable. This language does not mandate a specific method of taking costs into account, as the commenter would have it, but rather leaves EPA with significant discretion as to how costs are to be considered. *See Husqvarna AB* v. *EPA,* 254 F.3d 195, 200 (D.C. Cir. 2001). In that case, the court interpreted the requirement in section 213(a)(3) of the CAA (which mirrors the language in section 112(d)(2)) that nonroad engines ''achieve the greatest degree of emission reduction achievable through the application of [available] technology * * * giving appropriate consideration to the cost of applying such technology,'' and held that this language ''does not mandate a specific method of cost analysis.'' The court therefore ''f[ound] reasonable EPA's choice to consider costs on the per ton of emissions removed basis.''

Moreover, where Congress intended that economic achievability be the means of assessing the reasonableness of costs of technology-based environmental standards, it says so explicitly. See Clean Water Act section 301(b)(2)(A) (direct dischargers of toxic pollutants to navigable waters must meet standards reflecting ''best available technology economically achievable''). There is no such explicit directive in section 112(d)(2). EPA accordingly does not accept the commenter's interpretation.

Comment: The same commenter argues that the concept of cost-effectiveness is at odds with the mandate of section 112(d)(2) that

[42] In its petition for reconsideration, the Sierra Club also requested that EPA reconsider beyond-the-floor standards based on wet and dry scrubbing. We denied the Sierra Club's petition to reconsider these rule provisions for reasons discussed in a letter to Sierra Club. See docket item EPA–HQ–OAR–2004–0022–0558 (August 22, 2006).

[43] The aggregate total annualized cost of the comprehensive analysis was $8.8 million and would result in the following emission reductions: 0.3 g TEQ of dioxin/furans; 468 tpy of particulate matter; 0.03 tpy of mercury; 0.47 tpy of semivolatile metals; 0.52 tpy of low volatile metals; 794 tpy of total chlorine; and 0.97 tpy of non-dioxin/furan organic HAP. See July 2006 technical support document supporting the reconsideration notice (Appendix A, page 10 of 37 and Table 4–4, page 4–6).

[44] The beyond-the-floor analysis of particulate matter alone resulted in total annualized costs of $1.5 million and would result in a reduction of 468 tpy of particulate. These estimates equate to a cost-effectiveness of $2,569 per ton of particulate matter, which we proposed to be justified (Appendix A, page 3 of 37).

[45] USEPA, ''Technical Support Document for HWC MACT Standards: Petitions for Reconsideration Support Document,'' February 2008, Section 4.

[46] See comments 0563, 0564, 0565, 0567, 0568, 0569, and 0573 in the docket (EPA–HQ–OAR–2004–0022).

requires beyond-the-floor standards to reflect the ''maximum'' achievable degree of reduction. According to the commenter, cost-effectiveness is an inherently subjective measure that compares ''cost'' with a benefit (the amount of pollution reduced). By asserting discretion to set a beyond-the-floor standard at a level yielding not the ''maximum'' degree of reduction that is ''achievable'' but, instead, the degree of reduction that EPA believes is cost-effective, the commenter argues that EPA alters the statutory mandate and defeats Congress's purpose.

Response: First, the commenter is simply not correct that section 112(d)(2) precludes EPA from considering cost-effectiveness as a means of evaluating costs. In addition to the authority cited in the previous response, see *Bluewater Network* v. *EPA,* 372 F.3d 404, 411, (D.C. Cir. 2004) a case interpreting the same statutory language described in the previous response (section 213(a)(3) of the Act), which is substantially identical to the language in section 112(d)(2). Rejecting an argument that EPA must require the greatest technically achievable reductions immediately, the court stated ''the lesson from *Husqvarna* * * * is not that the EPA must adopt the most stringent standards based on the most advanced control technologies but that the EPA is to arrive at standards that reduce emissions to the greatest degree possible after considering the spectrum of available technologies and the costs and benefits associated with those technologies.'' Considering costs and benefits associated with control technologies is essentially synonymous with the cost per increment of HAP removed, viz. cost effectiveness.[47]

The comment also mischaracterizes the proposed beyond-the-floor methodology. The commenter essentially states that EPA's proposed beyond-the-floor analyses may not reflect the ''maximum'' degree of HAP reduction that is achievable by a given beyond-the-floor control technology or method. This is simply not the case. As proposed in the reconsideration notice, the beyond-the-floor control options are based on what we consider a reasonable assumption of a given control method's consistent performance given the levels achieved at the floor. Therefore, for each HAP, this performance estimate does indeed reflect the maximum degree of reduction that is achievable. Using total chlorine as an example, when evaluating beyond-the-floor standards based on duct injection dry scrubbing for lightweight aggregate kilns and solid fuel boilers, we assumed an incremental control level of 75% (from levels achieved at the floor).[48] We then evaluated the cost impacts per ton of total chlorine emission reduction, and the adverse energy and solid waste impacts, but only at the control level of 75%. That is, we did not evaluate the costs and corresponding emission reductions of a given control method—in this example duct injection dry scrubbing—for less stringent beyond-the-floor standards (e.g., less efficient control levels of 70%, 60%, 50%, etc. for duct injection dry scrubbing) and then select the most cost efficient of the various control levels evaluated. Thus, the beyond-the-floor analyses presented in the reconsideration proposed rule do correspond to a ''maximum'' degree of HAP reduction.

Comment: The same commenter states, contrary to EPA's claim, that *Husqvarna AB* v. *EPA,* 254 F.3d 195, 200 (D.C. Cir. 2001) does not support EPA's interpretation of section 112(d)(2). According to the commenter, although EPA apparently based its cost analysis on cost-effectiveness in *Husqvarna,* its decision to do so was neither challenged nor at issue in that case, and *Husqvarna* does not endorse it.

Response: The commenter's reading of *Husqvarna* is not correct. The case both holds that language substantially identical to that in section 112(d)(2) ''does not mandate a specific method of cost analysis,'' and explicitly upholds the cost-effectiveness method for assessing costs used in the rule, since it upheld ''the EPA's choice to consider costs on the per ton of emissions removed basis.'' 254 F.3d at 200. The court also rejected arguments that EPA was required to conduct incremental cost-effectiveness analyses (justifying each successive increment of control as cost effective), *Id.,* surely an unnecessary step if the Agency could not lawfully conduct any type of cost effectiveness analysis at all as a means of ascertaining if a standard is achievable considering costs.

Comment: The same commenter further states that EPA's proposed method for determining cost-effectiveness for multiple HAP that are controlled by a single control mechanism is arbitrary and unrelated to any relevant inquiry under the CAA. The commenter notes several deficiencies, including: (1) The proposed beyond-the-floor methodology is arbitrary because EPA did not explain how the cost of a single control device (e.g., an activated carbon injection system) is apportioned among the different HAP controlled by it in the comprehensive analysis; (2) EPA assigned inappropriately the entire cost of a single control mechanism to each different HAP controlled by it that yielded false information and a meaningless analysis; and (3) EPA failed to assess the cost of a control method against all of the HAP controlled by it.

Response: We disagree with all the points raised in the comment as explained below. With respect to the first point made by the commenter, the technical support document supporting the reconsideration notice explained how the cost of a single control device was apportioned among the HAP controlled by it in the comprehensive analysis. The data used in the beyond-the-floor cost calculations and the cost apportioning results were also included in the appendices of the technical support document. Simply stated, the costs of a beyond-the-floor control technology or technique is apportioned among the HAP that it would control according to the formula shown in the technical support document.[49]

For purposes of responding to the comment that EPA's proposed beyond-the-floor methodology requires beyond-the-floor controls to be purchased and installed more than once (thus overestimating total control costs), the following example illustrates why the methodology does not do what the commenter suggests. This example shows how the beyond-the-floor costs are apportioned using the detailed information presented at proposal in Appendix A of the technical support document.[50] Source no. 487 is an

[47] See also, *Bluewater Network* v. *EPA,* 370 F.3d 1, 20 (D.C. Cir. 2004) (''We agree that EPA may rely on cost and other statutory factors to set standards at a level less stringent than that reflected by across-the-fleet implementation of advanced technologies. This court noted in *Husqvarna* that 'the overriding goal of [section 213] is air quality and the other listed considerations, while significant, are subordinate to that goal.' 254 F.3d at 200. Nevertheless, as the court emphasized in reflecting on very similar language in section 202(*l*) of the CAA, the provision 'does not resolve how the Administrator should weigh all [the statutory] factors in the process of finding the greatest emission reduction achievable.' *Sierra Club* v. *EPA,* 355 U.S. App. D.C. 474, 325 F.3d 374, 378 (D.C. Cir. 2003)''.

[48] See USEPA, ''Draft Technical Support Document for HWC MACT Standards: Reconsideration of the Beyond-the-Floor Evaluations,'' July 2006, Section 3, page 3–2.

[49] USEPA, ''Draft Technical Support Document for HWC MACT Standards: Reconsideration of the Beyond-the-Floor Evaluations,'' July 2006, Section 3.1.3. We note that the formula to apportion beyond-the-floor costs is shown in Section 3.1.3, paragraph (b), on pages 3–4 and 3–5.

[50] USEPA, ''Draft Technical Support Document for HWC MACT Standards: Reconsideration of the Beyond-the-Floor Evaluations,'' July 2006. All page references related to this discussion are from this document.

incinerator that would need reductions in emissions of dioxin/furans, mercury, particulate matter, and semivolatile metals in order to achieve the suite of beyond-the-floor standards (page 13 of 37 in Appendix A) in the comprehensive analysis. Emission reductions of dioxin/furans and mercury would be achieved by a new activated carbon injection system and improvements to the existing fabric filter, while reductions in particulate matter and semivolatile metals would be achieved by the same improvements to the existing fabric filter (*Id.*). Thus, costs associated with the activated carbon system are apportioned between dioxin/furans and mercury, while the costs of the fabric filter improvements are allocated among all four HAP. We estimated the combined total annualized costs of one activated carbon injection system and the fabric filter improvements for source 487 to be approximately $396,000 (*Id.*). In the comprehensive beyond-the-floor analysis, the costs were allocated according to the discussion in section 3.1.3 of the technical support document. The results of the proposed analysis show that $178,000 was allocated each to dioxin/furan and mercury and the remaining $40,000 was allocated equally to particulate matter and semivolatile metals (page 27 of 37 in Appendix A). The sum of these allocated costs equals the total cost of the new activated carbon injection system and fabric filter improvements—$396,000 ($178,000 + $178,000 + $40,000). Thus, as this example shows, we disagree with the commenter that the comprehensive beyond-the-floor analysis inflates control costs by requiring beyond-the-floor costs to be purchased and installed more than once.[51]

We further disagree with the commenter that our approach to apportion control costs is inherently arbitrary and unrelated to any relevant inquiry under the CAA. Apportioning control costs in the context of the comprehensive analysis allows us to evaluate the costs in relation to the HAP controlled. This is particularly true in the hazardous waste combustor NESHAP because numerous emission standards are established, including standards for dioxin/furans, mercury, semivolatile and low volatile metals, particulate matter, hydrogen chloride and chlorine, hydrocarbons and carbon monoxide.[52] The allocation approach allows us to evaluate the costs associated with a specific HAP and compare it to costs that we have accepted (or rejected) in other EPA air programs. Otherwise, given the extensive use of standards for individual HAP, such comparisons are difficult. Moreover, we are willing to assume higher costs for particularly toxic HAP and apportioning control method costs among the similarly controlled HAP helps us identify such cases. For example, consider the following two theoretical beyond-the-floor situations for a control method that achieves a total combined reduction of 100 tons of total chlorine and mercury at a cost of $1,000,000. Assume under the first scenario that the emission reductions would be split at 99.99 tons of total chlorine and 0.01 tons of mercury. Under the second scenario, 100 tons of total chlorine and mercury would also be reduced, but assume the emissions split is 90 tons of total chlorine and 10 tons mercury. While the overall cost and total reduction in emissions are constant between the two scenarios and may not be warranted as a beyond-the-floor control option, we may find the reductions for mercury under the second scenario as justified, given the greater reductions achieved for mercury, and given that mercury is a persistent bioaccumulative toxic compound.[53]

Finally, the commenter states that EPA failed to assess the cost of a control method against all the HAP controlled by it. We disagree. The table below, summarizing information in the record at the time we issued the reconsideration notice, presents the comprehensive beyond-the-floor analysis for each source category.[54] The summary table below shows the total annualized control costs and associated emission reductions for the beyond-the-floor option for all HAP and HAP surrogates.[55]

TABLE 1—SUMMARY OF COMPREHENSIVE BEYOND-THE-FLOOR (BTF) ANALYSIS IN PROPOSED RULE

Source category	Total annualized cost of BTF option	Emission reductions of BTF option	
		Total all HAP and HAP surrogates	Reductions by HAP and HAP surrogate
Incinerators	$20,200,000	140 t	D/F: 0.8 g; PM: 46 t; Hg: 0.2 t; SVM: 0.4 t; LVM: 0.2 t; TCl: 91 t; organic HAP: 2.4 t.
Cement kilns	27,800,000	499 t	D/F: 1.4 g; PM: 322 t; Hg: 0.7 t; SVM: 1.3 t; LVM: 0.06 t; TCl: 141 t; organic HAP: 33 t.
Lightweight aggregate kilns	4,200,000	279 t	D/F: 1.1 g; PM: 9.1 t; Hg: 0.02 t; SVM: 0.02 t; LVM: 0.01 t; TCl: 270 t; organic HAP: 0.2 t.
Liquid fuel boilers	24,400,000	679 t	D/F: 0.4 g; PM: 437 t; Hg: 0.06 t; SVM: 0.1 t; LVM: 1.1 t; TCl: 241 t; organic HAP: 0.1 t.
Solid fuel boilers	8,800,000	1,264 t	D/F: 0.3 g; PM: 468 t; Hg: 0.03 t; SVM: 0.5 t; LVM: 0.5 t; TCl: 794 t; organic HAP: 1.0 t.

[51] This example remains valid as an illustration, although EPA has determined for independent reasons not to defend the standards for some of the HAP given in the example.

[52] For example, as explained in an earlier footnote, we rejected as unachievable the costs associated with adopting beyond-the-floor standards for all HAP for solid fuel boilers. However, our cost allocation procedure showed us that the particulate matter standard was achievable even though beyond-the-floor standards for the remaining HAP were not.

[53] See also 64 FR at 52882 and 52897 (September 30, 1999), where EPA accepted a higher cost-effectiveness for semivolatile metal reductions for cement and lightweight aggregate kilns to ensure that these sources are using the best controls for HAP introduced almost exclusively from the burning of hazardous waste.

[54] USEPA, ''Draft Technical Support Document for HWC MACT Standards: Reconsideration of the Beyond-the-Floor Evaluations,'' July 2006, Section 3.1.3, Table 4–4, and Appendix A. The examples in the text are to illustrate the reasonableness of the general methodology for making beyond-the-floor determinations. EPA has determined, for independent reasons, not to defend certain of the standards included in the above Table.

[55] The PM standard is used as a surrogate to control: (1) Emissions of nonenumerated metals (antimony, cobalt, manganese, nickel, and selenium) that are attributable to all feedstreams (both hazardous waste and remaining inputs); and (2) all nonmercury metal HAP emissions (both enumerated and nonenumerated metal HAP) from the nonhazardous waste process feeds at cement kilns, lightweight aggregate kilns, and liquid fuel boilers (e.g., emissions attributable to coal and raw material at a cement kiln, and emissions attributable to fuel oil for liquid fuel boilers).

TABLE 1—SUMMARY OF COMPREHENSIVE BEYOND-THE-FLOOR (BTF) ANALYSIS IN PROPOSED RULE—Continued

Source category	Total annualized cost of BTF option	Emission reductions of BTF option	
		Total all HAP and HAP surrogates	Reductions by HAP and HAP surrogate
Hydrochloric production furnaces	904,000	17 t	D/F: 0.1 g; TCl: 17 t; organic HAP: 0.01 t.

Comment: The same commenter states that EPA proposed a flawed beyond-the-floor analysis with respect to organic HAP (other than dioxin/furans) that would be controlled by activated carbon injection. According to the commenter, carbon monoxide and hydrocarbons are not valid surrogates for non-dioxin/furan organic HAP, in general, and are irrational as a basis for evaluating the cost-effectiveness of activated carbon injection for the organic HAP that it controls because EPA did not propose a cost-effectiveness of the control measure. As a result, the proposed beyond-the-floor analysis overstated costs and understated effectiveness.

Response: To the extent the commenter is suggesting that carbon monoxide and hydrocarbons are generally poor surrogates for organic HAP, we strongly disagree. We have fully explained in earlier rules our rationale of using these organic HAP surrogates when establishing MACT floor standards for hazardous waste combustors. 64 FR at 52847–52. Furthermore, the beyond-the-floor analysis of control methods for organic HAP that do not control other HAP regulated by this rule (e.g., use of an afterburner or use of better combustion practices to reduce organic HAP emissions) are not at issue in this proceeding.

As stated in the reconsideration notice, we indicated that it was inappropriate to identify numerical beyond-the-floor standards for carbon monoxide and hydrocarbons based on activated carbon injection. 71 FR at 52636. We continue to believe this decision is sound for the reasons discussed in the proposed rule. However, in response to comments, we have examined the activated carbon injection beyond-the-floor analysis discussed in the reconsideration notice. In the proposed rule we estimated total annualized costs and emission reductions of dioxin/furans, mercury, and organic HAP associated with activated carbon injection.[56] Aggregating the costs and emission reductions for the three HAP, the cost-effectiveness of the activated carbon injection option can be estimated for each source category. For each source category, the cost-effectiveness results were considered unreasonable, within the meaning of section 112(d)(2). For example, the cement kiln standards were found to be most cost-effective at approximately $560,000 per ton of organic HAP, mercury, and dioxin/furan removed. Given that 98% of the 34 tpy of HAP reduced under the activated carbon injection option are organic HAP, we find that this cost-effectiveness value exceeds estimates previously rejected by EPA for organic HAP control for non-hazardous waste cement kilns. 71 FR at 76531.

Comment: One commenter states that some of the emission standards promulgated in the October 12, 2005 final rule already represent beyond-the-floor standards because EPA has not shown that 12% of existing sources can achieve the standards without modification. Thus, the commenter states that the beyond-the-floor analyses are moot until EPA justifies the existing standards as beyond-the-floor standards.

Response: We disagree with the commenter. The MACT floor standards are based on the performance of actual sources within each source category. That is, we did not base MACT floors on theoretical sources. Given that the control methods needed to achieve the MACT floor standards are fully integrable and compatible, we are not obligated to establish a suite of floor standards that are simultaneously achievable by at least six percent of the sources because the standards are not technically interdependent. See *Chemical Manufacturers Ass'n,* 870 F. 2d at 239 (best performing sources can be determined on a pollutant-by-pollutant basis so that different plants can be best performers for different pollutants).

Comment: One commenter suggests that EPA better explain how costs were allocated among multiple HAP in the comprehensive analysis and why the chosen method is reasonable and appropriate.

Response: In finalizing the technical support document, we have expanded the discussion as suggested by the commenter. See ''Technical Support Document for HWC MACT Standards: Petitions for Reconsideration Support Document,'' October 2008.

G. Dioxin/Furan Standard for Incinerators With Dry Air Pollution Control Devices

The petition of the Sierra Club sought reconsideration of the dioxin/furan standard for existing incinerators with either a dry air pollution control device or waste heat boiler.[57] In the October 12, 2005 final rule, we promulgated a dioxin/furan standard of 0.40 ng TEQ/dscm provided that the combustion gas temperature at the inlet to the initial particulate matter control device is 400 °F or below (see § 63.1219(a)(1)(i)). The final standard for this subcategory was less stringent than that proposed (0.28 ng TEQ/dscm) as a result of a data base change between proposal and promulgation. 71 FR at 52636–638. We made this data base change, which pertained to incinerator source 327 (specifically, test condition C10) in our data base, in response to public comments to the proposed rule. 70 FR at 59432. In its petition for reconsideration, the Sierra Club stated that the dioxin/furan floor standard increased as a result of EPA's post proposal decision to use different data to represent source 327 and that EPA had provided no opportunity for public comment on this data handling decision. Pursuant to section 307(d)(7)(B) of the CAA, we granted the Sierra Club's petition for reconsideration of the dioxin/furan standard for incinerators with either a dry air pollution control device or waste heat boiler.

As stated in the September 6, 2006 reconsideration notice, the arguments provided by the Sierra Club in its petition for reconsideration did not convince us that our decision on what emissions data to use to represent source 327 for the dioxin/furan MACT

[56] USEPA, ''Draft Technical Support Document for HWC MACT Standards: Reconsideration of the Beyond-the-Floor Evaluations,'' July 2006, page 4–6, Appendix A, pages 2 and 4.

[57] The Sierra Club also petitioned EPA to reconsider the dioxin/furan standard for the subcategory of incinerators with wet or no air pollution control devices. As discussed in the September 6, 2006 notice, we denied this reconsideration request (71 FR at 52627). See also docket item EPA–HQ–OAR–2004–0022–0558.

floor analysis was erroneous or inappropriate. Therefore, in the reconsideration notice we solicited comment on the identical MACT floor analysis (for dioxin/furans for this incinerator subcategory) and underlying data handling decision regarding source 327 as promulgated in the October 12, 2005 final rule. 71 FR at 52636–38. That is, we proposed not to use the dioxin/furan test results where source 327 encountered operational problems with its carbon injection system. Instead, we proposed to use other valid emissions data in our emissions data base from this source in the MACT floor analysis. In response to the notice for reconsideration, we received five comment letters on this issue. These comment letters are available in the official public docket.[58]

1. Summary of the Final Action

The comments to the reconsideration notice provided limited new information regarding the dioxin/furan standard for incinerators with either a dry air pollution control device or waste heat boiler. No new technical information on the dioxin/furan test results that EPA excluded were received in comments. We received one comment letter that challenged whether we exercised appropriate judgment in excluding the one test result from source 327. After evaluation of the comments, we are deciding to retain the dioxin/furan standard as promulgated and are making no changes to the final rule. Because we are not revising the dioxin/furan standard for incinerators, the standard as promulgated under § 63.1219(a)(1) remains unchanged.

2. What Are the Responses to Major Comments?

We received five comment letters in support of and one comment letter objecting to our decision to replace the 2001 data for source no. 327 with other dioxin/furan emissions data in our data base. A summary of major comments received on this reconsideration issue and EPA's responses to those comments are provided below.

Comment: A comment was received stating that EPA did not explain why the MACT floor standard was based exclusively on compliance test data. The same commenter argues that the 2001 test results from source 327 (i.e., the test data during which operational problems with the carbon injection system occurred) were conducted under compliance test conditions and should be characterized as such in EPA's data base. Finally, the commenter states that whether or not the test results for source 327 were used to establish operating parameter limits is not relevant in determining whether they are compliance test data.

Response: We disagree with the comment. As explained in the September 6, 2006 reconsideration notice, we solicited comment on the identical MACT floor analysis and standard that was promulgated for this subcategory of incinerators. 71 FR at 52636–38. As explained in the proposed rule, EPA's data base is comprised of emissions data from tests conducted for various reasons. For MACT floor analysis purposes, all emissions data were characterized in one of four ways: ''compliance test'' data, ''normal'' data, ''in-between'' data, and ''not applicable'' data. See 69 FR at 21218–219 (April 20, 2004). After characterizing the data, we followed a general ''data hierarchy'' to identify the data to use for each emissions standard. 69 FR at 21229. For the subcategory of existing incinerators with either a dry air pollution control device or waste heat boiler, we tentatively concluded at proposal and confirmed in the 2005 final rule that it is appropriate to base the dioxin/furan standard on ''compliance test'' emissions data associated with the most recent test campaign. See 69 FR at 21240 (April 20, 2004) and page 10–4 of ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards'' (September 2005). Therefore, the record clearly shows our consistent intent to use compliance test data to determine the MACT floor standard for this subcategory of incinerators, as the data most representative of the performance of sources in this subcategory.

In response to public comments to the April 20, 2004 proposed rule, the characterization of source 327's test data (i.e., test condition 327C10 in our data base) was changed from ''compliance test'' to ''not applicable'' because the carbon injection system malfunctioned during the test. As discussed in the technical support document, one of the reasons data may be characterized as ''not applicable'' is if problems were encountered during testing that ''prevented the data from being used for regulatory compliance purposes.'' The operational troubles experienced during testing prevented source 327 from using the data in question to set operating parameter limits, a regulatory compliance purpose. See ''Draft Technical Support Document for HWC MACT Standards, Volume II: HWC Data Base'' (March 2004), pages 2–3 to 2–6, and ''Technical Support Document for HWC MACT Standards, Volume II: HWC Data Base'' (September 2005), pages 2–11 to 2–13. If the data are unsuitable for regulatory purposes (which is unquestioned here), then EPA can reasonably decline to use the data to characterize the source's performance for standard setting purposes.

Comment: One commenter states that our decision not to use the 2001 test data from source 327 and instead use dioxin/furan emissions data with higher levels from 1992 is arbitrary and capricious. This is because EPA had no reason to believe that source 327 would perform worse than the level it achieved despite operational problems.

Response: The 2001 test data in our data base for source 327 do not represent the source's performance over time because the source encountered operational problems during testing. As a result, we believe it is inappropriate to use such data when identifying MACT floor standards (or any other standards, for that matter). The fact remains that we have no valid data reflecting the performance and performance variability of this source when using a carbon injection system. While dioxin/furan emission results may be lower using the carbon injection system, we are not in possession of such data. It is also a fact that none of the available 1992 emissions data (i.e., the only compliance test data in our data base for this source) is low enough to be considered among the 12 percent of best performers. As a result, available valid emissions data for source 327 have no direct impact on the MACT floor analysis.

Comment: One commenter stated that the dioxin/furan standard is unlawful and arbitrary and capricious because the calculated MACT floor of 0.42 ng TEQ/dscm is less stringent than the current interim standard of 0.40 ng TEQ/dscm. Therefore, these results indicate that the MACT floor methodology does not yield floors reflecting the actual performance of the relevant best sources.

Response: We disagree with the comment for the same reasons discussed in Part Four, Section III.F of the October 12, 2005 final rule. 70 FR at 59458.

H. Provisions of the Health-Based Compliance Alternative

The October 12, 2005 final rule allowed sources to establish and comply with health-based compliance alternatives for total chlorine for hazardous waste combustors other than hydrochloric acid production furnaces in lieu of the MACT technology-based emission standards established under §§ 63.1216, 63.1217, 63.1219, 63.1220,

[58] See comments 0563, 0565, 0567, 0568, and 0569 in the docket (EPA–HQ–OAR–2004–0022).

and 63.1221. See 70 FR at 59413–19 and § 63.1215.

Sierra Club petitioned for reconsideration stating that EPA changed several provisions of the health-based compliance alternative after the period for public comment and therefore did not provide notice and opportunity for public comment.[59] In addition, Sierra Club stated that three new provisions are problematic: (1) It is unlawful to allow sources to comply with the health-based compliance alternative without prior approval from the permitting authority; (2) it is unlawful to allow a source to obtain an unlimited extension of the compliance date if their eligibility demonstration is disapproved and the source is unable to change the design or operation of the source to comply with the MACT emission standards by the compliance date; and (3) the Agency cannot rely on the Title V program as the vehicle for establishing health-based compliance alternatives.

We granted reconsideration of these provisions because we developed them in response to comments on the proposed rule, after the period for public comment as Sierra Club stated. Furthermore, to address Sierra Club's concerns, we proposed to revise the rule pertaining to these provisions as follows: (1) The rule would state that the operating requirements specified in the eligibility demonstration are ''applicable requirements'' as defined in 40 CFR 70.2 or 71.2 and therefore must be incorporated in the Title V permit; (2) a source may comply with the health-based compliance alternative without prior approval from the permitting authority provided that the source has made a good faith effort to provide complete and accurate information and to respond to any requests for additional information; and (3) the compliance date extension cannot exceed one year if the eligibility demonstration is disapproved and the source is unable to change the design or operation to comply with the MACT emission standards by the compliance date.

1. Summary of the Final Action

We are today promulgating revisions to the health-based compliance alternative as proposed in the reconsideration notice. The comments to the reconsideration notice did not provide a basis for us to conclude that the health-based compliance alternative, as we proposed to revise it, was inappropriate. Therefore, we reaffirm the health-based compliance alternative that we promulgated in the October 12, 2005 final rule, as revised today subsequent to the reconsideration notice.

Please note that the revised provisions are effective immediately, and today's final rule does not change the October 14, 2008 compliance date established by the October 12, 2005 final rule. Sources can readily comply with the revised provisions promulgated today on the compliance time line established by the October 12, 2005 final rule.

2. What Are the Responses to Major Comments?

Comment: Sierra Club states that the health-based compliance alternatives are implemented through Title V permits, and because Title V permits expire, this is evidence that the health-based alternatives are not emission standards within the meaning of CAA section 112(d)(4).

Response: In the reconsideration notice, we explained that, because the health-based compliance alternative requirements are clearly defined (e.g., HCl-equivalent emission limits, chlorine feedrate limits), and because any standards or requirements created under CAA section 112 are considered ''applicable requirements'' under 40 CFR part 70, the compliance alternatives would be incorporated into Title V permits.[60] 70 FR at 59481; 71 FR at 52639.

Nonetheless, in response to Sierra Club's reconsideration petition that the Agency cannot rely on the Title V program as the vehicle for establishing health-based compliance alternatives we proposed to revise the rule to add clarifying regulatory language stating that § 63.1215 requirements are applicable requirements under part 70 and therefore must be included in the Title V permit as would any other applicable requirement.

We are promulgating that requirement today (see § 63.1215(e)(3)) and disagree with the commenter's view that the health-based alternatives are implemented through the Title V permit rather than established as a national standard by rule. The rule itself establishes not only the standard's level of protection, which is uniform nationwide and assures that emissions of total chlorine from each source complying with the alternative standard will be less than the threshold level for total chlorine with an ample margin of safety,[61] but also establishes each and every step that sources must use to calculate that standard. The permit writer ascertains that the source has applied the rule properly (e.g., has not put incorrect factual inputs into the equations and formulae provided in the rule). Thus, the rule not only establishes the level of control (which is uniform nationally, as just stated) but the exclusive means of developing the emission limit which satisfies that level. Moreover, sources must establish a numerical limit (using the exclusive protocols set out in the rule) before permitting. This limit is immediately enforceable against the source. The permitting process determines if this limit was determined correctly (i.e. whether the source applied the protocols in the rule correctly). See § 63.1215(e) and (g).

The situation is analogous to the way parametric monitoring limits implementing numeric section 112(d)(2) standards are established: a national rule establishes a numerical standard and specifies which parameters are to be monitored; a source determines the actual levels of those parameters based on site-specific conditions and establishes enforceable parametric monitoring limits for itself; and a permit writer decides whether to ratify the source's determination and memorializes the quantified parametric monitoring limit in the source's permit. *Id.* There is no suggestion that this process violates the requirement that EPA establish national emission standards.

Comment: Sierra Club states that allowing sources to comply with the health-based compliance alternatives without prior approval from the permitting authority further confirms that the alternatives are not standards at all, and violates the CAA by allowing sources to operate without any assurance that HAP emissions are controlled.

Response: The comment is confusing, since MACT standards are implemented in advance of permitting (as are the alternative section 112(d)(4) standards), and are, of course, emission standards. Further, the health-based compliance alternative is a requirement established by EPA ''which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis,'' and so is an ''emission standard'' under section 302(k) of the Act (which definition applies to section 112(d)).

[59] See letter from James Pew to Stephen Johnson, dated December 12, 2005, Section XII, docket item EPA–HQ–OAR–2004–0022–0517.

[60] Applicable requirements defined under § 70.2 must be included in Title V permit, as required under § 70.6(a)(1).

[61] Specifically, that exposure to the actual individual most exposed to the facility's emissions, considering off-site locations where people congregate for work, school, or recreation, is less than that level. See § 63.1215(c)(ii).

The section 112(d)(4) standard is an emission concentration limit (ppmv) for total chlorine that is demonstrated not to result in a Hazard Index [62] for hydrogen chloride and chlorine gas exceeding 1.0.

Comment: Sierra Club states that EPA's ''individualized source-by-source loophole program'' does not provide emission standards. The comment continues that since section 112(d) standards must be established on a category or subcategory basis, the most a section 112(d)(4) standard can lawfully do is require all sources to emit at the uniform limit which will not result in adverse effects to human health with an ample margin of safety. The commenter continues that to satisfy section 112(d)(4), that standard must moreover account for the individual circumstances of each emitting source (including receptor location).

Response: The standards adopted in the rule apply on a categorical basis and assure that each source in the category adopting this alternative emits total chlorine at a level which is protective of human health with an ample margin of safety. The level of protection afforded is identical in each instance the compliance alternative is satisfied: exposure to less than the hazard index for total chlorine (which hazard index reflects an ample margin of safety), and hence exposure to less than the threshold level of effect for total chlorine. Individual circumstances of each emitting source (such as dispersion characteristics and the location of most-exposed receptor) must be accounted for in demonstrating that the source is eligible for the alternative standard (just as actual parametric monitoring limits implementing numeric limits are established post-rule to account for individual circumstances). See § 63.1215(c)(2) which requires that the demonstration of eligibility show that emissions of total chlorine (measured as HCl equivalence) be shown to be less than the Hazard Index for chronic exposure ''for the actual individual most exposed to the facility's emissions, considering off-site locations where people reside and where people congregate for work, school, or recreation''; see also § 63.1215(c)(3)(v) requiring the demonstration to account for emissions from all emitting hazardous waste combustors at a site. As explained in the previous response, this provision thus satisfies the statutory definition of ''emission standard,'' as well as all applicable section 112(d) requirements.

Comment: Sierra Club states, without analysis, that the provision violates RCRA as well as the Clean Air Act, because the standards are insufficient to protect public health and the environment.

Response: EPA showed in promulgating the provision that emissions would be protective of human health and the environment (70 FR at 59479–80), and commenter has not provided information to the contrary.

Comment: The commenter cites legislative history to the 1990 amendments (1 Legislative History at 866) in which Congress rejected a provision which would have allowed individual sources to waive out of MACT requirements by demonstrating that their HAP emissions pose negligible risk to public health. The commenter views this history as supporting its argument since it regards the provision here as analogous.

Response: EPA does not believe the provision discussed in the legislative history is analogous. It would have allowed a demonstration of low risk for all toxics, not just threshold pollutants. Section 112(d)(4) is limited in scope to threshold pollutants where the Administrator has identified a level that protects public health with an ample margin of safety. EPA's rule here reasonably implements that authority.

Comment: Sierra Club states that it is impermissible and further indication that the health-based compliance alternatives are not emission standards to allow an automatic extension of the compliance date upon disapproval of an eligibility demonstration to allow the source time to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable the source to achieve compliance with the total chlorine MACT standards. Sources must comply with MACT standards within no more than three years, absent an individualized demonstration of a need for further time to install controls.

Response: We disagree with the characterization that the time extension is automatic. Section 63.1215(e)(2)(i)(B) states that the permitting authority may extend the compliance date by up to one year (as revised by today's rule) to allow the source to make changes to the design or operation of the combustor to achieve compliance with the MACT total chlorine standards. An individualized showing is required to support such an extension. In addition, an extension would be granted only for the time needed (but not exceeding one year) to make the changes required to achieve compliance with the emission standards. That is expressly the purpose of the time extension provision of CAA section 112(i)(3)(B), which allows extensions of a section 112(d) standard's effective date for up to one year where necessary for the installation of controls.

Comment: Sierra Club states that EPA lacks authority to grant source-by-source exemptions from Section 112 emission standards.

Response: We agree. The health-based compliance alternatives are section 112 emission standards, as we have explained in this preamble and in the October 12, 2005 final rule. See 70 FR at 59479. Thus, no sources are exempted from such standards.

IV. Response to Comments to the September 27, 2007 Notice

On September 27, 2007, EPA issued a notice for public comment which discussed the standards that EPA promulgated in October 2005, and specifically identified which standards EPA believes are consistent with the Act and caselaw, and which standards are not and need to be reexamined through a subsequent rulemaking. 72 FR 54875. With respect to those standards EPA announced it intended to defend, the notice indicated the portions of the rationale upon which EPA intended to rely, and which portions EPA would no longer rely upon as a justification for the standards. EPA sought public comment on this analysis and placed edited versions of various support documents in the public docket, edited to remove portions of the rationale on which EPA no longer planned to rely, and solicited public comment on these edits.

After receipt of public comment, EPA has further narrowed the number of standards it intends to defend. We respond here to the principal public comments with respect to those standards which EPA has announced its intention to defend. However, as an initial matter, one commenter argued that EPA may not amend portions of the record or revise rationales for the final rule without proposing to amend the rule, i.e., recommencing rulemaking procedures. EPA disagrees. The Clean Air Act provides that EPA may reconsider rules based on new information which arose after the period for public comment. CAA section 307(d)(7)(B). The *Brick MACT* opinion is such a type of new information. *Sierra Club* v. *EPA*, 479 F.3d 875 (2007) (*Brick MACT*). Also, EPA may decide itself to

[62] The Hazard Index is the sum of the Hazard Quotients for hydrogen chloride and chlorine gas. The Hazard Quotient (HQ) is the ratio of the predicted ambient air concentration of a pollutant to the air concentration at which no adverse effects are expected. For chronic inhalation exposures, the HQ is calculated as the air concentration divided by the reference concentration (RfC). For acute inhalation exposures, the HQ is calculated as the air concentration divided by the acute reference exposure level (aREL).

reconsider a rule based on existence of such new information (i.e., initiate reconsideration *sua sponte*). See 72 FR at 76553 (December 20, 2006). EPA essentially adopted that course here, providing notice and opportunity for public comment as required by section 307(d)(7)(B) (including a comment period ultimately extended to two months (see 72 FR 59067 (October 18, 2007). However, to make explicit that this action is part of a reconsideration process, EPA is including its responses to comment here as part of the reconsideration process already initiated for the Hazardous Waste Combustor MACT rule.[63] Final edited versions of the various support documents are also included in the public docket.

With one exception, all commenters to the September 2007 notice supported EPA's analysis of the standards and did not suggest any changes to that analysis. The one adverse commenter was Earthjustice (on behalf of Sierra Club), which submitted extensive comments raising various challenges. Earthjustice, however, did not contest EPA's main premise: sources which emit more hazardous air pollutant (HAP) over time than other sources (e.g., those with lower emissions in single tests) do not have to be regarded as best performing, and this holds true for those higher-emitting sources which may emit less HAP in a single snapshot test. 72 FR at 54877. EPA set out at length in the October 2005 rule and the September 2007 notice why it believes it identified as best performers sources emitting the lowest amount of HAP over time and reasonably estimated their levels of performance. Most of the responses below deal with the issue of the reasonableness of this analysis.

Before addressing these specifics, we first address certain general points. EPA demonstrated in both the preamble to the final rule and in the September notice that the commenter's preferred approach for the existing source floor of taking the average of the lowest emitting sources in single tests did not properly characterize these sources' performance because it ignored their short- and long-term variability and thus their performance over time. The commenter now maintains that even if this is true, it is irrelevant because EPA must still show that the sources the Agency identified as best are in fact best performers. Although EPA must of course provide a reasoned explanation justifying its selection of best performers and their level of performance, EPA believes it is clear on this record that one cannot presume that sources with lowest HAP emission in single tests are best performers, or presume that single snapshot performance test information is an adequate representation of sources' actual performance over either short or long time periods. A further consequence, as explained in the following paragraph, is that whatever methodology is utilized for identifying best performing sources necessarily involves some type of estimate as to sources' performance and that the starting point for such estimates need not be sources with lowest HAP emissions in single tests.

Earthjustice, however, seizes on EPA's conclusion that sources rejected by EPA as best performers ''likely'' perform worse over time, calling this unwarranted speculation, and suggests more data-gathering to develop a legally mandated quantum of proof (e.g., Earthjustice's Comments pp. 1, 2, 8; docket item EPA–HQ–OAR–2004–0022–0613). As the commenter is aware, however, no reliable quantification of performance over time is now possible (except for particulate matter emissions from sources equipped with fabric filters (see 72 FR at 54879)) because continuous emission monitors for HAP do not exist, or for HAP for which CEMS are just beginning to be implemented for HWCs, there are too few data to evaluate sources' performance. Long-term performance of sources for HAP therefore are necessarily estimates. EPA's conclusion that sources it selected as best performers ''likely'' emit less HAP over time is an accurate reflection that definitive proof (i.e., day-in, day-out quantified performance) is impossible in the absence of continuous emission monitoring results. More data collection would yield more snapshot results, so long-term performance would still have to be estimated.[64] However, the record demonstrates that EPA's conclusions are not mere speculations, but rather are supported by sound evidence and are consequently reasonable. *Mossville Environmental Action Now* v. *EPA* (*Mossville*), 370 F. 3d at 1240–41 (D.C. Cir. 2004) (summarizing case law that EPA may use estimates to assess performance of best-performing sources, and stating further that courts will accept these estimates if they have a reasoned basis).

Finally, Earthjustice repeats earlier comments that because sources maximize operating parameters when they conduct compliance tests in order to obtain an ample compliance margin, compliance tests already account for total operating variability. However, as explained in the rulemaking, compliance tests can only account for controllable operating variability, and there are numerous uncontrollable factors that result in short- and long-term variability not accounted for in compliance tests. 70 FR at 59439 (October 12, 2005). The record shows that in virtually every case when comparisons with other test conditions are possible, lowest emitters in one compliance test emitted more HAP in other tests.[65] Indeed, in most of the comparisons, the sources emitted more than their estimated performance including run-to-run variability (which we refer to as UPL99).[66] *Id*.[67] Another example, as discussed above, is the Ash Grove Chanute source, where the source in later tests emitted more particulate matter than projected by EPA even after adjusting the source's initial test results to account for run-to-run and test-to-test variability. This empirical demonstration shows that lowest emitting sources in single tests can emit more HAP over time, and that the amounts emitted routinely can exceed even their estimated short-term variability or total variability. Necessarily, the demonstration also shows that the single test condition measurements do not fully encompass these sources' actual variability. EPA thus correctly concluded that run-to-run and test-to-test variability—short-term and long-term variability over and beyond performance measured in a single stack test—are real and appreciable, and consequently an

[63] EPA also does not believe any commenters were prejudiced by the procedure EPA adopted, since all the commenters had notice of EPA's action, and had ample time to submit comments, of which they availed themselves. In addition, EPA provided notice to the general public by means of publication in the **Federal Register** so any interested person could respond.

[64] However, in this rule, EPA has carefully compiled and studied data from different tests from lowest emitting sources in single tests to best estimate these sources' long-term performance.

[65] See memorandum from Bob Holloway to docket entitled ''Analysis of Available Performance Data from Best Performing Sources'', September 8, 2008.

[66] The UPL99 means the 99th percentile upper prediction limit and is an estimate of the value that the source would achieve in 99 of 100 future tests if it could replicate the operating conditions of the compliance test. 70 FR at 59437 (October 12, 2005).

[67] The commenter challenged EPA's statements, maintaining that these data do not show which sources are the best performers. See, e.g. Earthjustice's comments p. 3. EPA developed these data to show that the commenter's argument that test conditions already account for all of sources' operating variability ''and then some'' (Earthjustice's comments p. 4) is demonstrably incorrect, and that an approach of averaging snap shot emission tests—even after adjusting results to account for run-to-run variability, still does not fully account for sources' full operating variability—i.e., their performance over time.

element of sources' performance. See Technical Support Document (''TSD'') Vol. III, sections 16.3 to 16.6, 17.2 and 17.3.[68]

A. Standards for Particulate Matter

1. Standards for Incinerators, Cement Kilns, Lightweight Aggregate Kilns, and Solid Fuel Boilers

EPA has carefully reviewed all of its data for particulate matter and concluded, with certain exceptions, that the current standards require some revision (in some cases due to record correction issues rather than to issues related to section 112(d)(3) and the *Brick MACT* opinion).[69] The exceptions are the new source particulate matter standards for incinerators, cement kilns (see also section III.E above), and lightweight aggregate kilns, and the particulate matter standards for existing and new solid fuel boilers. For these standards, EPA believes that it properly assessed which sources are best performing and reasonably estimated their level of performance. EPA also has previously indicated why more stringent, beyond-the-floor standards are or are not achievable for these source categories. See 71 FR at 14670; TSD Vol. III, sections 10.3.4, 12.3.4, 14.3.2 and 14.3.4.

2. Standards for Liquid Fuel Boilers

EPA believes that the particulate matter standard for existing and new liquid fuel boilers requires revision for the reasons discussed in the September 2007 notice. 72 FR at 54880.

B. Standards for Semivolatile Metals and Low Volatile Metals

1. Standards for Incinerators and Solid Fuel Boilers

EPA selected as best performers for semivolatile (lead and cadmium, or SVM) and low volatile (arsenic, beryllium and chromium, or LVM) HAP metals the sources with the best combination of hazardous waste feedrate control of the respective metals and best system removal efficiency (generally, most efficient emission controls). EPA continues to believe that these sources will emit the least SVM and LVM over time since they will have the least long-term variability. 72 FR 54880–881. Comparative test data support this conclusion. Sources with lower SVM and LVM emissions in single tests either have had emissions in historic tests that are higher than the emissions of the sources EPA identified as best performing, can reasonably be projected to emit more than the EPA-identified best performers based on their historic performance (historic system removal efficiency applied to amount fed in performance test would result in higher emissions than EPA-identified best performers), [70] or are simply unrepresentative.[71]

Earthjustice states that such comparisons are unwarranted because there is no reason to assume a source would operate with a worse efficiency than in their compliance test. Earthjustice Comments p. 9. Removal efficiency is, however, a key aspect of normal operating variability. Contrary to Earthjustice's suggestion, a source does not choose to operate with worse control efficiency. Control equipment simply does not operate uniformly day-in, day-out. That variation in performance affects emissions and is part of a source's operating performance. Moreover, EPA carefully examined whether the sources were properly designed and operated during the comparative test conditions and determined that they were. TSD Vol. III pp. 17–13 to 16. The commenter presents no information questioning that analysis.

Earthjustice also states repeatedly that EPA selected this floor methodology for SVM and LVM to assure that all sources could meet MACT floors, citing to 70 FR at 59442. E.g., Earthjustice's Comments p. 11. EPA never made such a statement, and the record does not support the commenter's assertion. For example, 60% (13 of 22) of incinerators had emissions in the relevant test conditions (those considered in establishing the standard) that were higher than the SVM floor, and over 70% (19 of 26) had higher LVM emissions in those test conditions. TSD Vol. III, App. E, Tables SF–INC–SVM and SF–INC–LVM.

2. Standards for Cement Kilns, Lightweight Aggregate Kilns, and Liquid Fuel Boilers (Low and High Heating Value Subcategories)

EPA has determined that these standards should be re-examined and not defended in litigation.

3. Alternative to the Particulate Matter Standard for Liquid Fuel Boilers

EPA promulgated alternatives to the particulate matter standard for each subcategory of liquid fuel boilers (i.e., high and low heating value subcategories) under § 63.1217(e). EPA believes that these alternatives require revision for the reasons discussed in the September 2007 notice. 72 FR at 54882.

4. Alternative Metal and Total Chlorine Standards for Cement Kilns and Lightweight Aggregate Kilns

EPA promulgated alternatives to the mercury, semivolatile volatile metals, low volatile metals, and total chlorine standards for cement and lightweight aggregate kilns. See alternatives under § 63.1206(b)(9), (b)(10), and (b)(15). EPA has determined that these alternatives should be re-examined and not defended in litigation. 72 FR at 54882–83.

C. Standards for Total Chlorine

1. Standards for Incinerators, Cement Kilns, Lightweight Aggregate Kilns, Liquid Fuel Boilers, and Solid Fuel Boilers

All comments on these source categories are already addressed either in the final agency action on reconsideration (issue of analytical bias with stack sampling method for total chlorine, see section III.B of this preamble above), or in earlier parts of this rulemaking. TSD Vol. III, Chapter 19. With respect to the standards for total chlorine for existing and new cement kilns and liquid fuel boilers (high heating value subcategory) and new lightweight aggregate kilns, EPA believes these standards require revision

[68] USEPA, ''Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards'', (TSD Vol. III) September 2005. Unless otherwise specified, all TSD references in this section of the notice are to this document, which is available in the docket to the rule.

[69] With respect to standards for particulate matter for incinerators, for example, EPA is concerned that the database includes certain types of specialty chemical demilitarization operations where metals are not volatilized within the common pool of incinerators (see also n. 72 below with respect to high and low volatility metals emitted by incinerators). With respect to particulate matter emitted by cement kilns, further study of operating conditions of one of the sources classified as a best performer may require reassessment of that source's performance.

[70] For example, incinerator source 327, which in a single test condition had a UPL99 for SVM which is 25 times less than the highest-emitting of the best-performing sources in the MACT pool, would emit over three times more SVM than that highest-emitting best performer assuming it fed the same amount of metals as in its compliance test but removed them from its emissions at the efficiency demonstrated in other of its historic compliance tests. TSD Vol. III, Table 17.6 and App. E, Table SF–INC–SVM.

[71] Certain of the sources (incinerator sources 494 and 3011) are specialty operations feeding large chunks of metal contaminated with trace organics (e.g., inert materials, bulk explosives, metal waste). These metals generally are not emitted because of the large particle size of the feed—SVM are not volatilized and LVM are not entrained in the combustion gas. These operations are not representative of usual incineration, where metals are present in the feed as organometallic compounds or metal dispersed in an organic or aqueous liquid such that SVM is generally volatilized and LVM is generally entrained in the combustion gas. USEPA, ''Technical Support Document for HWC MACT Standards, Volume II: HWC Data Base'', (TSD Vol. II) September 2005, App. B in data sheet ''inc-svm.xls'', App. C in data sheets ''494.xls'' and ''3011.xls''.

for the reasons signaled in the September 2007 notice. 72 FR at 54883. Finally, with respect to the standards for total chlorine for liquid fuel boilers (low heating value subcategory), EPA has determined that these standards should also be re-examined and not defended in litigation for reasons discussed in section IV.F.3 below.

2. Hydrochloric Acid Production Furnaces

EPA adheres to the analysis set out in the September 2007 notice: The pool of best performing sources are those emitting the least total chlorine and EPA has discretion to express these sources' performance in terms of percent reduction. Sections 112(i)(5)(A) and 129(a)(4) of the Act support this conclusion (a point not addressed by Earthjustice in its comments). See 72 FR at 54884/2.

Earthjustice states that standards expressed in terms of control efficiency are not ''emission standards'' under the Act. This is incorrect. An ''emission standard'' includes ''a requirement * * * which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.'' CAA section 302(k). Standards requiring HAP reduction of a given percent limit the emission quantity, rate, and (in any realistic scenario) concentration of the HAP and so falls squarely within the statutory definition.

Earthjustice stresses the following language from *Brick MACT:* ''EPA cannot circumvent *Cement Kiln's* holding that section 7412(d)(3) requires floors based on the emission level actually achieved by the best performers (those with the lowest emission levels), not the emission level achievable by all sources * * *''. EPA is not establishing a floor for these sources based on an emission level achievable by all sources (six of ten sources in the category had test conditions with higher (less efficient) performance than the MACT floor (see TSD Vol. III, App. E, Table SO–HCLPF–CL)), or otherwise looking to performance of sources other than the lowest emitting to establish this floor.

D. Standards for Dioxins/Furans

1. Standards for Incinerators

a. *Dry Air Pollution Control Device or Waste Heat Boiler Subcategory.* The commenter challenges establishing the floor at the level of the 2002 Interim Standard. EPA did so because the average of the performance of the top 12 percent of lowest emitting sources was slightly higher than that level, accounting for run-to-run (short-term) variability. TSD Vol. III, App. C, Table E–INCDWHB–DF. Under these circumstances, the Interim Standard is the best emissions information available to EPA as to the performance of the lowest emitting sources. As in *Mossville,* EPA may establish a MACT floor at a regulatory level when the best performing sources performance over time (i.e., accounting for variability) ''barely satisfied'' the regulatory limit. EPA thus disagrees with the commenter that the floor cannot be established at the level of the Interim Standard because the Interim Standard is a level sources are required to meet, not the lowest level achieved.

The commenter also continues to dispute that incinerators with dry air pollution control devices or waste heat boilers are a separate subcategory for purposes of a dioxin/furan standard. As explained at 69 FR 403 (January 5, 2004), subcategorization on the basis of air pollution control technology is not legally permissible. But in this case, dry air pollution control devices and waste heat boilers do not capture dioxins but form them, making this a different type of process for purposes of a dioxin/furan standard.

b. *Wet Air Pollution Control Device or No Air Pollution Control Device Subcategory.* EPA established the floor at the level of the Interim Standard because the lowest emitting sources in single test conditions had dioxin emissions in other tests much higher than the Interim Standard. EPA's analysis was strongly influenced by comparative test data from incinerator source 3016, which appeared to show multiple orders of magnitude operating variability. EPA has since re-reviewed all of the test data for this source and has found that the amount of variability from this source was overstated because results of one of the three test runs in test condition 2 were inadvertently omitted from the calculation. Remaining sources demonstrate operating variability, but not enough to justify retention of the Interim Standard as the MACT floor. EPA therefore does not intend to defend this standard in litigation, and will re-examine it.

2. Standards for Cement Kilns and Lightweight Aggregate Kilns

EPA believes it erred in the way in which it assessed the relative stringency of the calculated floors and the 2002 Interim Standards (i.e., the dioxin/furan standards promulgated under §§ 63.1204 and 63.1205) so that the promulgated standard is expressed incorrectly.

3. Standards for Liquid Fuel Boilers

For existing liquid fuel boilers-dry air pollution control subcategory, the commenter again challenges whether sources with dry air pollution control devices can be categorized separately from other boilers for purposes of assessing dioxin/furan performance. This point is addressed in section IV.D.1.a above. With respect to the remaining dioxin/furan standards (new source liquid fuel boilers-dry air pollution control subcategory and existing and new source liquid fuel boilers-wet or no air pollution control system subcategory), EPA believes that these standards require revision for reasons discussed in the September 2007 notice. 72 FR at 54886.

4. Standards for Solid Fuel Boilers and Hydrochloric Acid Production Furnaces

As discussed in the September 2007 notice, EPA believes that these dioxin/furan standards require revision. 72 FR at 54886.

E. Standards for Non-Dioxin/Furan Organic HAP

EPA has determined that these standards—carbon monoxide and hydrocarbons, as surrogates for control of non-dioxin/furan organic HAP—should be re-examined and not defended in litigation.

F. Standards for Mercury

1. Standards for Incinerators

The commenter challenges use of the 2002 Interim Standard as the standard for mercury for existing sources. EPA did so because the average of the mercury emissions from the best performing sources under any of the possible ranking methodologies was higher than the Interim Standard. 72 FR at 54887. The commenter states that this is impermissible (although any alternative would lead to a less stringent standard than the one EPA promulgated). The commenter further states that under *Mossville,* regulatory levels can constitute a floor if there is a factual showing that best performers emit at a level close to that regulatory level. Earthjustice's Comments p. 24. EPA agrees. That factual showing exists here: The best performers are emitting at a level even higher than the regulatory level (reflecting performance before the Interim Standard took effect). The regulatory level thus is a reasonable measure of best performance. *Mossville*, 370 F. 3d at 1240–41.

2. Standards for Cement Kilns and Lightweight Aggregate Kilns

As discussed in the September 2007 notice, EPA believes that the mercury standards for existing and new cement kilns require revision. 72 FR at 54887–88. With respect to the mercury standards for existing and new lightweight aggregate kilns, EPA has determined that these standards should be re-examined and not defended in litigation.

3. Standards for Liquid Fuel Boilers

In the promulgated rule, EPA had subcategorized liquid fuel boilers based on thermal content of hazardous waste burned and established separate standards for high heating value and low heating value boilers. EPA has determined not to defend the high heating value subcategory standards for the reasons stated at 72 FR at 54888. This decision also necessitates revision of the mercury standards for the low heating value subcategory because all sources' data will now be in a common pool—i.e., There will no longer be high and low heating value subcategories. See also preamble discussion at III.A above.

4. Standards for Solid Fuel Boilers

The commenter again raises the issue of consideration of and means of calculating run-to-run variability. EPA's response is at 70 FR 59438–40. EPA continues to believe that these standards are based on the average performance of the best performing sources and that EPA has reasonably ascertained that level of performance.

G. Normalization

Ordinarily, one cannot meaningfully compare performance of different entities without providing a common metric of comparison. Miles per gallon is an example, whereby meaningful comparison of fuel economy can be made for vehicles traveling different distances. Stating that two vehicles traveled 200 and 300 miles respectively says nothing about which has the better fuel economy performance. The commenter states nonetheless that normalization is impermissible under section 112(d)(3). EPA continues to disagree. Section 112(d)(3) does not address the issue of whether sources' performance can be expressed and compared in normalized units, so the commenter's argument that the approach is forbidden as a matter of law appears incorrect. See also 70 FR at 59451, 72 FR at 54888, and *National Lime II*, 233 F. 3d at 631, 632 (rejecting *Chevron I* argument that section 112(d)(3) requires EPA to establish MACT floors ''at the lowest recorded emission level for which it has data'' because ''[s]ection [112's] additional phrase says nothing about what data the Agency should use to calculate emission standards''). EPA's interpretation is moreover reasonable, since normalizing emission results allows a meaningful way to determine which performers are better, the very purpose of section 112(d)(3).

V. What Other Rule Provisions Are Being Amended or Clarified?

We are making several corrections to 40 CFR part 63, Subpart EEE. In addition, we are clarifying the particulate matter standard for cement kilns.

A. What corrections are we making?

1. Revisions to § 63.1207(d)

The last sentences under § 63.1207(d)(4)(i) and (ii) refer to demonstrating compliance with ''the replacement standards promulgated on or after October 12, 2005.'' This regulatory language is confusing. We are revising these paragraphs to clarify that the ''replacement'' standards are the standards under §§ 63.1219, 63.1220, and 63.1221. Accordingly, we are amending § 63.1207(d)(4).

2. Revisions to § 63.1207(m)

Section 63.1207(m) waives the performance test if the HAP metals or total chlorine feed rate (after conversion to an exhaust gas concentration using continuously monitored exhaust gas flow data) is less than the applicable emission rate, assuming that 100 percent of the constituent in the feed is emitted from the combustion unit. This provision applies to emission standards expressed either on a volumetric flow rate of exhaust gas basis (i.e., µg/dscm or ppmv) or on a hazardous waste thermal concentration basis (i.e., pounds of HAP emitted attributable to the hazardous waste per million Btu of heat input from the hazardous waste).

The performance test waiver provisions under § 63.1207(m)(1), which addresses emission standards expressed on a volumetric flow rate of exhaust gas basis, currently state that a source is ''deemed to be in compliance with an emission standard * * * if the twelve-hour rolling average maximum theoretical emission concentration (MTEC) * * * does not exceed the emission standard.'' The twelve-hour rolling average requirement under § 63.1207(m)(1) was appropriate when this provision was codified in 1999 because all the metals and total chlorine feedrate limits were specified as twelve-hour rolling average limits. 64 FR at 52967, 53060–62 (September 30, 1999). However, when we finalized standards for liquid and solid fuel boilers in 2005, twelve-hour rolling average limits were not required for all standards. See, for example, the rolling average requirements under § 63.1209(n)(2)(v). Moreover, we also finalized in the 2005 rule a new provision that allows sources to use shorter averaging periods than those specified in the rule because shorter averaging periods result in more stringent control of the parameter. Section 63.1209(r).[72] EPA inadvertently failed to revise § 63.1207(m)(1) to remove the twelve-hour rolling average requirement in the October 2005 rule. Today, we are correcting that inadvertent error. Accordingly, we are revising § 63.1207(m)(1)(i).

3. Revisions to § 63.1220(a)(2) and (b)(2)

In an April 8, 2008 rule, we revised the mercury standards under § 63.1220(a)(2) and (b)(2) by clarifying that a source must comply with the maximum concentration of mercury in the hazardous waste limitation and either a hazardous waste maximum theoretical emission concentration feed limit or stack gas concentration limit. 73 FR at 18972 (April 8, 2008) and 71 FR at 52641 (September 6, 2006). However, the mercury standards issued on April 8 were not amended correctly, which resulted in the maximum theoretical emission concentration feed limit requirement being incorrectly repeated under § 63.1220(a)(2)(iii) and (b)(2)(iii). Today, we are removing § 63.1220(a)(2)(iii) and (b)(2)(iii), which paragraphs were correctly and previously incorporated under § 63.1220(a)(2)(ii) and (b)(2)(ii), respectively.

B. Clarification of the PM Standard for Cement Kilns

In their comments on the proposed rule, the Ash Grove Cement Company (Ash Grove) and Cement Kiln Recycling Coalition (CKRC) each sought clarification regarding the portion of the new source particulate matter (PM) standard specifying that the prescribed concentration limit be ''corrected to 7% oxygen.'' [73] Ash Grove raised its point in the context of its plans to build a new cement kiln at its Foreman, Arkansas plant. The plant will be configured with an energy-saving design in which combustion gases from the kiln and

[72] USEPA, ''Technical Support Document for HWC MACT Standards, Volume IV: Compliance with the HWC MACT Standards'', September 2005, Section 2.2.6.

[73] See docket items EPA–HQ–OAR–2004–0022–0538 (p. 5) and –0541 (p. 2).

non-combustion gases from the clinker cooler would be combined prior to passing through the in-line raw mill, the PM control device, and the emission stack. The purpose of this configuration is to recover heat from the clinker cooler exhaust to aid in drying the raw feed in the in-line raw mill. CKRC endorsed Ash Grove's comments and sought the clarification more generically with respect to member companies' plans to employ similar energy-saving engineering configurations in new kiln designs.

Ash Grove and CKRC noted in their comments that, under their proposed design, the PM standard would be unattainable if the facility were required to correct the combined gas stream to 7 percent oxygen. The commenters acknowledged that the oxygen correction procedure is a necessary component of a concentration-based emission standard because it prevents a facility from meeting the standard by simply diluting the regulated, dust-laden gas stream with clean air. In this case, however, Ash Grove proposes to combine two regulated, dust-laden gas streams for legitimate energy recovery purposes. In their comments, Ash Grove and CKRC asked EPA to clarify that, in the Ash Grove design, the oxygen associated with the clinker cooler exhaust does not represent dilution air and should not be included in the oxygen correction calculation when determining compliance with the PM standard of the Subpart EEE MACT standard. That is, the oxygen contribution in the combined stream attributable to the clinker cooler gas should be ''subtracted'' when assessing compliance with the Subpart EEE standard.

The Agency acknowledges that combining the two regulated gas streams, as proposed in the Ash Grove design, is not impermissible dilution that the oxygen correction factor of Subpart EEE is meant to prevent.[74] We also recognize that applying the oxygen correction factor to the combined gas stream in this case would be tantamount to requiring a clinker cooler PM emission rate of zero, which is not physically possible.

Facilities which opt to combine their emissions streams, for heat recovery or other legitimate purposes, are referred to the Agency's long standing compliance policy. In the case where two (or more) separately-regulated streams are physically combined in common duct work prior to control, they are evaluated for compliance with the more stringent standard; or, in the case where two (or more) separately regulated streams are physically combined for a legitimate process purpose, they should be evaluated for compliance with the emission standard of the affected facility from which the gases are discharged.[75] These policies were developed specifically for application of the opacity standard, where once two (or more) gas streams are combined, it is not possible to evaluate them separately.

In the case of streams combined from the clinker cooler and the kiln, where separate PM emission standards apply, facilities may submit site-specific compliance procedures to eliminate the effect of the clinker cooler exhaust gas on the Subpart EEE oxygen correction calculation. Any method proposed must be evaluated against the standards forbidding circumvention at 40 CFR 63.4(b) and against the requirements to provide means for accurate sampling of applicable emission standards at 40 CFR 63.7(d). Any claims made under these provisions should be submitted to the appropriate delegated authority for site-specific implementation.

Two commenters raised procedural objections to the Ash Grove and CKRC requests for clarification on this oxygen correction issue.[76] These comments appear to be based on the premise that EPA legally would be required to publish a new notice of proposed rulemaking before clarifying the issue. We disagree that such a new notice is necessary in situations such as this, where it is merely responding to requests for clarification and the clarification is fully consistent with the plain text of the governing regulation (as explained above). EPA also provided actual notice to all commenters and invited reply comments on the issue, both a permissible means of giving notice and one which removes any possible prejudice to persons receiving such notice. See *Small Refiners lead Phase-Down Task Force* v. *EPA*, 705 F. 2d 506, 540, 549 (D.C. Cir. 1983).

VI. Summary of Environmental, Energy, and Economic Impacts

A. What facilities are affected by the final amendments?

A description of the affected source categories is discussed in the April 20, 2004 proposed rule. 69 FR at 21207–09. In the October 12, 2005 final rule, we estimated that there are a total of 267 sources subject to the rule requirements, including 116 boilers (104 liquid fuel boilers and 12 solid fuel boilers), 92 on-site incinerators, 25 cement kilns, 15 commercial incinerators, nine lightweight aggregate kilns, and ten hydrochloric acid production furnaces. 70 FR at 59530. While we are aware of several changes to the universe of operating hazardous waste combustors, these estimates remain a reasonable representation of existing operating sources.[77]

Today's action also revises the particulate matter standards for new cement kilns and new incinerators. Based on comments received in response to the March 23, 2006 proposed rule, EPA does not believe that there are any cement kiln or incinerator sources that are currently complying with the new source particulate matter standards. In addition, EPA estimates that the majority of, if not all, sources that will be subject to the revised new source standards over the next five years will not be greenfield sources, but sources that upgrade at existing facilities (e.g., a new state-of-the-art preheater/precalciner kiln to replace one or more existing wet process cement kilns).[78]

B. What are the air quality impacts?

For existing sources, we estimate that there will be no air emission impacts as the result of this rule. This is because today's rule is not revising any of the emission standards promulgated in the October 12, 2005 final rule. Furthermore, the final amendments to the compliance and monitoring provisions will not affect the current level of control at existing facilities subject to the rule.

[74] See also memorandum entitled ''Potential Environmental Benefits of Combining Kiln Combustion and Clinker Cooler Gas,'' dated September 15, 2008, in the docket to the rule.

[75] See letter from Michael S. Alushin, USEPA, to Evelyn Rodriquez Cintron, Commonwealth of Puerto, entitled ''Opacity Limit for Commingled Emission Streams,'' dated March 24, 2005; letter from Michael S. Alushin, USEPA, to Francis Torres, Torres and Garcia P.S.C., entitled ''Opacity Limit for Commingled Emission Streams,'' dated March 24, 2005; memorandum from John B. Rasnic, USEPA, to USEPA Regional Directors and Regional Counsels, entitled ''Opacity Limitation for In-line Portland Cement Plants,'' dated September 7, 1996; and memorandum from John B. Rasnic, USEPA, to USEPA Regional Directors and Regional Counsels, entitled ''Opacity Limitations for the Portland Cement Plant New Source Performance Standards,'' dated April 6, 1995. These documents are available on the Agency's Applicability Determination Index Web site at *http://cfpub.epa.gov/adi/*.

[76] See docket items EPA–HQ–OAR–2004–0022–0548 and –0579.

[77] Given the small size of the lightweight aggregate kiln category, it is worth mentioning that the Solite Cascade plant in Virginia has ceased operations. Prior to closure, this plant operated four kiln sources. See also 70 FR at 59426.

[78] Examples of cement plants pursuing plant modernizations can be found in several docket items, including EPA–HQ–OAR–2004–0022–0383 (pg. 4), EPA–HQ–OAR–2004–0022–0521 (Attachments F, G, and H), and EPA–HQ–OAR–2004–0022–0604 (pg. 8).

For new sources, we are promulgating revised particulate matter standards for cement kilns and incinerators. The revised particulate matter standards for new cement kilns and new incinerators are 0.0069 gr/dscf (an increase from 0.0023 gr/dscf) and 0.0016 gr/dscf (an increase from 0.0015 gr/dscf), corrected to 7 percent oxygen, respectively. For a new preheater/precalciner cement kiln with an average gas flow rate of 250,000 dry standard cubic feet per minute (dscfm) emitting particulate matter at 0.0069 gr/dscf, we estimate emissions of particulate matter would be approximately 59 tons per year. A similarly designed new cement kiln emitting particulate matter at 0.0023 gr/dscf would emit approximately 20 tons per year. And for an incinerator with an average gas flow rate of 25,000 dscfm, we estimate that particulate matter emissions would increase by approximately 170 pounds per year per new incinerator if it were emitting particulate matter at 0.0016 gr/dscf as compared to 0.0015 gr/dscf. However, as discussed in section VI.A above, we do not believe that there are any cement kiln or incinerator sources that are currently in operation and complying with the particulate matter standards for new sources. Thus, we estimate that there will be no actual increases in particulate matter emissions at currently operating facilities as a result of today's action. Moreover, we believe that the majority of new cement kiln and incinerator sources over the next five years will be sources that upgrade at existing facilities (e.g., an older existing source replaced by a new source). See discussion in section VI.A above. For these facilities, particulate matter emissions will actually decrease from current levels because the new source standards finalized today are more stringent than the standards for existing sources. For example, the reduction in particulate matter emissions for a new preheater/precalciner cement kiln with an average gas flow rate of 250,000 dscfm emitting particulate matter at 0.028 gr/dscf (the existing source standard) as compared to 0.0069 gr/dscf (the new source standard) is approximately 180 tons per year.[79]

C. What are the water quality, solid waste, energy, cost and economic impacts?

This rule will result in negligible impacts to water quality, solid waste, and energy requirements from levels presented in the October 12, 2005 rule. 70 FR at 59529. We likewise estimate minimal cost and no economic impacts (as compared with the total costs and economic impacts that were calculated for the October 12, 2005 rule).[80]

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, this final rule is not considered to be an economically significant action because the social costs for this rule are significantly below the $100 million threshold established for economically significant actions. This is because this final rule does not have any significant new regulatory requirements as compared to the requirements discussed in the October 12, 2005 final rule, a rule with estimated total social costs of $22.6 million per year. See 70 FR at 59537.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Today's rule amendments consist of new compliance options, clarifications, and corrections to the existing rule that impose no new net information collection requirements on industry or EPA. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (see 40 CFR part 9) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0171, EPA ICR number 1773.08. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. As discussed in the October 12, 2005 final rule (of which today's final rule amends), we determined that hazardous waste combustion facilities are not owned by small governmental jurisdiction or nonprofit organizations. 70 FR at 59538. Therefore, in that rule only small businesses were analyzed for small entity impacts (a small entity was defined either by the number of employees or by the dollar amount of sales). We found that few—a total of eight out of 145 facilities—of the sources affected by the October 2005 rule were owned by small businesses. Finally, our analysis indicated that none of these facilities are likely to incur annualized compliance costs greater than one percent of gross annual corporate revenues. Cost impacts were found to range from less than 0.01 percent to 0.46 percent of annual gross corporate revenues. 70 FR at 59538.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. We note that today's final rule does not alter the number or type of small businesses that were discussed in the October 12, 2005 final rule. In addition, this rule revises or clarifies several compliance provisions that increases flexibility and improves implementation.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

[79] USEPA, ''Technical Support Document for HWC MACT Standards: Petitions for Reconsideration Support Document,'' October 2008, Section 2.3.3.

[80] USEPA, ''Technical Support Document for HWC MACT Standards: Petitions for Reconsideration Support Document,'' October 2008, Section 7.

EPA is taking this action to make certain amendments, corrections, and clarifications to the October 12, 2005 final rule (70 FR 59402 and 59538). Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The amendments, corrections, and clarifications made through this action contain no requirements that apply to such governments, impose no obligations upon them, and will not result in any expenditures by them or any disproportionate impacts on them. This rule is not subject to section 203 of UMRA.

E. Executive Order 13132: Federalism

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

This final rule does not have federalism implications. The final rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule makes certain amendments, corrections, and clarifications to the October 12, 2005 final rule (70 FR 59402 and 59538). These final amendments and clarifications do not impose requirements on State and local governments. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Today's rule amendments, corrections, and clarifications do not impose requirements on tribal governments. They also have no direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Finally, tribal governments do not own or operate any sources subject to the Hazardous Waste Combustor MACT rule. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it is based solely on technology performance. Furthermore, this final rule is not considered ''economically significant'' as defined under EO 12866.

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

This rule is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects because energy requirements will not be significantly impacted by the amendments, corrections, and clarifications finalized by this action.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The amendments, corrections, and clarifications finalized today do not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low income populations because it does not affect the level of protection provided to human health or the environment. The corrections and clarifications in today's rule will not affect the current level of control at facilities subject to these rules. In addition, for reasons discussed in Section VI above, we estimate that the revised particulate matter emission standards for new cement kilns and new incinerators will not result in any adverse or disproportional health or safety effects on minority or low-income populations. As a result, we believe our findings regarding Executive Order 12898 published in the October 12, 2005 rule are not adversely impacted by today's action. 70 FR at 59539.

K. Congressional Review

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major action'' as defined by 5 U.S.C. 804(2). This final rule will be effective on October 28, 2008.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 16, 2008.

Stephen L. Johnson,

Administrator.

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

PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

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

■ 2. Section 63.1206 is amended as follows:

■ a. By revising paragraph (a)(1)(ii)(B)(*3*).

■ b. By revising paragraphs (c)(8)(iii), (c)(8)(iv), and (c)(9).

§ 63.1206 When and how must you comply with the standards and operating requirements?

(a) * * *

(1) * * *

(ii) * * *

(B) * * *

(*3*) If you commenced construction or reconstruction of a cement kiln after April 20, 2004, you must comply with the new source emission standard for particulate matter under § 63.1220(b)(7)(i) by the later of October 28, 2008 or the date the source starts operations.

* * * * *

(c) * * *

(8) * * *

(iii) *Bag leak detection system corrective measures requirements.* The operating and maintenance plan required by paragraph (c)(7) of this section must include a corrective measures plan that specifies the procedures you will follow in the case of a bag leak detection system alarm or malfunction. The corrective measures plan must include, at a minimum, the procedures used to determine and record the time and cause of the alarm or bag leak detection system malfunction in accordance with the requirements of paragraph (c)(8)(iii)(A) of this section as well as the corrective measures taken to correct the control device or bag leak detection system malfunction or to minimize emissions in accordance with the requirements of paragraph (c)(8)(iii)(B) of this section. Failure to initiate the corrective measures required by this paragraph is failure to ensure compliance with the emission standards in this subpart.

(A) You must initiate the procedures used to determine the cause of the alarm or bag leak detection system malfunction within 30 minutes of the time the alarm first sounds; and

(B) You must alleviate the cause of the alarm or bag leak detection system malfunction by taking the necessary corrective measure(s) which may include, but are not to be limited to, the following:

(*1*) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions;

(*2*) Sealing off defective bags or filter media;

(*3*) Replacing defective bags or filter media, or otherwise repairing the control device;

(*4*) Sealing off a defective baghouse compartment;

(*5*) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system; or

(*6*) Shutting down the combustor.

(iv) *Excessive exceedances notification.* If you operate the combustor when the detector response exceeds the alarm set-point or the bag leak detection system is malfunctioning more than 5 percent of the time during any 6-month block time period, you must submit a notification to the Administrator within 30 days of the end of the 6-month block time period that describes the causes of the exceedances and bag leak detection system malfunctions and the revisions to the design, operation, or maintenance of the combustor, baghouse, or bag leak detection system you are taking to minimize exceedances and bag leak detection system malfunctions. To document compliance with this requirement:

(A) You must keep records of the date, time, and duration of each alarm and bag leak detection system malfunction, the time corrective action was initiated and completed, and a brief description of the cause of the alarm or bag leak detection system malfunction and the corrective action taken;

(B) You must record the percent of the operating time during each 6-month period that the alarm sounds and the bag leak detection system malfunctions;

(C) If inspection of the fabric filter demonstrates that no corrective action is required, then no alarm time is counted; and

(D) If corrective action is required, each alarm shall be counted as a minimum of 1 hour. Each bag leak detection system malfunction shall also be counted as a minimum of 1 hour.

(9) *Particulate matter detection system requirements.* You must continuously operate a particulate matter detection system (PMDS) that meets the specifications and requirements of paragraphs (c)(9)(i) through (v) of this section and you must comply with the corrective measures and notification requirements of paragraphs (c)(9)(vii) and (viii) of this section if your combustor either: Is equipped with an electrostatic precipitator or ionizing wet scrubber and you do not establish site-specific control device operating parameter limits under § 63.1209(m)(1)(iv) that are linked to the automatic waste feed cutoff system under paragraph (c)(3) of this section, or is equipped with a baghouse (fabric filter) and you do not operate a bag leak detection system as provided by paragraph (c)(8)(i)(B) of this section.

(i) *PMDS requirements.*—(A) The PMDS must be certified by the manufacturer to be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligrams per actual cubic meter unless you demonstrate, under § 63.1209(g)(1), that a higher detection limit would routinely detect particulate matter loadings during normal operations;

(B) The particulate matter detector shall provide output of relative or absolute particulate matter loadings;

(C) The PMDS shall be equipped with an alarm system that will sound an audible alarm when an increase in relative or absolute particulate loadings is detected over the set-point;

(D) You must install, operate, and maintain the PMDS in a manner consistent with the provisions of paragraph (c)(9) of this section and available written guidance from the U.S. Environmental Protection Agency or, in the absence of such written guidance, the manufacturer's written specifications and recommendations for installation, operation, maintenance and quality assurance of the system.

(1) *Set-points established without extrapolation.* If you establish the alarm set-point without extrapolation under paragraph (c)(9)(iii)(A) of this section, you must request approval from the regulatory authority, in the continuous monitoring system test plan, of the quality assurance procedures that will reasonably ensure that PMDS response values below the alarm set-point correspond to PM emission concentrations below those demonstrated during the comprehensive performance test. Your recommended

quality assurance procedures may include periodic testing under as-found conditions (i.e., normal operations) to obtain additional PM concentration and PMDS response run pairs, as warranted.

(2) *Set-points established with extrapolation.* If you establish the alarm set-point by extrapolation under paragraph (c)(9)(iii)(B) of this section, you must request approval from the regulatory authority, in the continuous monitoring system test plan, of the quality assurance procedures that will reasonably ensure that PMDS response values below the alarm set-point correspond to PM emission concentrations below the value that correlates to the alarm set-point.

(E) You must include procedures for installation, operation, maintenance, and quality assurance of the PMDS in the site-specific continuous monitoring system test plan required under §§ 63.1207(e) and 63.8(e)(3);

(F) Where multiple detectors are required to monitor multiple control devices, the system's instrumentation and alarm system may be shared among the detectors.

(G) You must establish the alarm set-point as a 6-hour rolling average as provided by paragraphs (c)(9)(ii), (c)(9)(iii), and (c)(9)(iv) of this section;

(H) Your PMDS must complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period. You must update the 6-hour rolling average of the detector response each hour with a one-hour block average that is the average of the detector responses over each 15-minute block; and

(I) If you exceed the alarm set-point (or if your PMDS malfunctions), you must comply with the corrective measures under paragraph (c)(9)(vii) of this section.

(ii) *Establishing the alarm set-point for operations under the Documentation of Compliance.* You must establish the alarm set-point for operations under the Documentation of Compliance (i.e., after the compliance date but prior to submitting a Notification of Compliance subsequent to conducting the initial comprehensive performance test) of an existing source as follows:

(A) You must obtain a minimum of three pairs of Method 5 or 5I data, provided in appendix A–3 to part 60 of this chapter, and PMDS data to establish an approximate correlation curve. Data obtained up to 60 months prior to the compliance date may be used provided that the design and operation of the combustor or PMDS has not changed in a manner that may adversely affect the correlation of PM concentrations and PMDS response.

(B) You must request approval from the regulatory authority, in the continuous monitoring system test plan, of your determination whether multiple correlation curves are needed considering the design and operation of your combustor and PMDS.

(C) You must approximate the correlation of the reference method data to the PMDS data.

(*1*) You may assume a linear correlation of the PMDS response to particulate matter emission concentrations;

(*2*) You may include a zero point correlation value. To establish a zero point, you must follow one or more of the following steps:

(*i*) Zero point data for in-situ instruments should be obtained, to the extent possible, by removing the instrument from the stack and monitoring ambient air on a test bench;

(*ii*) Zero point data for extractive instruments should be obtained by removing the extractive probe from the stack and drawing in clean ambient air;

(*iii*) Zero point data also can be obtained by performing manual reference method measurements when the flue gas is free of PM emissions or contains very low PM concentrations (e.g., when your process is not operating, but the fans are operating or your source is combusting only natural gas); and

(*iv*) If none of the steps in paragraphs (c)(9)(ii)(B)(*2*)(*i*) through (*iii*) of this section are possible, you must estimate the monitor response when no PM is in the flue gas (e.g., 4 mA = 0 mg/acm).

(*3*) For reference method data that were obtained from runs during a test condition where controllable operating factors were held constant, you must average the test run averages of PM concentrations and PMDS responses to obtain a single pair of data for PM concentration and PMDS response. You may use this pair of data and the zero point to define a linear correlation model for the PMDS.

(D) You must establish the alarm set-point as the PMDS response that corresponds to a PM concentration that is 50% of the PM emission standard or 125% of the highest PM concentration used to develop the correlation, whichever is greater. For reference method data that were obtained from runs during a test condition where controllable operating factors were held constant, you must use the average of the test run averages of PM concentrations for extrapolating the alarm set-point. The PM emission concentration used to extrapolate the alarm set-point must not exceed the PM emission standard, however.

(iii) *Establishing the initial alarm set-point for operations under the Notification of Compliance.* You must establish the initial alarm set-point for operations under the Notification of Compliance as provided by either paragraph (c)(9)(iii)(A) or paragraph (c)(9)(iii)(B) of this section. You must periodically revise the alarm set-point as provided by paragraph (c)(9)(iv) of this section.

(A) *Establishing the initial set-point without extrapolation.* (*1*) If you establish the initial alarm set-point without extrapolation, the alarm set-point is the average of the test run averages of the PMDS response during the runs of the comprehensive performance test that document compliance with the PM emission standard.

(*2*) During the comprehensive performance test, you may simulate PM emission concentrations at the upper end of the range of normal operations by means including feeding high levels of ash and detuning the emission control equipment.

(B) *Establishing the initial set-point by extrapolation.* You may extrapolate the particulate matter detector response to establish the alarm set-point under the following procedures:

(*1*) You must request approval from the regulatory authority, in the continuous monitoring system test plan, of the procedures you will use to establish an approximate correlation curve using the three pairs of Method 5 or 5I data (see methods in appendix A–3 of part 60 of this chapter) and PMDS data from the comprehensive performance test, the data pairs used to establish the correlation curve for the Documentation of Compliance under paragraph (c)(9)(ii) of this section, and additional data pairs, as warranted.

(*2*) You must request approval from the regulatory authority, in the continuous monitoring system test plan, of your determination of whether multiple correlation curves are needed considering the design and operation of your combustor and PMDS. If so, you must recommend the number of data pairs needed to establish those correlation curves and how the data will be obtained.

(*3*) During the comprehensive performance test, you may simulate PM emission concentrations at the upper end of the range of normal operations by means including feeding high levels of ash and detuning the emission control equipment.

(*4*) Data obtained up to 60 months prior to the comprehensive performance

test may be used provided that the design and operation of the combustor or PMDS has not changed in a manner that may adversely affect the correlation of PM concentrations and PMDS response.

(*5*) You may include a zero point correlation value. To establish a zero point, you must follow the procedures under paragraph (c)(9)(ii)(C)(*2*) of this section.

(*6*) You must use a least-squares regression model to correlate PM concentrations to PMDS responses for data pairs. You may assume a linear regression model approximates the relationship between PM concentrations and PMDS responses.

(*7*) You must establish the alarm set-point as the PMDS response that corresponds to a PM concentration that is 50% of the PM emission standard or 125% of the highest PM concentration used to develop the correlation, whichever is greater. The emission concentration used to extrapolate the PMDS response must not exceed the PM emission standard.

(iv) *Revising the Notification of Compliance alarm set-point.* (A) *Revising set-points established without extrapolation.* If you establish the alarm set-point without extrapolation under paragraph (c)(9)(iii)(A) of this section, you must establish a new alarm set-point in the Notification of Compliance following each comprehensive performance test as the average of the test run averages of the PMDS response during the runs of the comprehensive performance test that document compliance with the PM emission standard.

(B) *Revising set-points established with extrapolation.* If you establish the alarm set-point by extrapolation under paragraph (c)(9)(iii)(B) of this section, you must request approval from the regulatory authority, in the continuous monitoring system test plan, of the procedures for periodically revising the alarm set-point, considering the additional data pairs obtained during periodic comprehensive performance tests and data pairs obtained from other tests, such as for quality assurance.

(v) *Quality assurance.* (A) *Set-points established without extrapolation.* If you establish the alarm set-point without extrapolation under paragraph (c)(9)(iii)(A) of this section, you must request approval from the regulatory authority, in the continuous monitoring system test plan, of the quality assurance procedures that reasonably ensure that PMDS response values below the alarm set-point correspond to PM emission concentrations below the average of the PM concentrations demonstrated during the comprehensive performance test. Your recommended quality assurance procedures may include periodic testing under as-found conditions (i.e., normal operations) to obtain additional PM concentration and PMDS response run pairs, as warranted.

(B) *Set-points established with extrapolation.* If you establish the alarm set-point by extrapolation under paragraph (c)(9)(iii)(B) of this section, you must request approval from the regulatory authority, in the continuous monitoring system test plan, of the quality assurance procedures that reasonably ensure that PMDS response values below the alarm set-point correspond to PM emission concentrations below the value that correlated to the alarm set-point.

(vi) *PMDS are used for compliance assurance only.* For a PMDS for which the alarm set-point is established by extrapolation using a correlation curve under paragraphs (c)(9)(ii), (c)(9)(iii)(B), and (c)(9)(iv)(B) of this section, an exceedance of the PMDS response that appears to correlate with a PM concentration that exceeds the PM emission standard is not by itself evidence that the standard has been exceeded.

(vii) *PMDS corrective measures requirements.* The operating and maintenance plan required by paragraph (c)(7) of this section must include a corrective measures plan that specifies the procedures you will follow in the case of a PMDS alarm or malfunction. The corrective measures plan must include, at a minimum, the procedures used to determine and record the time and cause of the alarm or PMDS malfunction as well as the corrective measures taken to correct the control device or PMDS malfunction or minimize emissions as specified below. Failure to initiate the corrective measures required by this paragraph is failure to ensure compliance with the emission standards in this subpart.

(A) You must initiate the procedures used to determine the cause of the alarm or PMDS malfunction within 30 minutes of the time the alarm first sounds or the PMDS malfunctions; and

(B) You must alleviate the cause of the alarm or the PMDS malfunction by taking the necessary corrective measure(s) which may include shutting down the combustor.

(viii) *Excessive exceedances notification.* If you operate the combustor when the detector response exceeds the alarm set-point or when the PMDS is malfunctioning more than 5 percent of the time during any 6-month block time period, you must submit a notification to the Administrator within 30 days of the end of the 6-month block time period that describes the causes of the exceedances and the revisions to the design, operation, or maintenance of the combustor, emission control device, or PMDS you are taking to minimize exceedances. To document compliance with this requirement:

(A) You must keep records of the date, time, and duration of each alarm and PMDS malfunction, the time corrective action was initiated and completed, and a brief description of the cause of the alarm or PMDS malfunction and the corrective action taken;

(B) You must record the percent of the operating time during each 6-month period that the alarm sounds and the PMDS malfunctions;

(C) If inspection of the emission control device demonstrates that no corrective action is required, then no alarm time is counted; and

(D) If corrective action to the emission control device is required, each alarm shall be counted as a minimum of 1 hour. Each PMDS malfunction shall also be counted as a minimum of 1 hour.

■ 3. Section 63.1207 is amended by revising paragraphs (d)(4) and (m)(1)(i) introductory text to read as follows:

§ 63.1207 What are the performance testing requirements?

* * * * *

(d) * * *

(4) *Applicable testing requirements under the interim standards.* (i) *Waiver of periodic comprehensive performance tests.* Except as provided by paragraph (c)(2) of this section, you must conduct only an initial comprehensive performance test under the interim standards (§§ 63.1203 through 63.1205); all subsequent comprehensive performance testing requirements are waived under the interim standards. The provisions in the introductory text to paragraph (d) and in paragraph (d)(1) of this section apply only to tests used to demonstrate compliance with the standards under §§ 63.1219 through 63.1221.

(ii) *Waiver of confirmatory performance tests.* You are not required to conduct a confirmatory test under the interim standards (§§ 63.1203 through 63.1205). The confirmatory testing requirements in the introductory text to paragraph (d) and in paragraph (d)(2) of this section apply only after you have demonstrated compliance with the standards under §§ 63.1219 through 63.1221.

* * * * *

(m) * * *

(1) * * * (i) You are deemed to be in compliance with an emission standard based on the volumetric flow rate of

exhaust gas (i.e., μg/dscm or ppmv) if the maximum theoretical emission concentration (MTEC) does not exceed the emission standard over the relevant averaging period specified under § 63.1209(l), (n), and (o) of this section for the standard:

* * * * *

■ 4. Section 63.1210 is amended by revising the table in paragraph (a)(1) to read as follows:

§ 63.1210 What are the notification requirements?

(a) * * *

(1) * * *

Reference	Notification
63.9(b)	Initial notifications that you are subject to Subpart EEE of this Part.
63.9(d)	Notification that you are subject to special compliance requirements.
63.9(j)	Notification and documentation of any change in information already provided under § 63.9.
63.1206(b)(5)(i)	Notification of changes in design, operation, or maintenance.
63.1206(c)(8)(iv)	Notification of excessive bag leak detection system exceedances.
63.1206(c)(9)(v)	Notification of excessive particulate matter detection system exceedances.
63.1207(e), 63.9(e) 63.9(g)(1) and (3).	Notification of performance test and continuous monitoring system evaluation, including the performance test plan and CMS performance evaluation plan.[1]
63.1210(b)	Notification of intent to comply.
63.1210(d), 63.1207(j), 63.1207(k), 63.1207(l), 63.9(h), 63.10(d)(2), 63.10(e)(2).	Notification of compliance, including results of performance tests and continuous monitoring system performance evaluations.

[1] You may also be required on a case-by-case basis to submit a feedstream analysis plan under § 63.1209(c)(3).

* * * * *

■ 5. Section 63.1215 is amended as follows:

■ a. By revising paragraphs (e)(2)(i)(B), (e)(2)(i)(C), and (e)(2)(i)(D).

■ b. By adding paragraph (e)(3).

§ 63.1215 What are health-based compliance alternatives for total chlorine?

* * * * *

(e) * * *

(2) * * *

(i) * * *

(B) Your permitting authority should notify you of approval or intent to disapprove your eligibility demonstration within 6 months after receipt of the original demonstration, and within 3 months after receipt of any supplemental information that you submit. A notice of intent to disapprove your eligibility demonstration, whether before or after the compliance date, will identify incomplete or inaccurate information or noncompliance with prescribed procedures and specify how much time you will have to submit additional information or to achieve the MACT standards for total chlorine under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221. If your eligibility demonstration is disapproved, the permitting authority may extend the compliance date of the total chlorine standards up to one year to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT total chlorine standards.

(C) If your permitting authority has not approved your eligibility demonstration by the compliance date, and has not issued a notice of intent to disapprove your demonstration, you may begin complying, on the compliance date, with the HCl-equivalent emission rate limits you present in your eligibility demonstration provided that you have made a good faith effort to provide complete and accurate information and to respond to any requests for additional information in a timely manner. If the permitting authority believes that you have not made a good faith effort to provide complete and accurate information or to respond to any requests for additional information, however, the authority may notify you in writing by the compliance date that you have not met the conditions for complying with the health-based compliance alternative without prior approval. Such notice will explain the basis for concluding that you have not made a good faith effort to comply with the health-based compliance alternative by the compliance date.

(D) If your permitting authority issues a notice of intent to disapprove your eligibility demonstration after the compliance date, the authority will identify the basis for that notice and specify how much time you will have to submit additional information or to comply with the MACT standards for total chlorine under §§ 63.1216, 63.1217, 63.1219, 63.1220, and 63.1221. The permitting authority may extend the compliance date of the total chlorine standards up to one-year to allow you to make changes to the design or operation of the combustor or related systems as quickly as practicable to enable you to achieve compliance with the MACT standards for total chlorine.

* * * * *

(3) The operating requirements in the eligibility demonstration are applicable requirements for purposes of parts 70 and 71 of this chapter and will be incorporated in the title V permit.

* * * * *

■ 6. Section 63.1219 is amended by revising paragraph (b)(7) to read as follows:

§ 63.1219 What are the replacement standards for hazardous waste incinerators?

* * * * *

(b) * * *

(7) Except as provided by paragraph (e) of this section, particulate matter emissions in excess of 0.0016 gr/dscf corrected to 7 percent oxygen.

* * * * *

■ 7. Section 63.1220 is amended by removing paragraphs (a)(2)(iii) and (b)(2)(iii) and revising paragraph (b)(7) to read as follows.

§ 63.1220 What are the replacement standards for hazardous waste burning cement kilns?

* * * * *

(b) * * *

(7) For particulate matter, both:

(i) Emissions in excess of 0.0069 gr/dscf corrected to 7 percent oxygen; and

(ii) Opacity greater than 20 percent, unless your source is equipped with a bag leak detection system under § 63.1206(c)(8) or a particulate matter detection system under § 63.1206(c)(9).

* * * * *

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Federal Energy Regulatory Commission

18 CFR Part 35

Wholesale Competition in Regions With Organized Electric Markets; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket Nos. RM07–19–000 and AD07–7–000]

Wholesale Competition in Regions With Organized Electric Markets

Issued October 17, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations under the Federal Power Act to improve the operation of organized wholesale electric markets in the areas of: Demand response and market pricing during periods of operating reserve shortage; long-term power contracting; market-monitoring policies; and the responsiveness of regional transmission organizations (RTOs) and independent system operators (ISOs) to their customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services. Each RTO and ISO will be required to make certain filings that propose amendments to its tariff to comply with the requirements in each area, or that demonstrate that its existing tariff and market design already satisfy the requirements.

DATES: *Effective Date:* This Final Rule will become effective December 29, 2008.

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I. Introduction

1. This Final Rule addresses reforms to improve the operation of organized wholesale electric power markets.[1] Improving the competitiveness of organized wholesale markets is integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable and not unduly discriminatory or preferential rates. Effective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers. National policy has been, and continues to be, to foster competition in wholesale electric power markets. This policy was embraced in the Energy Policy Act of 2005 (EPAct 2005),[2] and is reflected in Commission policy and practice. The Commission balances the mix of regulation and competition based on changing circumstances, taking into account such factors as the opportunities for competition to control market power, advances in technology, changes in economies of scale, and new state and federal laws that affect the energy industry.

2. The Commission has a duty to improve the operation of wholesale power markets. To that end, in this Final Rule, the Commission is making reforms to improve the operation of organized wholesale electric markets in the areas of demand response, long-term power contracting, market monitoring policies, and RTO and ISO responsiveness. By making these reforms, the Commission is not seeking to fundamentally redesign organized markets; rather, these reforms are intended to be incremental improvements to the operation of organized markets without undoing or upsetting the significant efforts that have already been made in providing demonstrable benefits to wholesale customers.

3. In the areas of demand response and the use of market prices to elicit demand response, the Commission is requiring RTOs and ISOs to: (1) Accept bids from demand response resources in RTOs' and ISOs' markets for certain ancillary services on a basis comparable to other resources; (2) eliminate, during a system emergency, a charge to a buyer that takes less electric energy in the real-time market than it purchased in the day-ahead market; (3) in certain circumstances, permit an aggregator of retail customers (ARC)[3] to bid demand response on behalf of retail customers directly into the organized energy market; (4) modify their market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power; and (5) study whether further reforms are necessary to

[1] Organized market regions are areas of the country in which a regional transmission organization (RTO) or independent system operator (ISO) operates day-ahead and/or real-time energy markets. The following RTOs and ISOs have organized markets: PJMInterconnection, LLC (PJM), New York Independent System Operator, Inc. (NYISO), Midwest Independent Transmission System Operator, Inc. (Midwest ISO), ISO New England, Inc. (ISO New England), California Independent Service Operator Corp. (CAISO), and Southwest Power Pool, Inc. (SPP).

[2] Pub. L. 109–58, 119 Stat. 594 (2005).

[3] We will use the phrase ''aggregator of retail customers,'' or ARC, to refer to an entity that aggregates demand response bids (which are mostly from retail loads).

eliminate barriers to demand response in organized markets.

4. With regard to long-term power contracting, the Commission is requiring RTOs and ISOs to dedicate a portion of their Web sites for market participants to post offers to buy or sell power on a long-term basis. This requirement will promote greater use of long-term contracts by improving transparency among market participants.

5. To improve market monitoring, the Commission is requiring that RTOs and ISOs provide their Market Monitoring Units (MMU) with access to market data, resources and personnel sufficient to carry out their duties, and that the MMU (or the external MMU in a hybrid structure) report directly to the RTO or ISO board of directors.[4] In addition, the Commission is requiring that the MMU's functions include: (1) Identifying ineffective market rules and recommending proposed rules and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying appropriate Commission staff of instances in which a market participant's behavior may require investigation. The Commission is also expanding the list of recipients of MMU recommendations regarding rule and tariff changes, and broadening the scope of behavior to be reported to the Commission.

6. The Commission is also modifying MMU participation in tariff administration and market mitigation, requiring each RTO and ISO to include ethics standards for MMU employees in its tariff, and requiring each RTO and ISO to consolidate all its MMU provisions in one section of its tariff. The Commission is expanding the dissemination of MMU market information to a broader constituency, with reports made on a more frequent basis than they are now, and reducing the time period before energy market bid and offer data are released to the public.

7. Finally, the Commission establishes an obligation for each RTO and ISO to make reforms, as necessary, to increase its responsiveness to customers and other stakeholders and will assess each RTO's or ISO's compliance using four responsiveness criteria: (1) Inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.

8. In each of these four areas, the Commission is requiring each RTO or ISO to consult with its stakeholders and make a compliance filing that explains how its existing practices comply with the Final Rule in this proceeding, or its plans to attain compliance.

9. Significant differences exist between regions, including differences in industry structure, mix of ownership, sources of electric generation, population densities, and weather patterns. Some regions have organized spot markets administered by an RTO or ISO, and others rely solely on bilateral contracting between wholesale sellers and buyers. We recognize and respect these differences across various regions. At the same time, wholesale competition can serve customers well in all regions. The focus of this Final Rule is to further improve the operation of wholesale competitive markets in organized market regions.

II. Background

10. The Commission has acted over the last few decades to implement Congressional policy to expand the wholesale electric power markets to facilitate entry of new generators and to support competitive markets. Absent a single national power market, the development of regional markets is the best method of facilitating competition within the power industry, and the Commission has made sustained efforts to recognize and foster such markets.

11. In 2007, the Commission held several public conferences to gather information and address issues on competition at the wholesale level and other related issues.[5] At these conferences, the Commission examined issues affecting competition in the RTO and ISO regions, including the levels of wholesale prices, the need for long-term power contracts, the effectiveness of market monitoring, and the lack of adequate demand response. The Commission also addressed concerns related to the RTO and ISO board of directors' responsiveness to their customers and other stakeholders.

12. On June 22, 2007, the Commission issued an Advance Notice of Proposed Rulemaking (ANOPR),[6] identifying four specific issues in organized market regions that were not being adequately addressed or were not under consideration in other proceedings. These areas were: (1) The role of demand response in organized markets and greater use of market prices to elicit demand response during periods of operating reserve shortage; (2) increasing opportunities for long-term power contracting; (3) strengthening market monitoring; and (4) enhancing the responsiveness of RTOs and ISOs to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services. The Commission presented preliminary views on proposed reforms for these areas and sought comment on them.

13. After receiving and considering over a hundred comments on the ANOPR, on February 22, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR).[7] In the NOPR, pursuant to the Commission's responsibility under sections 205 and 206 of the Federal Power Act (FPA),[8] the Commission proposed reforms in the four specific areas identified above that were designed to ensure just and reasonable rates, to remedy undue discrimination and preference, and to improve wholesale competition in regions with organized markets. As noted in the NOPR, these proposed reforms are intended to improve the operation of wholesale competition in organized markets.[9]

14. In the NOPR, the Commission also noted that the reforms proposed in this proceeding do not represent its final effort to improve the functioning of competitive organized markets for the benefit of consumers; rather, the Commission will continue to evaluate specific proposals that may strengthen organized markets.[10] To that end, for example, the Commission proposed to require each RTO or ISO to study whether further reforms are necessary to eliminate barriers to demand response in organized markets. Any reforms must ensure that demand response resources are treated on a basis comparable to other resources. The Commission also ordered two staff technical conferences: (1) One to investigate proposals by American Forest and the Portland Cement Association, *et al.* to modify the design of organized markets; [11] and (2) a separate conference to consider several issues related to demand response participation in wholesale

[4] Our use of the phrase ''board of directors'' also includes the board of managers, board of governors, and similar entities.

[5] Three technical conferences were held on February 27, 2007, April 5, 2007, and May 8, 2007.

[6] *Wholesale Competition in Regions with Organized Electric Markets,* Advance Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,617 (2007).

[7] *Wholesale Competition in Regions with Organized Electric Markets,* Notice of Proposed Rulemaking, 73 FR 12,576 (March 7, 2008), FERC Stats. & Regs. ¶ 32,628 (2008).

[8] 16 U.S.C. 824d—824e.

[9] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 11.

[10] *Id.* P 1.

[11] The technical conference was held on May 7, 2008. *See* Supplemental Notice of Technical Conference, Capacity Markets in Regions with Organized Electric Markets, Docket No. AD08–4–000 (April 25, 2008).

markets.[12] Further, the Commission directed each RTO or ISO to provide a forum for affected consumers to voice specific concerns (and to propose regional solutions) on how to improve the efficient operation of competitive markets.[13]

III. Discussion

A. Demand Response and Pricing During Periods of Operating Reserve Shortages in Organized Markets

15. This section of the Final Rule makes several reforms to further eliminate barriers to demand response participation in organized energy markets. These reforms are to ensure that demand response is treated comparably to other resources. To that end, the Commission will require RTOs and ISOs to: (1) Accept bids from demand response resources in their markets for certain ancillary services, on a basis comparable to other resources; (2) eliminate, during a system emergency, certain charges to buyers in the energy market for voluntarily reducing demand; (3) permit ARCs to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets; and (4) modify their rules governing price formation during periods of operating reserve shortage to allow the market-clearing price during periods of operating reserve shortage to more accurately reflect the true value of energy.

1. Background

16. Commission policy does not favor granting preference for demand response; rather, our goal is to eliminate barriers to the participation of demand response in the organized power markets by ensuring comparable treatment of resources. This policy reflects the Commission's view that the cost of producing electricity and the value to customers of electric power varies over time and from place to place.[14] Demand response can provide competitive pressure to reduce wholesale power prices; increases awareness of energy usage; provides for more efficient operation of markets; mitigates market power; enhances reliability; and in combination with certain new technologies, can support the use of renewable energy resources, distributed generation, and advanced metering. Thus, enabling demand-side resources, as well as supply-side resources, improves the economic operation of electric power markets by aligning prices more closely with the value customers place on electric power. A well-functioning competitive wholesale electric energy market should reflect current supply and demand conditions.

17. The Commission's policy also reflects its responsibility under sections 205 and 206 of the FPA to remedy any undue discrimination and preference in organized markets. To that end, the Commission explicitly addressed demand response in its Open Access Transmission Tariff (OATT) Reform (Order No. 890) [15] and reliability standards (Order No. 693).[16]

18. Additionally, on numerous occasions, the Commission has expressed the view that the wholesale electric power market works best when demand can respond to the wholesale price.[17] Also, the Commission has issued numerous orders over the last several years on various aspects of electric demand response in organized markets, with the goal of removing unnecessary obstacles to demand response participating in the wholesale power markets of RTOs and ISOs.[18] To that end, some of these orders approved various types of demand response programs, including programs to allow demand response to be used as a capacity resource [19] and as a resource during system emergencies,[20] to allow wholesale buyers and qualifying large retail buyers to bid demand response directly into the day-ahead and real-time energy markets and certain ancillary service markets, particularly as a provider of operating reserves, as well as programs to accept bids from ARCs.[21] The Commission also has approved special demand response applications such as use of demand response for synchronized reserves and regulation service.[22] The theme underlying the Commission's approval of these programs has been to allow demand response resources to participate in these markets on a basis that is comparable to other resources.

19. While the Commission and the various RTOs and ISOs have done much to eliminate barriers to demand response in organized power markets, more needs to be done to ensure comparable treatment of all resources. Therefore, as discussed below, the Commission is taking action in this Final Rule to further eliminate barriers to demand response in organized power markets.

2. Ancillary Services Provided by Demand Response Resources

20. The Commission included several components in the NOPR obligating RTOs and ISOs to accept bids from demand response resources for ancillary services. First, demand response resources were required to meet necessary technical requirements established by the RTO or ISO in order to participate in these markets. Second, the Commission proposed that demand response resources be allowed to specify the frequency and duration of their service through the use of additional bidding parameters. Finally, the Commission proposed that RTOs and ISOs perform a small demand response resource assessment to evaluate the technical feasibility and value to the market of such smaller resources. Comments in response to these issues are addressed below.

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[12] The technical conference was held on May 21, 2008. *See* Supplemental Notice of Technical Conference, Demand Response in Organized Electric Markets, Docket No. AD08–8–000 (May 13, 2008).

[13] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 11.

[14] That is, for two customers at the same time and place, one customer may prefer to reduce consumption if the price is high, and the other may be willing to pay a high price to avoid curtailment in an emergency.

[15] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g,* Order No. 890–A, 73 FR 2,984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g,* Order No. 890–B, 73 FR 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008).

[16] *See Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[17] *See, e.g., New England Power Pool and ISO New England, Inc.,* 101 FERC ¶ 61,344, at P 44–49 (2002), *order on reh'g,* 103 FERC ¶ 61,304, *order on reh'g,* 105 FERC ¶ 61,211 (2003); *PJM Interconnection, LLC,* 95 FERC ¶ 61,306 (2001); *PJM Interconnection, LLC,* 99 FERC ¶ 61,227 (2002); *Southwest Power Pool, Inc.,* 116 FERC ¶ 61,289 (2006).

[18] *See, e.g., New York Indep. Sys. Operator, Inc.,* 92 FERC ¶ 61,073, *order on clarification,* 92 FERC ¶ 61,181 (2000), *order on reh'g,* 97 FERC ¶ 61,154 (2001); *New England Power Pool and ISO New England, Inc.,* 100 FERC ¶ 61,287, *order on reh'g,* 101 FERC ¶ 61,344 (2002), *order on reh'g,* 103 FERC ¶ 61,304, *order on reh'g,* 105 FERC ¶ 61,211 (2003); *PJM Interconnection, LLC,* 95 FERC ¶ 61,306 (2001); *PJM Interconnection, LLC,* 99 FERC ¶ 61,139 (2002); *PJM Interconnection, LLC,* 99 FERC ¶ 61,227 (2002).

[19] *See, e.g., PJM Interconnection, LLC,* 117 FERC ¶ 61,331 (2006); *Devon Power LLC,* 115 FERC ¶ 61,340, *order on reh'g,* 117 FERC ¶ 61,133 (2006), *appeal pending sub nom. Maine Pub. Utils. Comm'n v. FERC,* No. 06–1403 (DC Cir. 2007).

[20] *See, e.g., New York Indep. Sys. Operator, Inc.,* 95 FERC ¶ 61,136 (2001); *NSTAR Services Co. v. New England Power Pool,* 95 FERC ¶ 61,250 (2001); *New England Power Pool and ISO New England, Inc.,* 100 FERC ¶ 61,287, *order on reh'g,* 101 FERC ¶ 61,344 (2002), *order on reh'g,* 103 FERC ¶ 61,304, *order on reh'g,* 105 FERC ¶ 61,211 (2003); *PJM Interconnection, LLC,* 99 FERC ¶ 61,139 (2002).

[21] *See, e.g., New York Indep. Sys. Operator, Inc.,* 95 FERC ¶ 61,223 (2001); *New England Power Pool and ISO New England, Inc.,* 100 FERC ¶ 61,287, *order on reh'g,* 101 FERC ¶ 61,344 (2002), *order on reh'g,* 103 FERC ¶ 61,304, *order on reh'g,* 105 FERC ¶ 61,211 (2003); *PJM Interconnection, LLC,* 99 FERC ¶ 61,227 (2002).

[22] *See, e.g., PJM Interconnection, LLC,* 114 FERC ¶ 61,201 (2006).

a. Ancillary Services Market

21. In the NOPR, the Commission proposed to obligate each RTO or ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources: (1) are technically capable of providing the ancillary service and meet the necessary technical requirements; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.[23] The Commission stated that this proposal would apply to competitively-bid markets, if any, for energy imbalance, spinning reserves, supplemental reserves, reactive supply and voltage control, and regulation and frequency response as defined in the *pro forma* OATT, or to the markets for their functional equivalents in an RTO or ISO tariff.[24]

22. The Commission proposed that, on compliance, an RTO or ISO must either propose amendments to its tariff to comply with the proposed requirement or demonstrate that its existing tariff and market design already satisfy the requirement. This filing would be submitted within six months of the date the Final Rule is published in the **Federal Register**. The Commission proposed to assess whether each filing satisfies the proposed requirement and issue additional orders as necessary.[25]

i. Comments

23. Many commenters support the Commission's proposal and agree that allowing demand response resources to participate in ancillary services markets would increase competition, enhance system reliability, and lower the overall price for ancillary services.[26] For instance, Public Interest Organizations assert that the presence of demand response in these markets will mitigate the exercise of market power and allow large amounts of variable resources (*e.g.*, wind and solar) to be integrated into the grid.[27] DRAM states that allowing demand response to participate in ancillary services markets and other types of wholesale markets would lead to a more viable and sustainable demand response industry, and to the availability of a larger overall demand response resource.[28] Comverge maintains that the Commission's proposal is particularly appropriate because it enables market participants to simultaneously participate in capacity markets (or resource adequacy) and operating reserve markets.[29] DRAM and APPA, while in support of the Commission's proposal, state that demand response resources must be able to meet the appropriate technical requirements.[30]

24. Several commenters state that they support the Commission's clarification in the NOPR that the proposal would not require the adoption of competitive bidding processes in areas where they were not previously used.[31] APPA states that it opposes the development of new RTO or ISO markets for ancillary services just so demand response resources could participate in them.[32] Similarly, EEI asserts that this proposal should be limited to competitively-bid markets only, as defined in the proposal.[33] Comverge also agrees with the Commission's proposed requirement that this provision apply only to competitively-bid markets, but asks the Commission to include two other services within its proposal: Out-of-Market[34] and Scarcity Pricing.[35]

25. Xcel requests that the Commission clarify that the proposed rule does not require a demand response provider to offer its potential demand response into the market.[36] Xcel argues that a demand response provider should be free to evaluate its willingness to bid its offering into the market.

26. In its reply comments, Allied Public Interests Groups note that providing for comparable treatment of demand-side resources in wholesale markets is critical to making those markets competitive, efficient, reliable and sustainable. Therefore, they ask the Commission to clarify the meaning and implication of the term ''comparable treatment.''[37]

27. NARUC argues that the state-law exemption within the NOPR should be modified to avoid displacing state authority and state policy decisions on demand response.[38] NARUC explains that this exemption places the burden on state regulators to show that the demand response proposal conflicts with state laws or regulations. NARUC would like to see this reversed, and the burden placed on the RTO or ISO to obtain the state regulator's permission to allow the demand response proposal. Similarly, Pennsylvania PUC states that the state exemption highlights a jurisdictional issue and recommends that the Commission continue to work with state authorities to eliminate these types of barriers to demand response.[39]

28. Some commenters recommend that each RTO and ISO should determine new rules for ancillary services.[40] Dominion states that each RTO and ISO should have flexibility to develop the necessary rules to modify existing ancillary services markets within its stakeholder processes.[41] Comverge suggests that these rules be determined by each RTO and ISO, but initially framed in a Commission technical conference, consistent with the Commission's substantive recommendations to amend RTO and ISO bidding rules.[42] SoCal Edison-SDG&E argue that an overly prescriptive national approach may be counterproductive.[43]

29. While Midwest Energy supports the proposal, it is concerned that the quest for comparability may evolve into a program that treats demand response preferentially with respect to competitive resource providers. It states

[23] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 56.

[24] *Id.*

[25] *Id.* P 63.

[26] *E.g.*, American Forest at 5; BlueStar Energy at 1–2; California PUC at 9; Cogeneration Parties at 2–3; Dominion at 4; Duke Energy at 3; Integrys Energy at 9; ISO/RTO Council at 3–4; Industrial Coalitions at 9; Midwest Energy at 2–3; North Carolina Electric Membership at 3–4; NYISO at 5; Public Interest Organizations at 5–6; Reliant at 3; and Wal-Mart at 5.

[27] Public Interest Organizations at 4–5.

[28] DRAM at 5–6.

[29] Comverge at 11.

[30] DRAM at 4–5; APPA at 31–32.

[31] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 58.

[32] APPA at 34–35.

[33] EEI at 11.

[34] It is not entirely clear what service Comverge is referring to here. It is possible that Comverge is referring to Out-Of-Market Dispatch, *i.e.*, RTO or ISO dispatch actions that are not reflected in the ISO's real-time market prices. In CAISO, for example, dispatchers procure energy to make up for imbalances by contacting selected resources or control area operators that chose not to submit any bids into the ISO's or RTO's markets. This practice results in bilateral trades negotiated by the RTO or ISO.

[35] Comverge at 13–14. Similarly, it is not clear to the Commission what service Comverge is referring to, as Scarcity Pricing is not an ancillary service.

[36] Xcel at 7.

[37] Allied Public Interest Groups at 1.

[38] NARUC at 7. The proposal for ancillary services market states: ''The Commission proposed to obligate each RTO or ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources (1) are technically capable of providing the ancillary service and meet the necessary technical requirements, and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, *unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.''* NOPR, FERC Stats. & Regs. ¶ 32,628 at P 56 (emphasis added).

[39] Pennsylvania PUC at 11.

[40] *See, e.g.*, Comverge at 17; Dominion at 4; and SoCal Edison-SDG&E at 3.

[41] Dominion at 4.

[42] Comverge at 17.

[43] SoCal Edison-SDG&E at 3.

that any such preferential treatment could lead to overall increases in costs to customers through the subsidization of demand response.[44] Therefore, Midwest Energy asks that the Commission require that: (1) each RTO or ISO demand response program be subject to a net-benefits test and (2) all demand-side resources be subject to a performance evaluation.[45]

30. Reliant comments that demand response resources should be subject to penalties for non-performance comparable to those that supply resources face. Reliant also states that demand response resources that supply ancillary services should participate in RTO and ISO ancillary services markets primarily via the entity that schedules and financially settles the load for their meters.[46] Allied Public Interest Groups agrees that demand response resources should face comparable penalties for non-performance, but notes in reply comments that ''comparable'' penalties does not mean ''the same'' penalties.[47]

31. Public Interest Organizations urge the Commission to expand the demand response provisions to include energy efficiency resources, environmentally benign behind-the-meter distributed generation, and all other demand-side resources that are capable of providing the service.[48] Public Interest Organizations explain in their comments that ''energy efficient resources produce load reductions for the length of their measured lives, relieving congestion, reducing market costs, and increasing system reliability.'' They state that ''a bundle of energy efficient resources that reduces energy use on a large scale—an 'efficiency power plant' or EPP—can achieve energy savings that are just as predictable and substantial as the energy output of a conventional power plant. The consistent savings from these energy efficiency programs and investments can be thought of as a virtual power plant.'' [49] Allied Public Interest Groups assert that the comparable treatment proposed for demand response in the NOPR should be expanded to cover all reliable and efficient demand response resources that are technically capable of providing the service needed. Allied Public Interest Groups notes that limiting participation in ancillary services markets to ''traditional'' demand response resources may unintentionally exclude innovative new technologies that can help achieve goals of system reliability and efficiency.[50]

32. TAPS asserts that behind-the-meter generation can perform as a demand resource in ancillary services markets. TAPS states that the regulatory language should be modified to include this type of resources as well as reliability-based demand response. They note that reliability-based demand response, or demand response that is not in reaction to an increase in the price of electric energy or to incentive payments, is currently not included in the regulatory definition of Demand Response contained within this proceeding.[51]

33. Some supporters state that the Commission should address in the Final Rule compensation for demand response resources. For instance, Industrial Consumers suggest that the payment structure for demand response resources should be comparable to the payment of a generator.[52] They also note that to promote the development of demand response resources and fairly compensate these resources for their ancillary services, a methodology for calculating and accurately representing customer baselines must be developed on a consistent basis.[53] EnerNOC agrees and asks the Commission to require RTOs and ISOs to demonstrate in future compliance filings that customer baseline methodologies appropriately address concerns of accuracy, integrity, and comparable treatment of demand response resources.[54]

34. E.ON U.S. does not support the Commission's proposal. E.ON U.S. believes that the Commission's proposal mandates the purchase of demand response products regardless of price, and that such a practice will distort the market and create additional costs for end-use customers.[55] E.ON U.S. argues that the Commission should only require comparable treatment of demand response resources and not place any extra emphasis or incentive on their use.

35. Several commenters request that the Commission develop a *pro forma* tariff regarding demand response participation in ancillary services markets. Industrial Consumers argue that the Commission should prescribe specific *pro forma* tariff language for RTOs and ISOs to adopt within 30 days of the Final Rule's effective date. Otherwise, they assert that piecemeal implementation by RTOs and ISOs may result in delay, inefficiency, and inconsistency.[56] Similarly, Industrial Coalitions state that the Commission should incorporate into a *pro forma* demand response tariff appropriate minimum standards to enable demand response resources to provide, and be comparably compensated for, ancillary services. Industrial Coalitions and Steel Manufacturers contend that the Commission should obligate RTOs and ISOs to demonstrate that their own tariffs are consistent with or superior to the *pro forma* provisions and any deviations from the *pro forma* tariff should only be permitted if they can provide a clear justification for doing so.[57]

36. A few commenters express concern about the Western Electricity Coordinating Council's (WECC) regional reliability standard addressing operating reserve requirements because WECC currently allows demand response to supply only non-spinning reserves.[58] For example, CAISO points out that WECC's standard is inconsistent with the Commission's directive in Order No. 890 that a transmission provider must permit non-generation resources to provide ancillary services to the extent they are capable of doing so. It argues that WECC is non-compliant with Order No. 693, which includes a requirement explicitly providing that demand-side management may be used as a resource for contingency reserves. Therefore, CAISO comments that the Commission should direct the Electric Reliability Organization (ERO) to effect a change in WECC requirements.[59]

37. Several entities ask that the Final Rule not disturb or replace ongoing proceedings in individual regions. Midwest ISO states that the Commission recently approved its integration of demand response resources to participate in Midwest ISO ancillary services markets, on a basis comparable to other resources (ASM Proposal).[60] Given this, Midwest ISO requests that the Commission find that its ASM Proposal satisfies the NOPR's

[44] Midwest Energy at 3.

[45] *Id.*

[46] Reliant at 4.

[47] Allied Public Interest Groups at 4.

[48] Public Interest Organizations at 4.

[49] *Id.* at 13–14.

[50] Allied Public Interest Groups at 7.

[51] TAPS at 9.

[52] Industrial Consumers at 13.

[53] *Id.* at 14.

[54] EnerNOC at 11.

[55] E.ON U.S. at 14.

[56] Industrial Consumers at 7–8. Industrial Consumers note that the Commission's practice extending back to Order No. 888 has been to standardize rules and procedures for generators and other transmission users with the *pro forma* OATT as necessary to promote consistency and to avoid undue discrimination. *Id.*

[57] Industrial Coalitions at 11; Steel Manufacturers at 10.

[58] California DWR at 8; CAISO at 5; California PUC at 9–10; and PG&E at 6–7.

[59] CAISO at 5; *see also* California PUC at 10.

[60] *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,283 (2005), *order on reh'g*, 123 FERC ¶ 61,297 (2008) (ASM Order).

requirement that each RTO and ISO submit for Commission approval standards by which demand response resources are able to participate and bid in the ancillary service markets on comparable terms as other resources.[61] CAISO states that it will comply with the NOPR requirement in the Release 1A enhancements to its Markets Redesign & Technology Upgrade (MRTU).[62] It asks the Commission to clarify that it does not intend to replace the specific schedule that it has accepted for the CAISO's implementation of MRTU with the generic compliance schedule proposed in the NOPR.[63]

38. In addition, while Maine PUC agrees that demand response is important to the efficient functioning of wholesale electric markets, it states that the Commission should allow ISO New England to work with state regulators and NEPOOL Participants to make existing programs more robust and to eliminate barriers to demand response participation.[64] Maine PUC notes that demand response programs in New England are achieving price savings and reducing the need for additional generation and transmission, demonstrated by the significant participation of demand response resources in the forward capacity market. Therefore, Maine PUC states that the Commission should not impose the NOPR's specific requirements for demand response on ISO New England.

39. SPP states that it does not currently have an ancillary services market; however, it reports that consideration and incorporation of demand response in future market development is currently being undertaken by SPP's Working Groups and Task Forces.[65]

40. Alcoa maintains that the Commission's proposal is well-intended, but falls short of what is needed to ensure non-discriminatory treatment of demand response bids by industrial customers. Alcoa asserts that the Commission's proposal is incomplete because it relies too heavily on vague concepts such as comparability of resources and reasonable requirements to increase access to ancillary services. Alcoa argues that there should be no restriction on the amount of participation by demand response resources in organized wholesale markets, and suggests that, at a minimum, regional operators should be required to justify such restrictions to the Commission and demonstrate that they are necessary for technical reasons.[66]

41. Several commenters support the Commission's conclusion that it is not appropriate for the Commission to develop a standardized set of technical requirements.[67] California PUC stresses the importance of allowing RTOs and ISOs the flexibility to modify requirements in the future, as experience is gained with demand response programs. EEI believes that standardization of these requirements could result in unnecessary expense and delay in implementation by requiring incompatible infrastructure across different RTOs and ISOs. EnerNOC believes that the Commission struck the appropriate balance by requiring coordination among the RTOs and ISOs without mandating standardization.

42. North Carolina Electric Membership states that the Commission should require RTOs and ISOs to develop technical requirements in conjunction with stakeholders to ensure that all interests are properly considered. Old Dominion also states that any standards developed in response to the Commission's requirement should be comprehensive and result from a stakeholder process.

43. LPPC supports the Commission's recognition that demand response resources must be technically capable of providing ancillary services. In addition, LPPC agrees with the Commission's statement that RTOs and ISOs need to impose requirements on telemetry and metering to allow demand response resources to fully participate in ancillary services markets. LPPC adds that an important element of any RTO- or ISO-led ancillary services program must be performance monitoring to ensure that demand response resources truly respond when called upon.[68] Also, Old Dominion argues that the ability to accurately measure and verify demand response is necessary to guarantee that these resources are providing real benefits to the market.[69]

44. APPA supports the Commission's overall proposal, but states that the Commission should recognize that metering, telemetry and performance requirements that may have to be imposed on demand-side resources to ensure their reliable performance will be more stringent than the requirements most retail customers are used to accommodating. APPA questions whether end-use customers will offer ancillary services that may require them to reduce consumption substantially on very short notice. APPA asserts that program participants may drop out when called upon too frequently. APPA states that it may prove difficult to reconcile the rigorous technical requirements for end users necessitated by the instantaneous nature of certain ancillary services with the desire of many larger loads for reliability, flexibility and convenience.[70]

45. NYISO recommends that the Final Rule clarify the NOPR's proposed regulatory language to specify that demand response resources must also meet applicable reliability requirements before they are permitted to bid into markets.[71] NYISO states that this language would clearly articulate the Commission's support for the integration of demand resources into ancillary services markets without overriding requirements adopted by NERC or the New York State Reliability Council. Further, it notes that this approach would be consistent with Order 890–A, which allows RTOs and ISOs to adopt reasonable reliability related limitations on demand resource participation.[72]

46. Comverge requests that the Commission ensure that any requirements imposed on demand response resources are not overly technical and burdensome.[73] California PUC states that telemetry, for example, is necessary for resources offering ancillary services, but a telemetry requirement for every participant (such as small commercial and residential customers) may be excessive and could erect a barrier to entry for these smaller customers, particularly when not every demand response supplier has the money to install real-time telemetry and metering.[74] EnerNOC also mentions this concern, and asks that the Commission clarify that its ''reasonableness'' requirement is aimed at ensuring that reasonable technical requirements not be unduly restrictive on demand response resources, such as those that may add unwarranted and unnecessary costs to participation. EnerNOC states that technical standards should focus on the reliability parameters of the

[61] Midwest ISO at 9.

[62] *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006), *order on reh'g*, 119 FERC ¶ 61,076 (2007).

[63] CAISO at 2–4.

[64] Maine PUC at 3–4.

[65] SPP at 5.

[66] Alcoa at 2–3.

[67] *E.g.*, California PUC at 9; EEI at 12; EnerNOC at 9; NYISO at 6; and North Carolina Electric Membership at 4.

[68] LPPC at 6–7.

[69] Old Dominion at 7.

[70] APPA at 33–34.

[71] NYISO at 5–6.

[72] *Id.* at 6 (citing Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 at P 499).

[73] Comverge at 13.

[74] California PUC at 11.

particular ancillary service and allowing demand response resources to utilize alternative methods to meet these standards.[75]

ii. Commission Determination

47. In this Final Rule, the Commission adopts the NOPR proposal to require each RTO or ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources: (1) are technically capable of providing the ancillary service and meet the necessary technical requirements; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. All accepted bids would receive the market-clearing price.

48. The Commission's policy has been, and continues to be, to identify and eliminate barriers to participation of demand response resources in organized power markets. Development of demand response resources provides benefits to consumers by providing competitive pressure to reduce wholesale power prices, providing for the more efficient operation of organized markets, helping to mitigate market power and enhance system reliability, and encouraging development and implementation of new technologies, including renewable energy and energy efficiency resources, distributed generation and advanced metering. The reforms implemented in this Final Rule will benefit energy consumers by removing several barriers to the development and use of demand response resources in organized wholesale electric power markets.

49. As noted in the NOPR, this requirement would apply to competitively-bid markets, if any, for energy imbalance, spinning reserves, supplemental reserves, reactive supply and voltage control, and regulation and frequency response as defined in the *pro forma* OATT, or to the markets of their functional equivalents in an RTO or ISO tariff.[76] The Commission requires that demand response resources that are technically capable of providing the ancillary service within the response time requirements,[77] and that meet reasonable requirements adopted by the RTO or ISO as to size, telemetry, metering and bidding, be eligible to bid to supply energy imbalance, spinning reserves, supplemental reserves, reactive and voltage control, and regulation and frequency response.[78]

50. In response to Allied Public Interest Groups, we decline to define ''comparable treatment.'' Each RTO and ISO is unique, and the Commission hesitates to impose a uniform definition. Each RTO and ISO therefore should establish policies and procedures in cooperation with its customers and other stakeholders that ensure that demand response resources are treated comparably to supply-side resources. The Commission will have ample opportunity to evaluate concerns that may arise when it reviews the compliance filings required by this Final Rule.

51. In light of APPA's comments, we clarify that this requirement applies only to competitively-bid markets for those ancillary services specified, as well as to the markets of their functional equivalents in an RTO or ISO tariff. This requirement does not obligate RTOs or ISOs to create new competitively-bid ancillary services markets.

52. In response to Xcel and E.ON U.S., we note that the Commission proposed in the NOPR to obligate RTOs and ISOs to accept bids from demand response resources on a comparable basis to supply resources for ancillary services. For Xcel, we clarify that demand response providers are not required to offer potential demand response into the ancillary services markets. Demand response resources may evaluate market prices and other factors before making a determination to bid or not. Regarding E.ON U.S.'s comments, the Commission did not propose (and does not require) that RTOs or ISOs must purchase ancillary services from demand response resources without regard to whether these resources are lower-bid alternatives to supply resources.

53. In response to NARUC and others who comment that the Commission's proposal would place the burden on retail regulatory authorities to show that a demand response proposal conflicts with state or local laws or regulations, we clarify that we will not require a retail regulatory authority to make any showing or take any action in compliance with this rule.[79] Rather, this rule merely requires an RTO or ISO to accept bids for ancillary services from demand response resources, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.

54. We disagree with commenters who argue that requiring RTOs and ISOs to allow demand response resources to participate in ancillary services markets may be counterproductive or unnecessary.[80] This requirement removes a barrier to participation of demand response resources in organized wholesale markets and allows these resources to provide ancillary services on a basis comparable to generation sources. This requirement would potentially expand the resource pool in these organized markets, thereby lowering the overall market price for ancillary services, as well as potentially mitigating the exercise of market power. The competitiveness within ancillary services markets, as well as the system reliability, would be enhanced through increased participation.

55. Contrary to Midwest Energy's comments, we do not find that this requirement will lead to any preferential treatment for demand response resources or supply-side resources. Both sets of resources would be treated and penalized comparably in instances of non-performance.

56. In response to Public Interest Organizations, the Commission has not excluded from eligibility any type of resource that is technically capable of providing the ancillary service, including a load serving entity's (LSE) or eligible retail customer's behind-the-meter generation or any other demand response resource. Further, the Commission appreciates the value of energy efficiency, and is aware of RTO and ISO efforts to integrate energy efficiency into organized markets. Nothing in this rule precludes an RTO or ISO from appropriately including energy efficiency into any of its markets. The Commission did not propose to include energy efficiency as a provider

[75] EnerNOC at 10–11.

[76] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 56.

[77] Some technologies may be capable of responding to an RTO's or ISO's control signal and providing certain ancillary services, such as regulation and frequency response service, more quickly than under existing response time requirements.

[78] The RTO or ISO may specify certain requirements, such as registration with the RTO or ISO, creditworthiness requirements, and certification that participation is not precluded by the relevant electric retail regulatory authority. The RTO or ISO should not be in the position of interpreting the laws or regulations of a relevant electric retail regulatory authority.

[79] In reply to the Pennsylvania PUC's recommendation that the Commission continue to work with state authorities to eliminate barriers to demand response, we note that NARUC and the Commission, through their Demand Response Collaborative, are working to outline options to coordinate retail and wholesale regulatory policies in order to stimulate participation in demand response by reducing or eliminating jurisdictional barriers.

[80] The Commission has approved actions by some RTOs and ISOs to incorporate demand response into their ancillary services markets. *See, e.g., California Indep. Sys. Operator*, 116 FERC ¶ 61,274 (2006); *PJM Interconnection, LLC*, 114 FERC ¶ 61,201 (2006).

of competitively procured ancillary services, and does not have an adequate record to address this issue here.

57. With regard to Industrial Consumers' and EnerNOC's comments requesting the resolution of customer baseline issues, the Commission agrees that customer baselines are an important factor in the appropriate compensation for demand response resources. Customer baselines are designed to depict, as accurately as possible, a customer's normal load on a given day. Establishing this baseline helps system operators to measure and verify load reductions, thus giving RTOs and ISOs the ability to not only determine if demand response resources showed up, but also what the proper value of the demand reduction should be. Many RTOs and ISOs currently establish such bidder baselines as part of their demand response programs, or they are working with their stakeholders to modify such methodologies. Accordingly, RTOs and ISOs should describe in their compliance filings their efforts to develop adequate customer baselines.

58. Regarding comments related to WECC's provisions for demand response resources in its reliability standards, we note that this rule requires comparable treatment for demand response resource participation in ancillary services markets. This is a general rulemaking and is not the proper venue for adjudicating the alleged issue regarding WECC's regional reliability standards.[81]

59. In response to comments, the Commission again finds that it is not appropriate in this rulemaking to develop a standardized set of technical requirements for demand response resources participating in ancillary services markets. Instead, the Commission will allow each RTO and ISO, in conjunction with its stakeholders, to develop its own minimum requirements. However, as proposed in the NOPR, the Commission will require RTOs and ISOs to coordinate with each other in the development of such technical requirements, and provide the Commission with a technical and factual basis for any necessary regional variations.[82] In addition, having RTOs and ISOs work in conjunction with stakeholders as well as with each other should ensure that any developed requirement is not so full of technical detail or so burdensome that it discourages demand response resource participation.

60. With respect to NYISO's request that the Commission clarify its proposed regulatory language to specify that demand response resources must also meet ''applicable reliability requirements,'' the Commission does not see a need to include this provision in this Final Rule. To do so would merely duplicate existing regulations that require reliability standards, and that set out certain reliability requirements. This duplication would serve no useful purpose.

61. As part of the compliance filing to be submitted within six months of the Final Rule, each RTO or ISO is required to file a proposal to adopt reasonable standards necessary for system operators to call on demand response resources, and mechanisms to measure, verify, and ensure compliance with any such standards. These standards would be subject to Commission approval.

62. The Commission is mindful of the progress being made in California with MRTU and in the Midwest ISO with its ASM Order. Our requirement is that, where there are markets for acquiring ancillary services, these markets must be open to qualified demand response bidders. This requirement allows each RTO or ISO to work with stakeholders to develop the appropriate implementation rules for its own market design. This approach allows for regional variation and should alleviate the concerns of Midwest ISO, CAISO, and Maine PUC.

63. The Commission will not now rule on CAISO's request that the Commission not interfere with its current timeline to implement MRTU, or Midwest ISO's request that the Commission find Midwest ISO already satisfies the proposed requirements through its ASM Proposal. CAISO and Midwest ISO must submit, within their respective compliance filings, a description of how their current activities comply with the requirements of this Final Rule. Upon review, the Commission will determine if further action on behalf of either RTO or ISO is necessary.

b. New Bidding Parameters

64. The Commission proposed to require RTOs and ISOs to allow demand response resources to specify limits on the frequency and duration of their service in their bids to provide ancillary services—or their bids into the joint energy-ancillary services market in the co-optimized RTO markets.[83] These limits would include a maximum duration for dispatch, a maximum number of times per day that demand response resources could be called, or a maximum amount of energy per day or week that a resource can produce.

65. The Commission requested comment on this proposed requirement and whether these new parameters should be available for all bidders, not just for demand response resources. Further, the Commission intended that the bidding parameters would be implemented by all RTOs and ISOs, and proposed to require them to confer with each other and to provide a technical and factual basis for any necessary regional variations.

i. Comments

66. Most commenters support the Commission's proposal to require RTOs and ISOs to incorporate new parameters into their bidding rules to allow demand response resources to specify in their bids the duration and frequency of their service.[84] For instance, several commenters state that allowing new bidding parameters would increase the number and type of demand response resources participating in the ancillary services markets.[85] Some commenters note that generators face certain constraints (including start-up costs, ramp rates, and limits on the number of hours that they may operate efficiently), which are reflected within their bids. They assert that allowing demand response resources to specify similar constraints within their bids is consistent with the Commission's principle of comparability between demand-side and supply-side resources.[86] DC Energy states that, similar to generators, demand response providers should have the choice to

[81] Concerns regarding WECC's regional reliability standards can be addressed by filing a complaint under section 206 of the FPA, 16 U.S.C. 824e, or by filing a notice under section 215 of the FPA, 16. U.S.C. 824o. Under section 215, ''[i]f a user, owner or operator of the transmission facilities of a Transmission Organization determines that a [r]eliablity [s]tandard may conflict with a function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission * * *. the Transmission Organization shall expeditiously notify the Commission * * *.'' 18 CFR 39.6.

[82] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 64.

[83] *Id.* P 62.

[84] *E.g.,* Ameren; American Forest; APPA; BlueStar Energy; Beacon Power; Mr. Borlick; BP Energy; California DWR; California PUC; Cogeneration Parties; Comverge; DC Energy; Detroit Edison; DRAM; Duke Energy; EEI; EnergyConnect; EnerNOC; Exelon; FTC; First Energy; Industrial Coalitions; Industrial Consumers; ISO New England; ISO/RTO Council; Midwest ISO; North Carolina Electric Membership; Ohio PUC; Old Dominion; Organization of Midwest ISO States; PG&E; Public Interest Organizations; Reliant; Steel Producers; TAPS; Wal-Mart; and Xcel.

[85] *E.g.,* American Forest at 5; Exelon at 5.

[86] American Forest at 5; Cogeneration Parties at 3; DRAM at 6–7; Duke Energyat 3–4; Exelon at 5–6; FTC at 25–27; FirstEnergy at 7; Industrial Consumers at 12; ISO/RTO Council at 4; North Carolina Electric Membership at 4; Old Dominion at 8; and Public Interest Organizations at 6.

observe market signals and make an informed decision on whether to bid into these markets.[87]

67. The ISO/RTO Council asserts that the implementation of these new bidding parameters must be done in a way that assures demand response resources participating in ancillary services markets meet the same product requirements as supply-side resources.[88] Several commenters express their support for this concept provided that demand response resources are not afforded an undue advantage over supply-side resources.[89]

68. Two commenters state that they support the proposal provided that certain conditions are met. Ameren states there should be no adverse effect on system reliability and that any market rules that provide this flexibility should be limited in scope so as to avoid the potential for gaming.[90] BP Energy agrees with the Commission's proposal only to the extent that bidding parameters submitted by demand response resources can be incorporated into the RTO and ISO software in a cost effective manner while maintaining the algorithm's ability to perform timely cost minimizing optimizations.[91]

69. ISO New England supports granting individual demand response resources the opportunity to specify additional bidding parameters, but notes that such specification may limit the resource's qualification (under market rules) on an individual basis to bid to supply operating reserves.[92] However, ISO New England itself notes that demand response aggregators should be in a position to formulate bids combining individual demand resources so as to be able to meet the reserves market's availability requirements in a manner comparable to that of generation.

70. Duke Energy notes that the NOPR proposal would allow demand response resources to manage the risk that they would be called upon too frequently or for too long a period relative to their individual constraints. In that respect, Duke Energy asserts that if RTOs and ISOs are not required to account for such bid flexibility, demand resources could potentially be eliminated from the ancillary services markets through voluntary means.[93] Duke Energy argues that without any knowledge of how and when they will be used, demand resources may view the ancillary services markets as too risky and, therefore, not participate in them. APPA states that large end-use customers' desire to reduce consumption on short notice decreases the more frequently they are called upon.[94]

71. Steel Producers asserts that demand response resources' unique characteristics need to be taken into account, and recommends that the Commission require RTOs and ISOs to allow, at a minimum, the following optional bidding parameters in addition to the three mentioned in the NOPR: (1) Minimum notice requirement; (2) minimum/maximum shut-down time; (3) minimum duration for dispatch; (4) targeted demand reduction level; (5) bids ''down to'' a designated megawatt level; and (6) guaranteed minimum LMP.[95]

72. Similarly, California PUC requests that the Commission expand its proposal to include all demand response resource bids in all aspects of wholesale markets, and also permit each demand resource bidder to submit, as part of its bid and a master file, its output constraints such as minimum load reduction, minimum load, load reduction initiation time, minimum load reduction time, maximum load reduction time, minimum base load time, maximum number of daily load curtailments, minimum and maximum daily energy limits, load pick up rate, load drop rate, load reduction initiation cost, and minimum load reduction cost.[96]

73. Multiple commenters argue for a regional approach in implementing the Commission's proposal.[97] For instance, EEI and Detroit Edison state that they support the Commission's proposal provided that RTOs and ISOs can establish lower or minimum limits for such service.[98] EEI asks that RTOs and ISOs be allowed to specify the minimum duration in hours or minimum number of times per day or week that a resource may be called upon. Duke Energy states that the specific bid parameters, as well as the methodologies and procedures that RTOs and ISOs use to implement the Commission's proposal, should be developed on a regional basis within their stakeholder processes, rather than through a Commission-imposed uniform requirement in the Final Rule.[99] NYISO also contends that a regional approach is appropriate because specifying bidding parameters in the regulations may prove problematic in the future as regional market designs continue to evolve.[100] Exelon agrees with the Commission that minimum requirements for bidding parameters should not be prescribed by the Commission in this rulemaking, but rather should be developed by RTOs and ISOs. Exelon also supports the Commission's proposed requirement that RTOs and ISOs provide justification for any necessary regional variations.[101] EnerNOC believes the Commission, by requiring coordination and justification for variations, without mandating standardization, has articulated the correct compromise.[102]

74. Midwest ISO and CAISO state that their market designs already satisfy the NOPR's proposed bidding parameters requirement. Midwest ISO states that it developed its bidding parameters through the stakeholder process and that the parameters were approved by the Commission within its ASM Order.[103] Therefore, Midwest ISO asks that the Commission find that its ASM proposal satisfies the NOPR's requirement regarding bidding parameters. Similarly, CAISO states that it is developing its ancillary services market and it will comply with the proposed bidding parameters in the Release 1A enhancements to MRTU.[104]

75. Further, several commenters support making additional parameters available for all bidders, to include both demand and supply resources.[105] Wal-Mart states that comparable rules could apply to supply resources as long as neither supply nor demand resources are provided with an advantage.[106] Old Dominion states that all resources bidding into the ancillary services markets should be susceptible to the same penalties, performance and reliability requirements.[107] Exelon states that as long as the specification of operational limitations does not impair

[87] DC Energy at 4.

[88] ISO/RTO Council at 4.

[89] *E.g.,* Old Dominion at 8; Reliant at 4; and Wal-Mart at 5.

[90] Ameren at 18.

[91] BP Energy at 14.

[92] ISO New England at 5.

[93] Duke Energy at 3–4.

[94] APPA at 36–37.

[95] Steel Producers at 4–5.

[96] California PUC at 13–14.

[97] *E.g.,* EEI; Detroit Edison; Duke Energy; ISO/RTO Council; North Carolina Electric Membership; NYISO; and Kansas CC.

[98] EEI at 13; Detroit Edison at 2–3.

[99] Duke Energy at 4.

[100] NYISO at 6.

[101] Exelon at 6.

[102] EnerNOC at 9.

[103] Midwest ISO at 10. Midwest ISO states that its tariff allows market participants (both generators and demand response resources) to specify hourly ramp rates, hourly economic minimum and maximum limits, hourly regulation minimum and maximum limits, minimum and maximum run times, as well as a maximum start-up limit, which establishes the maximum number of times the resource can be called upon within a twenty-four-hour period.

[104] CAISO at 2.

[105] *E.g.,* California DWR at 12; Duke Energy at 4; EEI at 14; EnerNOC at 8; Exelon at 6; Midwest ISO at 10; Reliant at 4; and Wal-Mart at 5.

[106] Wal-Mart at 5.

[107] Old Dominion at 8.

market efficiency, demand and supply resources should be treated on a comparable basis because they provide reliable and efficient capacity to RTOs and ISOs.[108]

76. The California DWR supports making new parameters available to all resources because certain facilities have a specific purpose that is distinct from sales to, or support of, the electric grid. For instance, hydroelectric generation sites must satisfy water storage, water delivery, and related operational requirements. The California DWR asserts that any RTO or ISO requirements must accommodate this primary purpose for these resources.[109]

77. Several commenters state that new bidding parameters should not be available to all resources.[110] For instance, TAPS states that there is already ample bidding flexibility for generators, and it is concerned about the possibility of creating unintended consequences such as new gaming opportunities. APPA states that RTO and ISO ancillary services markets are already complex and accommodating additional bid parameters for generators in their software and problem solving algorithms would make the markets even more complicated. Although EEI is in agreement with making new bidding parameters available for all bids, it is concerned that applying the new parameters to generation resources without evaluating the implications could result in creating unintended incentives. Therefore, EEI suggests that RTOs and ISOs should not be required to apply the new parameters across all generating resources as long as they provide justification for treating some generating resources differently.

78. Finally, among the supporters of this proposal, EEI states that the addition of new parameters to bidding rules must not result in any fundamental change to existing market designs or affect the efficiencies of co-optimized markets.[111]

79. Several commenters state that demand response providers should be allowed to sell into the ancillary services markets without being required to sell into the energy market.[112] Comverge is in favor of this, but notes that demand response providers should also be allowed to sell into the energy market on a voluntary basis. Beacon Power states that a generator is always capable of supplying energy and, therefore, does not face the financial risks and barriers that a non-generator faces if it is forced to bid into the energy market.

80. NEPOOL Participants opposes the Commission's proposal to implement new bidding parameters for demand response resources. NEPOOL Participants states that each region needs an opportunity to evaluate this issue more fully and consider whether bidding limits are the most appropriate solution and whether such limits or other reforms should be restricted to just demand response or include other kinds of resources. It asserts that any change in bidding requirements needs to ensure comparability with others resources and that system reliability is maintained.[113] Maine PUC agrees.[114]

ii. Commission Determination

81. The Commission determines that each RTO and ISO is required to allow demand response resources to specify limits on the duration, frequency and amount of their service in their bids to provide ancillary services—or their bids into the joint energy-ancillary services markets in the co-optimized RTO markets. As noted in the NOPR (and several commenters agree), these limits are comparable to the limits generators may specify on price, quantity, startup and no-load costs, and minimum downtime between starts.[115] All RTOs and ISOs must incorporate new parameters into their ancillary services bidding rules that allow demand response resources to specify a maximum duration in hours that the demand response resource may be dispatched, a maximum number of times that the demand response resource may be dispatched during a day, and a maximum amount of electric energy reduction that the demand response resource may be required to provide either daily or weekly.

82. This requirement eliminates a major barrier to participation of demand response resources in ancillary services markets by ensuring that demand response resources are treated comparably to supply-side resources. In this regard, the Commission agrees with comments from APPA, Duke Energy, and others that argue that the desire of many end-use customers to reduce their consumption levels on short notice may decrease the more frequently they are called upon. This requirement would allow those customers to limit the frequency with which they are called upon to reduce demand, and thus make it more economically beneficial for these resources to participate in ancillary services markets.

83. The Commission's requirement also enhances competition within ancillary services markets. With demand response resources able to specify the duration, frequency and amount of their service, ancillary services markets will become more attractive for such resources. Increased participation in the market will result in an expanded pool of available resources, thereby potentially improving demand elasticity and system reliability, as well as lessening price volatility.

84. The Commission also finds that this requirement removes barriers to the comparable treatment of demand-side and supply-side resources. Generators include operational constraints in their bids, and permitting demand response resources to do the same results in the comparable treatment of both supply-side and demand-side resources. However, in keeping with this effort of greater comparability, the Commission determines that implementation of its requirement by RTOs and ISOs should not lead to either demand-side or supply-side resources being afforded an undue advantage within ancillary services markets.

85. In the NOPR, the Commission requested comment on whether other bidding parameters should be considered.[116] The Commission noted that any proposed parameters must not have the effect of creating an undue preference for demand response resources. The Commission does not have a sufficient record here to assess whether the proposed additional bidding parameters submitted by the California PUC and Steel Producers may offer demand response resources greater flexibility within their bids as compared to the bids of generators. For this reason the Commission will not accept the proposed additional bidding parameters on a generic basis for all RTOs and ISOs in this rulemaking. Rather, individual RTOs and ISOs are free to propose additional parameters in their compliance filings, as long as they do not provide undue preference to demand response resources vis-a-vis supply-side resources, and interested persons may raise these additional parameters with their deliberations with the individual RTOs and ISOs.

86. In the NOPR, the Commission stated that it was not appropriate for the Commission to develop in a rulemaking a standardized set of minimum requirements for minimum size bids, measurement, telemetry and other

[108] Exelon at 5–6.

[109] California DWR at 12–13.

[110] *E.g.,* APPA at 37; Mr. Borlick at 2; and TAPS at 8.

[111] EEI at 14.

[112] *E.g.,* Beacon Power at 9; Comverge at 12; and Wal-Mart at 5.

[113] NEPOOL Participants at 11–12.

[114] Maine PUC at 3–4.

[115] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 62.

[116] *Id.* P 64.

factors, and instead allowed RTOs and ISOs to develop their own minimum requirements, including bidding parameters.[117] The Commission adopts this position in this Final Rule. RTOs and ISOs must incorporate bidding parameters that allow demand response resources to specify limitations on the duration, frequency and amount of their service. However, the development of specific parameters and the methods used to implement the Commission's requirement are the responsibility of the RTOs and ISOs, in consultation with their respective stakeholders. RTOs and ISOs are also required to confer with each other on such parameters and methods and to provide a technical and factual basis for any necessary regional variations. This approach adequately accounts for regional variation between the RTOs and ISOs and alleviates the concerns of those commenters requesting regional flexibility in implementing the Commission's requirement.

87. Midwest ISO asks that the Commission find that it already complies with the additional bidding parameters requirement of the Final Rule. Similarly, the California ISO asserts that it will also be compliant with the requirement upon Release 1A in its MRTU process. The Commission does not intend to interrupt the progress being made in either region. However, as indicated above, the Commission will not at this time determine that either region satisfies the Commission's requirement obligating RTOs and ISOs to incorporate new bidding parameters for demand response resources, and instead will wait until each region submits its necessary compliance filing.

88. In the NOPR, the Commission requested comment on whether these additional parameters should be available for all bids, or for demand response bids only. In light of the comments received, the Commission determines that new requirements for bidding rules allowing demand response resources to specify the duration, frequency and amount of their service pertain only to demand response resources. Individual RTOs and ISOs are free to propose to apply them more broadly. While the Commission understands that making these new parameters available for all resources could benefit hydropower resources and other environmentally restricted, or run-time limited resources, the Commission agrees with TAPS and others that there is already sufficient bidding flexibility afforded to generators, and is concerned about the possibility of creating unintended consequences. For these reasons, at this time the Commission will not require an RTO or ISO to make these new bidding parameters available for all resources.

89. With regard to comments that demand response providers should be allowed to sell into the ancillary services markets without being required to sell into the energy market, the Commission notes that the ANOPR proposal permitting such action was removed at the NOPR stage, and replaced with a proposal to allow demand response resources to specify limitations on the duration, frequency and amount of their service.[118] The Commission had received comments previously that argued that allowing demand response resources to bid into the ancillary services markets without also bidding into the energy markets could upset certain market efficiencies in co-optimized markets. Therefore, the Commission put forth a compromise proposal, which allows demand response resources to specify operational limits in their bids as a way for these resources to minimize the risk that they are called on too frequently, thereby making participation in ancillary services markets more feasible. No one has persuaded us otherwise; therefore, the Commission will adopt this provision from the NOPR.

c. Small Demand Response Resource Assessment

90. The NOPR proposed to direct RTOs and ISOs to assess the value and technical feasibility of small demand response resources providing ancillary services one year from the effective date of the Final Rule, including whether (and how) smaller demand response resources can reliably and economically provide operating reserves through pilot projects or other mechanisms.[119]

i. Comments

91. Several commenters support the NOPR proposal for small demand response resource assessment.[120] For example, Reliant states that accommodating smaller demand response resources may result in an increase in operating reserves.[121] EnerNOC believes that the assessment effort will reveal ways for smaller demand response resources to provide ancillary services while maintaining reliable operations and appropriate measurement and verification.[122] APPA believes that pilot programs could be particularly valuable in assessing technical feasibility of accommodating smaller demand-side resources.[123] It notes that accurate metering and telemetry would be significant factors in any efforts associated with this assessment, primarily because ''communication and operational performance standards applicable to demand-side resources are more demanding than the current requirements applicable to retail customers.'' Public Interest Organizations request that ''RTOs and ISOs be directed to specifically address the issue of comparable treatment of smaller loads.'' [124] Allied Public Interest Groups believe that the Commission should include in its Final Rule a directive to RTOs and ISOs to initiate pilot programs for small demand response resources similar to the ISO New England Demand Response Reserves Pilot Program.[125] In their view, pilot programs aid grid operators in determining whether a diverse portfolio of demand response resources that includes small resources can provide cost-effective and reliable ancillary services.

92. EnerNOC and DRAM indicate that technical requirements for demand response participation in ancillary services markets may act as a barrier if the technical requirements exceed what is necessary to ensure reliable electric system operations.[126] For example, they note that certain telemetry requirements may preclude smaller loads from participating in ancillary services markets. However, EnerNOC states that an assessment on how to accommodate these resources could result in reasonable standards for smaller loads that take into account the operational characteristics of such loads so as to capture their value efficiently. DRAM states that the proposed assessment should allow parties to focus on how best to modify the requirements for small demand response resource participation without creating a bias against supply-side resources.[127] Neither EnerNOC nor DRAM suggests that smaller demand response resources be allowed to participate in these markets with less stringent standards than other resources. Further, EnerNOC asserts that the small demand response resource assessment requirement should not be used as an excuse to delay currently underway pilot programs or

[117] *Id.*

[118] *Id.* P 62.

[119] *Id.* P 59.

[120] *E.g.*, APPA, Public Interest Organizations, EnerNOC; DRAM; Old Dominion; andReliant.

[121] Reliant at 4.

[122] EnerNOC at 3.

[123] APPA at 35.

[124] Public Interest Organizations at 6.

[125] Allied Public Interest Groups at 9.

[126] EnerNOC at 4; DRAM at 16.

[127] DRAM at 16.

other smaller resource reforms taking place in RTOs and ISOs. In addition, this requirement should not create an opportunity to avoid addressing barriers to smaller resource participation in ancillary services markets.[128]

93. Old Dominion supports the proposal and agrees that incorporating smaller demand response resources would be beneficial to the market, but notes that measurement and verification standards specific to these smaller resources may be necessary to ensure proper allocation of costs and to address any reliability concerns.[129]

94. Two commenters disagree on how smaller demand response resources should be defined. EnerNOC recommends that the Commission clarify that ''smaller demand response resources'' should be construed more broadly than the residential class of customers because a more diverse portfolio is more valuable to the market. EEI, however, disagrees and recommends that the Commission not define what constitutes smaller demand response resources, and instead allow each RTO or ISO to propose a definition that reflects its particular market design and characteristics.[130]

95. The ISO/RTO Council comments that its Markets Committee is already addressing certain aspects of this issue by developing a communications protocol for small demand resources, and that these efforts will be discussed at a technical conference on integrating small demand resources into organized markets. The ISO/RTO Council asserts that its report will not supplant the Commission's proposed assessment, but still urges the Commission to coalesce its proposal with the work of the ISO/RTO Council Markets Committee.[131]

96. Finally, ISO New England notes that it currently has a demand response reserve pilot program in place to assess the ability of smaller demand resources to provide reserve products to the wholesale market, and to develop comparable communication, metering, telemetry and other technical infrastructure solutions that are more suitable and cost effective for smaller, dispersed demand resources.[132]

ii. Commission Determination

97. The Commission will require RTOs and ISOs, in cooperation with their customers and other stakeholders, to perform an assessment, through pilot projects or other mechanisms, of the technical feasibility and value to the market of smaller demand response resources providing ancillary services, within one year from the effective date of the Final Rule, including whether (and how) smaller demand response resources can reliably and economically provide operating reserves and report their findings to the Commission. The choice between either a pilot program or other mechanisms in this assessment is appropriately left to the discretion of the RTO or ISO and its customers and other stakeholders. Additional issues raised here by commenters, such as the need for measurement and verification standards and a definition of what constitutes a ''small demand response resource'' should be addressed in the assessments.

98. The Commission finds that, based on the comments, accommodating smaller demand response resources through adjusted minimum size thresholds and telemetry requirements could result in an increase in potential operating reserves. Allowing more resources to participate in operating reserves and other ancillary services markets may increase the competitiveness of these markets and could lower the overall price for such services.

99. The Commission agrees that this assessment should not delay pilot programs that are currently underway or other smaller load reforms taking place in RTOs and ISOs, nor should it create an opportunity to avoid addressing barriers to smaller load participation in ancillary services markets. In addition, while not part of the Commission's requirement, the Commission encourages the ISO/RTO Council to continue developing a communications protocol for small demand response resources and encourages RTOs and ISOs to consider the ISO/RTO Council's work in developing their individual assessments.

3. Eliminating Deviation Charges During System Emergencies

a. Deviation Charges

100. The Commission proposed in the NOPR to require that all RTO and ISO tariffs be modified as necessary to eliminate a charge-referred to as a deviation charge [133]—to a buyer [134] in the energy market for taking less electric energy than it planned to take in the real-time market, during a real-time market period for which the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage.[135]

101. The Commission proposed that an RTO or ISO must either propose amendments to its tariffs to comply with this requirement or demonstrate through a compliance filing that its existing tariff and market design meet this requirement. The Commission proposed that this filing be submitted within six months of the date that this Final Rule is published in the **Federal Register** .

102. The Commission's proposal applies to real-time demand response that occurs in addition to the demand response of participants in an RTO's or ISO's wholesale demand response program. Under the proposal, deviation charges would be eliminated only when the RTO or ISO announces an emergency situation after the close of the day-ahead market. The Commission also proposed that since deviation charges cover real costs to generators and others that are not recovered from the sale of energy in real time, these costs should be allocated to all loads of the RTO or ISO.

i. Comments

103. A majority of commenters supports the Commission's proposal and agree that eliminating deviation charges during periods when the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage would eliminate a barrier to demand reduction in wholesale energy markets.[136] For instance, Energy Curtailment and PG&E state that penalizing an LSE for taking less energy in real-time during system

[128] EnerNOC at 6.

[129] Old Dominion at 8.

[130] EEI at 12.

[131] ISO/RTO Council at 6.

[132] ISO New England at 4.

[133] Deviation charges recover certain costs, including generators' costs (such as start-up costs) that exceed their energy market revenues when real-time demand is less than forecast. These ''uplift'' costs may include the cost of extra generators committed after the close of the day-ahead market to serve anticipated load, if those costs are not recovered from sales of energy at real-time LMPs.

[134] Examples of buyers in RTO and ISO energy markets include an LSE thatpurchases electricity to meet the load requirements of its retail customers and a retail customer that purchases electricity directly from the wholesale market.

[135] NOPR, FERC Stats. & Regs. ¶ 32,682 at P 72.

[136] Ameren at 23; American Forest at 6; APPA at 3; BlueStar Energy at 2; Mr. Borlick at 2; BP Energy at 15; California DWR at 15; CASIO at 1; California PUC at 15; Cogeneration Parties at 3; Comverge at 17; DC Energy at 5; Dominion Resources at 6; DRAM at 18; Duke Energy at 5; EEI at 14; Energy Curtailment at 4; EnerNOC at 11; Exelon at 6; FirstEnergy at 8; Industrial Coalitions at 11; Industrial Consumers at 15; Integrys Energy at 9; ISO New England at 8; ISO/RTO Council at 6; LPPC at 7; MADRI States at 6; Maine PUC at 3; Midwest Energy at 2; Midwest ISO at 11; NCPA at 5; NEPOOL Participants at 12; NIPSCO at 9; North Carolina Electric Membership at 4; Ohio PUC at 7; Old Dominion at 9; OMS at 3; OPSI at 4; Pennsylvania PUC at 11; PG&E at 8; Public Interest Organizations at 6; Reliant at 4; Steel Manufacturers at 11; Steel Producers at 5; TAPS at 9; Wal-Mart at 5; and Xcel at 8.

emergencies would be counterproductive.[137] Many commenters agree that this proposal would result in several benefits, including reduced market prices, mitigation of market power, and improved system reliability.[138]

104. Several supporters also agree with the Commission's proposal to allocate to all loads of the RTO and ISO uplift charges to cover costs associated with the elimination of such deviation charges.[139] However, NIPSCO and Old Dominion state that uplift charges should be allocated only within the zones where the emergency occurred.[140] Dominion Resources and ISO/RTO Council urge the Commission to allow each region to decide how the costs should be allocated based on market constraints and input from stakeholders.[141]

105. Several commenters seek clarification of various aspects of the proposal. For instance, EEI asks the Commission to clarify that deviation charges would be eliminated only when the RTO or ISO announces an emergency situation after the close of the day-ahead market.[142] TAPS suggests that the Commission clarify that it intends to encompass all forms of demand response that could be activated to reduce load during emergencies, including programs that operate behind the meter of the LSE with a reduction reflected in the wholesale market participant's demand.[143] Cogeneration Parties note that it is unclear whether the costs caused by uninstructed deviations during normal operations would also be incurred during a system emergency, and recommend that the Final Rule require RTOs and ISOs to verify their actual costs incurred during system emergencies before such charges are imposed on customers.[144] Similarly, Midwest Energy suggests that the net benefits for load reductions be verified before costs are imposed on customers.[145]

106. A few commenters urge the Commission to clearly define ''deviation charge'' and the circumstances under which deviation charges would be eliminated. For example, NYISO requests that the Commission clarify its proposed regulatory text to more specifically define deviation charges.[146] Others state that circumstances under which an RTO or ISO merely seeks to avoid an operating reserve shortage are significantly different from those in which it has experienced an actual operating reserve shortage or emergency. Therefore, they suggest that the Commission define the conditions when elimination of deviation charges would take place.[147] NIPSCO states that the Commission should clarify that deviation charges should also be waived when an RTO or ISO declares a NERC Energy Emergency Alert.[148] The Pennsylvania PUC states that there are two types of emergencies, generation insufficiency and generation excess, and while generation insufficiency is of greatest concern to the public, excess generation emergencies are not uncommon. At such times locational marginal price or LMP may go negative in an effort to resolve a rapidly dropping load situation. For such reasons the Pennsylvania PUC asks that the Commission clarify whether eliminating a deviation charge is appropriate for both kinds of emergencies.[149]

107. Additionally, some commenters recommend that the proposal should be expanded so that deviation charges would be eliminated not just in emergency situations, but in all situations when demand deviates from schedule by using less energy.[150] Duke urges the Commission to eliminate deviation charges so long as the load remains within an appropriate demand response ''bandwidth.'' [151] No deviation charges would be assessed in emergency or non-emergency situations, so long as the load behaves consistently with the price-sensitive demand schedule provided to the RTO or ISO. Other commenters suggest that the proposal be expanded to include other contractual arrangements,[152] demand-reduction services,[153] and programs that compensate market participants for demand reductions during system emergencies.[154]

108. Several commenters support a regional approach to establishing methods for dealing with deviation charges. For example, ISO/RTO Council urges the Commission to allow each RTO or ISO to develop its own appropriate rules to implement the proposal to account for regional operating considerations and to establish appropriate details, including defining what system conditions constitute an emergency.[155] California Munis urges regional flexibility to ensure that specific facts pertaining to each RTO or ISO can be fully considered in assessing whether this proposal will be beneficial to consumers or merely shifts costs among consumers.[156] Similarly, SoCal Edison-SDG&E state that, rather than having the Commission eliminate deviation charges in a uniform manner for all RTOs and ISOs, a method for dealing with deviations from the day-ahead energy market purchases must be considered comprehensively by each RTO or ISO within the framework of its overall market design.[157]

109. NEPOOL Participants states that the Commission should not impose its proposal on RTOs and ISOs before allowing NEPOOL Participants to evaluate, through its stakeholder process, issues around how deviation charges are calculated and assessed, including ISO New England's ability to separate out the types of deviation charges that the Commission has proposed.[158]

110. Constellation opposes this proposal, stating that eliminating

[137] Energy Curtailment at 4–5; PG&E at 8.

[138] While APPA supports this proposal, it states that if bid and offer caps are eliminated during system emergencies, it cannot support uplifting such charges.APPA at 3.

[139] *E.g.*, Ohio PUC at 7–8; Public Interest Organizations at 6; EEI at 14–15; DRAM at 18–19.

[140] NIPSCO at 9; Old Dominion at 9.

[141] Dominion Resources at 8–9; ISO/RTO Council at 6–8.

[142] EEI at 14–15.

[143] TAPS at 9–11.

[144] Cogeneration Parties at 3.

[145] Midwest Energy at 3.

[146] NYISO at 7–8.

[147] *E.g.*, DRAM at 18–19; Comverge at 17–18; and NIPSCO at 12–14.

[148] NIPSCO at 12–14. The NERC reliability standard provides procedures that RTOs and ISOs must follow when capacity emergencies are declared and requires that all resources be used to meet load before operating reserves are tapped to address an emergency.

[149] Pennsylvania PUC at 11.

[150] *E.g.*, California PUC at 15–16; Industrial Consumers at 15–16 and Steel Manufacturers at 11–12.

[151] Duke suggests that a reasonable solution to preventing inequitable cost shifts is to establish a bandwidth that would determine whether deviation charges should apply. Duke at 5–7.

[152] NCPA states that the Commission's proposal to allow RTOs and ISOs to waive deviation charges should be expanded to include other contractual arrangements to the degree that ARCs are permitted to perform aggregations of retail load. NCPA at 5–6.

[153] OMS recommends that the Commission direct RTOs and ISOs to explore the development of programs that compensate market participants for demand reductions during system emergencies. OMS at 3.

[154] *Id.* at 3. Similarly, EEI asks the Commission to allow RTOs and ISOs to propose compensation sufficient to encourage demand response resources to incur the cost of reducing consumption. EEI at 14–15.

[155] ISO/RTO Council at 6–8.

[156] California Munis is not opposed to the Commission's proposal, but states that there are California-specific issues that must be considered, which may lead to a policy conclusion that elimination of deviation charge may not be appropriate for California. California Munis at 11–12.

[157] SoCal Edison-SDG&E state that eliminating charges in a uniform manner to all demand does not recognize the locational benefits of reducing demand in certain areas or cases where decreasing demand could hinder efforts to address grid reliability concerns. SoCal Edison-SDG&E at 3.

[158] NEPOOL Participants at 14.

deviation charges during system emergencies could create unintended consequences. Constellation believes that the proposal provides preferential treatment for energy providers that supply load reductions over generators that supply a similar product. Constellation argues that deviation charges are appropriate because such charges provide: (1) an incentive for LSEs to accurately forecast and bid their load into the day-ahead market; and (2) a source of funds to compensate out-of-market generators that are necessary to meet peak load when the real-time load deviates from its day-ahead load bid.[159] In addition, Constellation states that opportunities for the demand side of the market to respond are lost whenever supply resources are compensated outside of market-clearing prices through the use of uplift charges. It believes this problem can be alleviated through proper price formation.[160] For these reasons, Constellation recommends that the Commission leave the deviation charge in place and institute a shortage pricing regime, and address other issues that socialize out-of-market costs in order to minimize socialized uplift charges.[161]

ii. Commission Determination

111. The Commission adopts the NOPR proposal to require all RTOs and ISOs to modify their tariffs to eliminate a deviation charge to a buyer in the energy market for taking less electric energy in the real-time market than was scheduled in the day-ahead market during a real-time market period for which the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load in order to avoid an operating reserve shortage. This requirement does not apply to RTO or ISO wholesale demand response program participants, but rather to market buyers who voluntarily provide additional demand response either during or prior to an RTO- or ISO-directed operating reserve shortage in an effort to improve system reliability.

112. Removal of the deviation charge during a system emergency will eliminate a disincentive for participation of demand response in the real-time market. A buyer may be deterred from reducing demand during periods of reserve shortage if that buyer is subject to a charge for reducing its real-time consumption below its day-ahead purchases at the request of the RTO or ISO market operator. This unintended disincentive may result in the buyer maintaining a higher level of demand or discourage an LSE from calling on the demand response resources in its retail market. Removal of this disincentive will help maintain system reliability and help reduce prices during system emergencies.

113. Demand response program participants currently are not levied a deviation charge if they reduce demand as directed by the RTO or ISO, and the Commission's requirement in this Final Rule does not alter this practice. In addition, the Commission is not requiring that RTOs and ISOs remove penalties for day-ahead bidders of demand response that fail to follow dispatch instructions to reduce demand in real time. What this requirement does focus on is demand response that is provided by LSEs and other market buyers that consume less total energy in real time during system emergencies or at the request of the RTO or ISO than they had scheduled in the day-ahead market. The intent of the Commission's requirement is not only to ensure that market buyers who voluntarily reduce their energy consumption during system emergencies at the request of the RTO or ISO are not penalized for their deviation, but also that demand-side and supply-side resources are treated comparably.

114. As noted above, a majority of commenters support this requirement and agree that removal of these deviation charges would remove a disincentive for demand reduction. Elimination of deviation charges for a buyer's response to RTO and ISO calls for demand reductions also will further comparable treatment of demand and supply resources. RTO and ISO tariffs already do not impose deviation charges on generators that generate more power during system emergencies than scheduled in the day-ahead market.

115. An RTO or ISO must either propose amendments to its tariff to comply with this requirement or demonstrate in a compliance filing that its existing tariff and market design already satisfy this requirement. This compliance filing must be filed with the Commission within six months of the date that this Final Rule is published in the **Federal Register** . The Commission will assess each filing to determine if it satisfies the requirements of this section and will issue additional orders, as needed. This process addresses comments by RTO/ISO Council, California Munis, SoCalEdison-SDG&E, NEPOOL Participants and others recommending regional flexibility in addressing this issue.

116. The Commission encourages each RTO and ISO to work with its customers and other stakeholders in making tariff revisions and other changes to its market design necessary to comply with this requirement. The Commission's goal is to remove barriers to the development and use of demand response resources in wholesale energy markets, and the Commission expects that barriers can be effectively removed if each RTO and ISO works effectively and cooperatively with its customers and stakeholders.

117. Although the majority of commenters express support for this requirement, as noted above, a significant number ask for clarification or suggest changes to the NOPR proposal. Customer demand reduction in response to an emergency appeal benefits all customers, by averting or reducing the severity of a power shortage, so voluntary reductions during system emergencies can provide system-wide benefits. They can help maintain system reliability and reduce overall energy prices, which benefits all customers. As a result, the Commission finds that socialization of these costs is justified. However, in response to comments by NIPSCO and Old Dominion that the deviation charge should be allocated locally rather than on a system wide basis, this matter is best addressed in each RTO's or ISO's compliance filing. Any proposal for local allocation of these costs should be accompanied by an explanation of when costs would be spread across the entire RTO or ISO region and when applied locally, how the local area would be determined, and why local cost recovery is justified. Further, in response to comments by EEI and NIPSCO, we clarify that deviation charges would be eliminated only when the RTO or ISO announces an emergency situation or requests a voluntary load reduction after the close of the day-ahead market.

118. In response to TAPS's request for clarification on what forms of demand response this requirement would apply to, we note that this requirement applies to all buyers in the wholesale energy market, outside of an RTO's or ISO's demand response program, that may respond to an RTO or ISO request for voluntary load reduction during a system emergency. In response to comments by Cogeneration Parties and Midwest Energy state that the costs and benefits of load reduction must be verified before costs are imposed on customers, measurement and verification protocols should be addressed within the RTO's or ISO's compliance filing, and therefore will not require a net benefits test. In order to accommodate regional differences, we will also defer NYISO's request that the

[159] Constellation at 6.

[160] *Id.* at 7.

[161] *Id.* at 6–7.

Commission specify more clearly the definition of ''deviation charge'' to the compliance filing process (which will permit stakeholder input).

119. The Pennsylvania PUC asked for clarification of whether it is appropriate to eliminate deviation charges during periods of excess generation, when RTOs and ISO might call upon generators to reduce supply. The Commission notes that the intent of this Final Rule is to remove disincentives to demand-side resources so that they can be treated similarly and comparably in relation to supply-side resources. While it may be appropriate to remove deviation charges for supply-side resources during periods of excess generation, issues involving periods of excess generation are not addressed in this rulemaking.

120. We disagree with comments by the California PUC, Industrial Consumers and Steel Manufacturers recommending that deviation charges be eliminated any time demand deviates from schedule by using less energy. As noted in the NOPR, a reduction in demand during a system emergency benefits the RTO or ISO and its customers by better matching demand with available supply.[162] The Pennsylvania PUC mentions in its comments that if actual demand deviates from scheduled demand during non-emergency periods, such load reductions may result in periods of excess supply and impose costs on the RTO or ISO and its customers. Similarly, Duke's request that no deviation charges be assessed, so long as load remains within a specified bandwidth, may lead to greater disparity between day-ahead and real-time market purchases and could result in additional costs to consumers without providing consumer benefits. In particular, eliminating deviation charges for all periods could result in over-scheduling, which has cost consequences for generators. Therefore, the Commission does not accept these recommendations.

121. With regard to Constellation's recommendation that the Commission leave the deviation charge in place and institute a shortage pricing regime to better match supply and demand, the Commission is addressing shortage pricing issues in another part of this Final Rule. As noted above, we find that elimination of deviation charges for demand reduction during system emergency periods provides benefits to consumers distinct from those inherent in a shortage pricing regime and removes a disincentive to participation of demand-side resources by treating demand and supply comparably. The Commission therefore declines to adopt Constellation's recommendation.

b. Virtual Purchasers

122. In the NOPR, the Commission asked for comments on whether it should require RTOs and ISOs to modify their tariffs to eliminate deviation charges for virtual purchases during system emergencies.[163] The Commission noted that virtual purchasers may not cause significant additional costs during an emergency. Instead, virtual purchases may enhance reliability by increasing the amount of generation resources available in real time during a system emergency. Therefore, the Commission noted that assessing a deviation charge on virtual purchasers during an emergency may be unfair and may discourage helpful virtual purchases when system resources are expected to be tight.[164]

i. Comments

123. Several commenters state that virtual purchasers should be treated in the same manner as other ''physical'' purchasers by exempting their day-ahead market bids from deviation charges during system emergencies.[165] MADRI States and BP Energy assert that there is no need to assess deviation charges to virtual purchasers because such purchasers enhance reliability by increasing the amount of generation resources available in real-time during an emergency.[166] Mr. Borlick asserts that virtual bids in the day-ahead market do not impose any costs on the system; he states this is because an RTO and ISO is able to differentiate between virtual and physical bids and it can ignore the virtual bids when determining unit commitment for the next day's real-time operations.[167] Further, DC Energy claims that all buyers of energy (physical and virtual buyers) in the real-time market should be treated equally.[168]

124. Exelon agrees with the elimination of charges for virtual purchasers during system emergencies, but suggests that the Commission allow each RTO or ISO to implement such a rule after exploring the consequences of such action through its stakeholder process.[169]

125. Other commenters oppose this option and state that virtual purchasers should be subject to deviation charges.[170] For instance, First Energy and TAPS state that virtual purchasers provide no load reduction benefit and, therefore should not be exempt from paying the deviation charge. TAPS also states that the NOPR record contains no evidence that the hypothetical benefits of eliminating the deviation charge for virtual bidders would outweigh the harm that would result from removing deviation charges, as they act to discourage bidding behavior that imposes significant costs on consumers.[171] Several commenters believe that exempting virtual purchasers from deviation charges (1) may encourage speculation; (2) result in over commitment of generation when it is not needed; and (3) result in cost shifts to other market participants, thereby distorting markets.[172] APPA asserts that virtual bidders may be able to game the system and receive a payment when no benefit is provided to the region.

126. NEPOOL Participants believes that it is important to more fully evaluate the issues around virtual bidding and whether it is necessary to include virtual bidding in any discussion regarding the removal of deviation charges.[173]

ii. Commission Determination

127. The Commission agrees with the comments that virtual purchases can enhance reliability by increasing the amount of generation resources available in real-time during an emergency. Further, assessing a deviation charge on virtual purchasers during an emergency may be unfair and may discourage such virtual purchasing when it may be most beneficial to other customers. Our preferred policy is to eliminate deviation charges for virtual purchasers as well as physical purchasers during a real-time market period for which the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load in order to avoid an operating reserve

[162] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 77.

[163] A virtual purchase (or sale) is a purchase (or sale) in the RTO or ISO day-ahead market that does not go to physical delivery. For example, an entity that does not serve load may make a purchase in the day-ahead market, which it must pay for, and then take no power in real time. This lack of consumption is treated as a sale of the purchased power into the real-time spot market. By making virtual energy purchases and sales in the day-ahead market and settling these positions in the real-time market, a market participant can arbitrage price differences between the two markets.

[164] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 78.

[165] *E.g.,* Mr. Borlick at 2–3; BP Energy at 15; Exelon; MADRI States; and DC Energy at 5–6.

[166] MADRI States at 6–7; BP Energy at 15.

[167] Mr. Borlick at 3.

[168] BP Energy at 5.

[169] Exelon at 6–8.

[170] *E.g.,* Ameren at 24; APPA at 3; ISO New England at 9; ISO/RTO Council at 8; Old Dominion at 10; and TAPS at 10.

[171] First Energy at 8; TAPS at 9–11.

[172] ISO New England at 8–9; RTO/ISO Council at 6–8; and NYISO at 7–8.

[173] NEPOOL Participants at 13.

shortage. However, we are concerned an RTO's or ISO's particular market design may not readily accommodate this policy, and we acknowledge commenters' concerns about the possibility of market manipulation under a particular market design if deviation charges are removed for virtual purchasers. Therefore, we direct RTOs and ISOs to modify their tariffs to eliminate deviation charges for virtual purchasers, during the same period as they are eliminated for physical purchasers as set out above, unless the RTO or ISO upon compliance makes a showing that it would be appropriate to assess such deviation charges for virtual purchasers during this period. This approach establishes a reasoned generic policy and still provides an opportunity for each RTO or ISO, on a case-by-case basis, to present a factual record that the generic policy does not fit its overall market design.

4. Aggregation of Retail Customers

a. Commission Proposal

128. In the NOPR, the Commission proposed to require RTOs and ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.[174]

129. The Commission recognized that each region's market design is different and that it is important for ARC provisions to respect these market design differences. For this reason, the Commission proposed not to mandate generic market rule amendments; rather, it proposed to require RTOs and ISOs to amend their tariffs and market rules as necessary to allow an ARC to bid demand response directly into the RTO's or ISO's organized market, provided that the ARC's demand response bid must meet the same requirements as a demand response bid from any other entity such as an LSE. The NOPR proposed the following flexibilities in RTO and ISO market designs:

- The RTO or ISO may require the ARC to be an RTO member if membership is a requirement for other bidders.
- RTOs and ISOs may require that an aggregated bid must consist of individual demand response bids from a single area, reasonably defined.
- An RTO or ISO may place appropriate restrictions on any customer's participation in an ARC-aggregated demand response bid to avoid counting the same demand response resource more than once.
- The market rules do not have to allow bids from an ARC if this is not permitted under the laws or regulations of the relevant electric retail regulatory authority. The RTO or ISO must receive explicit notification from the relevant retail regulatory authority in order to disqualify a bid from an ARC that includes the demand response of that authority's retail customers.

130. The Commission requested comment about whether: (1) These features of the proposal are appropriate and whether there are additional appropriate criteria or features for allowing an ARC to bid demand response; and (2) there is any reason not to subject an ARC to the same requirements as any other bidder in the energy market.[175]

131. The Commission proposed that an RTO or ISO must either propose amendments to its tariff to comply with the requirement or demonstrate in a filing that its existing tariff and market design already satisfy the requirement to permit an ARC to bid demand response on behalf of retail customers.[176] It also proposed that this filing be submitted within six months of the date the Final Rule is published in the **Federal Register**. The Commission proposed that it would assess whether each filing satisfies the proposed requirement and would issue additional orders as necessary.

b. Comments

i. Comments regarding ARC proposal

132. Many commenters support the NOPR proposal to allow ARCs to bid demand response directly into organized markets, unless it is not permitted by the relevant regulatory authority.[177] For instance, EEI asserts that the Commission should adopt this proposal in the Final Rule because it is appropriate for RTOs and ISOs to treat ARCs comparably to wholesale market participants under RTO and ISO rules as long as: (1) State commissions permit aggregation of retail demand response; (2) such treatment is aligned with state requirements; and (3) no preferential treatment is accorded to ARCs, including being subject to monitoring and verification requirements.[178] Some commenters note that experiences in organized markets have demonstrated that allowing ARCs to participate directly in wholesale energy markets has increased market efficiency and led to greater diversity of demand response options.[179] In particular, Comverge and EnerNOC note that allowing ARCs to enter wholesale energy markets has been successful in PJM, ISO New England, and NYISO.[180]

133. Industrial Coalitions note that this proposal would expand the pool of potential demand response providers, thereby increasing demand elasticity. American Forest states that the proposal could encourage development of state-level retail programs that may not otherwise be considered. The potential for such participation may encourage the development of state law or retail structures to accommodate participation where none now exists as retail customers seek to avail themselves of the opportunities larger markets offer.[181]

134. Ameren states, however, that unless RTOs and ISOs develop and properly implement clear tariff provisions and market rules that explain how the aggregation of retail customers for demand response reductions will work, LSEs and providers of last resort could be harmed by ARCs' demand bids. Ameren asserts that ARCs' unanticipated demand reductions can expose LSEs and providers of last resort to the difference between day-ahead and real-time locational marginal prices, as well as to deviation charges due to this difference. Ameren urges the Commission to require RTOs and ISOs to adopt tariff provisions and market rules that protect LSEs and providers of last resort from such harm if an ARC reduces load. Similarly, NCPA urges the Commission to require coordination among the LSE, the ARC, and the RTO or ISO. NCPA asserts that such coordination is necessary to preserve the value of the demand response and to prevent imprudent resource planning or operating decisions.[182]

135. BP Energy is concerned that ARCs' participation in wholesale markets during non-emergency periods can lead to gaming. Therefore, it recommends that the Commission consider restricting or eliminating during any non-emergency period any

[174] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 86.

[175] *Id.* P 88, 91.

[176] *Id.* P 92.

[177] *E.g.,* American Forest; BlueStar Energy; BP Energy; California PUC; Comverge; DC Energy; Dominion Resources; DRAM; EEI; EnergyConnect; Energy Curtailment; EnerNOC; Exelon; FirstEnergy; IMEA; Industrial Coalitions; Industrial Consumers; Integrys Energy; ISO/RTO Council; LPPC; MADRI States; Midwest ISO; NYISO; Ohio PUC; OMS; OPSI; Pennsylvania PUC; PG&E; Public Interest Organizations; Reliant; Retail Energy; Steel Producers; Wal-Mart; and Xcel.

[178] EEI at 16.

[179] *E.g.,* DRAM at 20; EnerNOC at 12.

[180] Comverge at 18; EnerNOC at 12–13.

[181] American Forest at 5–6.

[182] NCPA at 3–4.

incentive, subsidy or capacity-type payment for RTO and ISO demand response programs related to energy markets.[183] Similarly, LPPC states that each RTO or ISO should adopt mechanisms to prevent gaming of the program.[184]

136. TAPS believes that the Commission's proposal regarding ARCs may require existing LSE demand response programs to change to accommodate the ARC demand response programs, which would increase rather than decrease barriers to effective demand response programs. It requests clarification that the Commission's proposal would not require any change to an existing aggregation program that already functions well.

137. Several regional entities maintain that they are already working to allow ARC participation in their markets. CAISO states that it is working with its stakeholders and California PUC to address regulatory policy and state law concerning aggregation. ISO New England states that its current market rules allow ARCs to aggregate retail customers for the purpose of participating in demand response programs and the forward capacity market. Midwest ISO notes that, in accordance with the Commission's ASM Order,[185] it will continue to work with stakeholders to develop tariff provisions to allow ARCs to operate within its footprint. Finally, NYISO states that it is making efforts to identify common issues and best practices related to demand resource bidding programs.[186]

138. SPP states that there are no states within its footprint that currently provide retail access. However, to the extent there would be an ARC within its footprint, it notes that it would be up to the relevant retail regulatory authority to determine whether retail load would be permitted to participate in the wholesale market demand response program.[187]

ii. Comments on regulatory approval of ARCs

139. Most regulatory authorities, including NARUC, as well as other commenters, such as NRECA, APPA, and TAPS, ask the Commission to modify its proposal to clarify that an ARC or any retail customer may not bid load-reduction response into an RTO or ISO market without the relevant retail regulatory authority's express permission.[188] They assert that the Commission's proposal would allow ARCs to bid retail demand response into organized energy markets without express permission from the relevant retail regulatory authority and thereby place a burden on the local authority to take affirmative action to disallow such participation. Some assert that such a burden displaces state authority and would impose an undue burden on municipalities, resulting in unintended consequences.[189] They state that an ARC's participation should be subject to the rules and laws of the relevant retail regulatory authority and argue that an ARC or any retail customer should not bid load-reduction response into an RTO or ISO market without the relevant retail regulatory authority's express permission. They contend that the burden should be on the ARC or the regional entity to obtain state regulators' permission for the demand response program, and not on the retail electric regulatory authority to prohibit it.

140. The Final Rule, they contend, should specify that an RTO or ISO can accept ARC bids only if the relevant electric retail regulatory authority affirmatively informs the RTO or ISO that it permits ARC activities for its retail load; without such explicit notification, the RTO should presume that an ARC could not lawfully aggregate the retail load. For instance NARUC states that the last criterion proposed by the Commission should be revised to state that:

> The market rules shall not allow bids from an ARC unless this is expressly permitted under the laws or regulations of the relevant electric retail regulatory authority. The RTO or ISO must receive explicit notification from the relevant retail regulatory authority in order to qualify a bid from an ARC that includes the demand response of that authority's retail customers.[190]

141. NRECA argues that if the Commission does not require explicit permission from the relevant authority, ARCs would effectively be allowed to cherry-pick the best load response resources out of existing LSE demand response programs. NRECA contends that this would deprive those LSEs of important resources used to keep rates down for all consumers.[191] APPA, like NRECA, asks that the Commission require RTOs and ISOs to assume that in the case of public power systems, aggregation is not permitted unless the state's retail regulatory authority has notified the RTO or ISO otherwise. However, if the Commission maintains the NOPR proposal over APPA's objections, APPA suggests an alternative approach to this issue, making it clear that this is not its preferred approach. It suggests that the Commission implement its proposal for power systems with 4 million MWh or more in total annual output, but exempt systems of smaller size.[192] That is, for power systems above 4 million MWh of total annual output the presumption would be as proposed by the Commission: that an ARC or individual retail consumer may bid demand response into an organized wholesale power market unless the relevant electric retail regulatory authority notifies the RTO or ISO that this is not permitted. For smaller systems, the presumption would be that retail load may not be bid into the organized market, unless the relevant electric retail regulatory authority expressly indicates that participation by retail customers is permitted. APPA states that this option would preserve the Commission's intention to remove barriers to the participation of demand response resources in organized wholesale electricity markets while not imposing an undue burden on small systems that may not be prepared to address this issue.

142. E.ON U.S. opposes the proposal on the grounds that it violates the separation of federal and state jurisdiction and places at risk a utility's obligation to serve its retail load.[193] It notes that state regulatory commission approval is required before retail customers may band together to offer a bid into the wholesale market and such an approval will be difficult if the program benefits large customers to the detriment of many small customers. Also, while Mr. Borlick does not oppose the proposal, he states that ARCs are not the best means for promoting demand response resources.[194]

143. PG&E asserts that explicit approval of the regulatory authority is

[183] BP Energy at 16.

[184] LPPC at 8.

[185] *See infra* note 60.

[186] NYISO at 10.

[187] SPP at 5–6.

[188] *E.g.,* APPA at 43; California PUC at 17; IMEA at 2; Kansas CC at 2; Maine PUC at 4; NARUC at 8; NCPA at 3; North Carolina Electric Membership at 5; NRECA at 12; Ohio PUC at 8; Pennsylvania PUC at 12; NIPSCO at 13; PG&E at 9; and Old Dominion at 13.

[189] *E.g.,* NRECA at 10–14; NARUC at 7; TAPS at 13; and IMEA at 2. APPA notes that only a small fraction of the 1,315 public systems providing retail electric services in states served by RTOs and ISOs have laws or rules that address end-use aggregation. Therefore, it argues that requiring relevant electric retail regulatory authority to take affirmative actions to consider retail aggregation by ARCs can be a substantive undertaking. APPA at 44.

[190] NARUC at 9. PG&E and NRECA offer similar revisions. PG&E at 10; NRECA at 11.

[191] NRECA at 14.

[192] APPA at 47. APPA states that the United States Small Business Administration defines an entity whose total annual output is under 4 million MWh as a small utility. APPA at 45 & n.21.

[193] E.ON U.S. at 11.

[194] Mr. Borlick at 3.

needed to assure that opportunities for unreasonable and unfair allocations of cost are eliminated and that critical enabling elements have been established. According to PG&E, this includes: (1) Assuring that a customer properly informs a load-serving entity of its demand response participation; (2) assurance that costs are not inappropriately transferred from one group of customers to another through demand response aggregation; (3) that appropriate RTO or ISO metering protocols exist to eliminate double counting concerns; and (4) resource adequacy value is fairly allocated.[195]

144. Wal-Mart, however, states that the Commission has the authority to promote aggregation of retail load reduction bids, including bids from individual retail customers, and should not require RTOs or ISOs to reject bids unless permitted by the relevant retail regulatory authority.[196] Similarly, some commenters assert that the Commission should exercise its jurisdiction over demand response programs to direct RTOs and ISOs to allow any retail customer either on its own or through an aggregator to participate in RTO or ISO demand response programs as long as the customer can meet the operational requirements of the RTO or ISO tariff, without consulting with a state commission.[197] They contend that such unrestricted access to demand response programs is the best way to maximize program participation and thereby bring benefits to organized markets. In the alternative, however, they state that they support the NOPR proposal.[198]

145. Xcel supports the proposed rule on aggregation by ARCs, but asks the Commission to clarify how the RTO or ISO would receive explicit notification from the relevant regulatory authority to disqualify an offer from an ARC. Xcel suggests that the Commission follow the procedure used for compliance with NERC mandatory electric reliability standards and require each ARC to register with the RTO or ISO, which could then require the ARC to certify that it has received the appropriate regulatory approval.[199]

iii. Comments on proposed criteria and regional flexibility

146. Many commenters state that they support the Commission's proposed criteria and regional flexibility for RTOs and ISOs listed in the NOPR for allowing an ARC to bid retail load-response into an RTO or ISO market.[200] For example, LPPC believes that the proposed criteria are useful in evaluating RTO and ISO implementation of the proposal. It also suggests two additional criteria: (1) the RTO or ISO must demonstrate that its procedure for administering ARC bids effectively coordinates activities of the ARCs and LSEs; and (2) the Commission should ensure that there is a demonstration of net benefits to consumers and that a system is in place for verifying that demonstrated load reduction is achieved.[201]

147. Reliant agrees with the Commission's proposed criteria, but it believes that the most effective approach for demand response development is through the direct relationship between the retail customer and its LSE.[202]

148. Many commenters support the NOPR proposal to allow each market to develop its own rules to implement retail aggregation by ARCs.[203] For example, Dominion Resources agrees with the Commission that it is important for RTOs and ISOs to have flexibility in developing ARC provisions to account for regional differences.[204] EEI stresses that RTOs and ISOs should have flexibility to adopt pricing methods and other provisions that reflect regional differences.[205] NEPOOL Participants states that the current arrangements in ISO New England already allow ARCs to participate in its markets, and any changes to the existing program to accommodate Commission directives should be handled through the stakeholder process. SoCal Edison-SDG&E believe that CAISO should have the flexibility to pursue development of demand response programs without being constrained by overly broad nationwide restrictions and requirements. California Munis urges the Commission to consider regional and jurisdictional distinctions that may affect ARCs' effectiveness, noting that some states and local jurisdictions within RTO or ISO may not have adopted a retail choice model.

149. Public Interest Organizations, however, recommend that the Commission adopt a more detailed generic (*pro forma*) set of market rules on ARCs, which RTOs and ISOs may modify based on regional differences if the modifications are comparable or superior to the Commission's rules. According to Public Interest Organizations, these *pro forma* rules could be developed through a technical conference.

iv. Comments on Specific ARC Requirements and Clarifications

150. Many commenters assert that it is important that ARCs be required to comply with necessary technical requirements.[206] For instance, several commenters state that certain technical matters should be standardized, including (1) the method for determining baseline compensation, (2) tools to establish uniform baselines and verification, (3) interface tools for demand response to use a common portal and protocol in organized markets, and (4) telemetry and metering requirements.[207] DC Energy states that ARCs should provide verification of measurement equal to others in the same market and notes that all participants should have similar requirements for the ability to bid into wholesale markets. DRAM and Converge state that double payment should be avoided and FirstEnergy asserts that each RTO or ISO should adopt appropriate restrictions to avoid double counting.

151. EnergyConnect notes that past efforts to aggregate small retail loads have not been successful primarily due to the requirement that every small resource in an aggregated group meet the same registration, measurement and verification standards as large generators or other resources. EnergyConnect recommends the use of sampling or other techniques to address this issue.

152. Several commenters seek clarification of various aspects of the proposal. For instance, EEI stresses that the Final Rule should clarify that RTOs and ISOs may specify certain requirements of ARCs, such as registration and creditworthiness requirements, and that RTOs and ISOs should have the flexibility to adopt pricing methods and other provisions that reflect regional differences.[208] Industrial Coalitions also ask the Commission to clarify that ARCs, like LSEs and industrial customers, should be held accountable for responding

[195] PG&E at 9.

[196] Wal-Mart at 6–7.

[197] Integrys Energy at 4–5; Retail Energy at 2.

[198] Integrys Energy at 5; Retail Energy at 2

[199] Xcel at 9–10.

[200] *E.g.,* Exelon at 9; Industrial Consumers at 16; LPPC at 8; MADRI States at 5;NYISO at 9; Reliant at 6; and Wal-Mart at 7.

[201] LPPC at 8.

[202] Reliant at 6.

[203] *E.g.,* APPA; California Munis; Dominion Resources; EEI; Exelon; ISO/RTO Council; Old Dominion; NEPOOL Participants; and SoCal Edison-SDG&E.

[204] Dominion Resources at 5.

[205] EEI at 17.

[206] *E.g.,* NYISO at 5; LPPC at 7; Comverge at 18; EEI at 2; and Industrial Consumersat 14.

[207] *E.g.,* DRAM at 21; Comverge at 18; and NEPOOL Participants at 9.

[208] EEI at 17.

when called upon by their respective RTO or ISO. LPPC requests that the Commission clarify that its rules would not permit ARC bids to be submitted on behalf of load served by LSEs that are not RTO or ISO members. Similarly, SMUD requests clarification that the Commission did not intend that loads located outside the control area of an RTO or ISO would participate in demand response programs, whether through a retail aggregator or directly with the RTO or ISO.

153. NYISO states that the Commission should not accept proposals that would provide preferential treatment to ARCs or that would not be comparable to the rules for other demand resources or generators.[209] NYISO suggests that the Commission amend its proposed regulatory text in section 35.28(g)(iii) to clarify that ARCs must meet ''applicable reliability requirements'' before they can bid into regional markets, and clarify that the reference to ''organized market'' has the same meaning as proposed under subsection (g)(i).[210] Similarly, it states that the Commission should conform subsection (g)(iii) to (g)(i) so that (g)(iii) will specifically require ARCs to comply with ''necessary technical requirements under the RTO or ISO tariff.'' NYISO notes that such a change will ensure that RTOs and ISOs may adopt reasonable metering, verification, communications, minimum size, and other technical rules for both individual demand resources and ARCs.[211]

c. Commission Determination

154. The Commission adopts in this Final Rule the proposed rule to require RTOs and ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. We find that allowing an ARC to act as an intermediary for many small retail loads that cannot individually participate in the organized market would reduce a barrier to demand response. Aggregating small retail customers into larger pools of resources expands the amount of resources available to the market, increases competition, helps reduce prices to consumers and enhances reliability. We also agree with commenters that this proposal could encourage development of demand response programs and thereby provide retail customers more opportunities available through larger markets. Additionally, as some commenters note, experiences with existing aggregation programs in PJM, NYISO, and ISO New England have shown that these programs have increased demand responsiveness in these regions.

155. We are mindful of the comments that allowing ARCs to bid into the wholesale energy market without the relevant electric retail regulatory authority's express permission may have unintended consequences, such as placing an undue burden on the relevant electric retail regulatory authority. In the NOPR, the Commission sought to address the concerns of state and local retail regulatory entities by proposing to require that an ARC may bid retail load reduction into an RTO or ISO regional market unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate in this activity. The Commission's intent was not to interfere with the operation of successful demand response programs, place an undue burden on state and local retail regulatory entities, or to raise new concerns regarding federal and state jurisdiction, as some commenters argue. As described above, we clarify that we will not require a retail electric regulatory authority to make any showing or take any action in compliance with this rule. Rather, this rule requires an RTO or ISO to accept a bid from an ARC, unless the laws or regulations of the relevant electric retail regulatory authority do not permit the customers aggregated in the bid to participate.

156. In response to E.ON U.S., we do not agree that the approach we adopt here violates the separation of federal and state jurisdiction. Rather, we find that this action properly balances the Commission's goal of removing barriers to development of demand response resources in the organized markets that we regulate with the interests and concerns of state and local regulatory authorities.

157. With regard to LPPC's request that ARCs not bid on behalf of load served by LSEs that are not RTO or ISO members, SMUD's request for clarification that loads outside of an RTO's or ISO's control area would not participate in demand response programs, and TAPS's comment that the proposal should not require a change to an existing retail load reduction program, the continuing role of the relevant retail electric regulatory authority adequately addresses these concerns.

158. Further, we agree with the comments that, because each region's market design is different, it is important to permit each RTO or ISO to design ARC provisions that account for these differences. Therefore, instead of developing pro forma language or requiring RTOs and ISOs to make detailed generic market rule amendments, we direct RTOs and ISOs to amend their tariffs and market rules as necessary to allow an ARC to bid demand response directly into the RTO's or ISO's organized market in accordance with the following criteria and flexibilities that remain largely unchanged from those advanced in the NOPR:

a. The ARC's demand response bid must meet the same requirements as a demand response bid from any other entity, such as an LSE. For example:

i. Its aggregate demand response must be as verifiable as that of an eligible LSE or large industrial customer's demand response that is bid directly into the market;

ii. The requirements for measurement and verification of aggregated demand response should be comparable to the requirements for other providers of demand response resources, regarding such matters as transparency, ability to be documented, and ensuring compliance;

iii. Demand response bids from an ARC must not be treated differently than the demand response bids of an LSE or large industrial customer.

b. The bidder has only an opportunity to bid demand response in the organized market and does not have a guarantee that its bid will be selected.

c. The term ''relevant electric retail regulatory authority'' means the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission.

d. An ARC can bid demand response either on behalf of only one retail customer or multiple retail customers.

e. Except for circumstances where the laws and regulations of the relevant retail regulatory authority do not permit a retail customer to participate, there is no prohibition on who may be an ARC.

f. An individual customer may serve as an ARC on behalf of itself and others.

g. The RTO or ISO may specify certain requirements, such as registration with the RTO or ISO, creditworthiness requirements, and certification that participation is not precluded by the

[209] NYISO at 9–10.

[210] Section 35.28 (g)(i) establishes that ''organized markets'' includes any RTO or ISO-administered market based on competitive bidding.

[211] NYISO at 10.

relevant electric retail regulatory authority.[212]

h. The RTO or ISO may require the ARC to be an RTO or ISO member if its membership is a requirement for other bidders.

i. Single aggregated bids consisting of individual demand response from a single area, reasonably defined, may be required by RTOs and ISOs.

j. An RTO or ISO may place appropriate restrictions on any customer's participation in an ARC-aggregated demand response bid to avoid counting the same demand response resource more than once.

k. The market rules shall allow bids from an ARC unless this is not permitted under the laws or regulations of relevant electric retail regulatory authority.

159. The above criteria in combination with regional flexibility will provide the foundation for each RTO and ISO to work with its stakeholders, including state and local regulatory entities, to develop market rules that will enable more small entities to provide demand response to the regional markets. Such a process would provide the forum necessary to discuss and resolve concerns raised by the commenters in this proceeding, including: (1) Developing standardized terms and conditions, (2) the requirement that ARC's demand response bid must meet the same requirements as other demand response bids,[213] (3) verification and measurement, (4) penalties for non-compliance, (5) registration and creditworthiness requirements, and (6) mechanisms to prevent gaming. Further, in response to those who ask us to require in this rule (1) that each RTO or ISO should be required to demonstrate net benefits of its program, (2) that bids should be aggregated on a local basis, and (3) that so called ''double payment'' should be either required or prohibited, we decline to do so here. Such issues are more appropriately addressed by each region in its compliance filing if it chooses to do so.

160. Given this regional approach, we do not find that standardized technical issues or a *pro forma* set of market rules, as raised by some commenters, is necessary at this time. The comments do not persuade us to add additional criteria to the criteria adopted herein. As noted above, we encourage RTOs and ISOs to coordinate their efforts with customers, state and local regulatory entities, and other stakeholders. The Commission will consider such regional proposals in the compliance filings. Further, we agree with commenters on the need for coordination of the activities of the ARCs and LSEs to ensure efficient operation of the markets.

161. In accordance with NYISO's recommendation, the Commission will clarify that its regulatory reference in § 35.28 (g)(ii) to ''organized market'' has the same meaning as proposed under (g)(i) and that ARCs are to comply with any necessary technical requirements under the RTO's or ISO's tariff.

162. Regarding NYISO's recommendation that the Commission clarify that ARCs must meet ''applicable reliability requirements,'' the Commission does not see a need to change its proposed language in this rulemaking because reliability issues are addressed by each RTO or ISO in accordance with Commission established reliability requirements.

163. Each RTO and ISO is required to submit, within six months of the date that this Final Rule is published in the **Federal Register**, a compliance filing with the Commission, proposing amendments to its tariffs or otherwise demonstrating how its existing tariff and market design is in compliance with the requirements of this Final Rule.

164. We appreciate comments of CAISO, ISO New England, Midwest ISO, and NYISO that they are already working with stakeholders to allow ARCs to operate within their footprint or to address compliance issues. With regard to SPP's comment that there is no retail access state within SPP, the Commission notes that its ARC requirements are not limited to aggregation of retail customers who have retail choice. We will not prejudge here whether any nascent ARC program will satisfy our requirements. Nor will we decide whether a regulator of a traditional, vertically-integrated monopoly utility may give permission for an ARC to aggregate retail customers' demand responses for bidding into SPP's markets. SPP may explain in its compliance filing its situation regarding retail choice but should also explain how it would accommodate a bid from an ARC consistent with the criteria listed above.

5. Market Rules Governing Price Formation During Periods of Operating Reserve Shortage

165. In the NOPR, the Commission observed that existing RTO and ISO market rules continue to appear to be unjust, unreasonable, and unduly discriminatory or preferential during periods of operating reserve shortages. In particular, the Commission noted that these rules may not produce prices that accurately reflect the true value of energy in such an emergency and, by failing to do so, may harm reliability, inhibit demand response, deter new entry of demand response and generation resources, and thwart innovation.[214]

166. Therefore, the Commission proposed to reform market rules governing price formation in RTO and ISO energy markets during operating reserve shortages. Specifically, the Commission proposed to require each RTO or ISO with an organized energy market to make a compliance filing, within six months of the date that the Final Rule is published in the **Federal Register**, proposing any necessary reforms to ensure that the market price for energy accurately reflects the value of such energy during shortage periods (*i.e.*, an operating reserve shortage). The Commission stated that each RTO or ISO may propose one of four suggested approaches to pricing reform during an operating reserve shortage or to develop its own alternative approach to achieve the same objectives. These approaches are discussed in section (b) of this chapter. Alternatively, an RTO or ISO may demonstrate that its existing market rules already reflect the value of energy during periods of shortage and, therefore, do not need to be reformed. The Commission proposed to require RTOs and ISOs proposing reforms or demonstrating the adequacy of existing market rules to provide an adequate factual record for the Commission to evaluate their proposals; and proposed six criteria by which the Commission would evaluate the RTO's or ISO's compliance filing. The Commission asked for comments on these criteria. The Commission noted that any change in market rules to implement the proposed reforms must consider the issue of market power abuse, recognize regional differences in market rules, and be based on a sound factual record.

167. Further, the Commission stated that it would require any RTO or ISO proposing reform in this area to address the adequacy of any market power mitigation measures that would be in place during periods of operating reserve shortage. In addition, to ensure an adequate record on the issue of market power mitigation, the Commission proposed to solicit the views of the Independent Market

[212] The RTO or ISO should not be in the position of interpreting the laws or regulations of a relevant electric retail regulatory authority.

[213] We note that ''same requirement'' does not necessarily mean identical to other demand response bids. An ARC's demand response bid must meet similar or comparable requirements as other demand response bids.

[214] NOPR, FERC Stats. & Regs. ¶ 62,628 at P 107.

Monitor for each RTO or ISO region on any proposed reforms in this area.

168. Section (a) of this Chapter presents a discussion of the Commission's proposed rule to reform pricing for RTOs and ISOs to more accurately reflect the value of energy during periods of operating reserve shortage. Section (b) addresses comments on the four approaches provided by the Commission that RTOs and ISOs must consider in addressing this issue. Section (c) addresses the six criteria that the Commission proposed to ensure that any reforms implemented by an RTO or ISO achieve the desired results; and section (d) addresses the option for each RTO or ISO to phase-in its reform proposal over a number of years.

a. Price Formation During Periods of Operating Reserve Shortage

i. Comments

169. A number of commenters state that they support the proposed rule on price formation during periods of operating reserve shortage.[215] Some of these commenters assert that prices must be allowed to reflect the true value of energy during an operating reserve shortage in order for wholesale energy markets to operate efficiently.[216] Other commenters state that a transparent price signal can: (1) Enhance system reliability and protect customers; [217] (2) encourage a vibrant demand response market because both demand response and other sources of energy supply will participate in the market to a greater degree; [218] and (3) encourage those with advanced metering technology to follow energy prices more closely, and those without such technology to acquire it.[219]

170. EEI maintains that RTOs and ISOs should modify their market rules to allow the market-clearing price to accurately reflect the value of energy during periods of operating reserve shortages. It also agrees that any change in market rules must consider the issue of market power, recognize regional differences in market rules, and be based on a sound factual record.[220]

171. PJM Power Providers asserts that accurate price signals are the cornerstone of a successful wholesale market design. It notes that many of the problems in wholesale electric markets stem from market design features that suppress prices during shortage conditions to levels below the value of lost load.[221] It adds that shortage pricing can provide short-term signals to generation to ensure production and long-term signals to allow for fixed cost recovery supporting maintenance of existing facilities and new entry. Therefore, PJM Power Providers asserts that a shortage pricing mechanism must be integrated with the overall market design.

172. Reliant states that for all RTOs and ISOs—with or without capacity markets, prices in real-time should properly signal needed responses from both supply-side and demand-side resources. To the extent that price caps or bid mitigation suppress the appropriate price signals in the energy market, reforms should be made. These price signals are needed to encourage the necessary short-term response to the market and also to provide critical pricing information to the market.[222] Reliant argues that the current market design in several RTOs and ISOs does not support the investment needed to maintain system reliability.[223] It asserts that transparent price signals in the market will encourage the most efficient and effective implementation of new generation and demand-side technology and investment. Therefore, to the extent that RTO and ISO market design fails to provide such transparent price signals, Reliant asserts that the Commission should direct necessary pricing reforms.[224]

173. Several commenters note that they support the proposed shortage pricing proposal and also note that generation and demand resources should be treated comparably during shortage pricing.[225] For instance, OMS states that both generation and demand resources are equally valuable so they should be treated comparably. In that respect, it notes that, similar to generators, demand resources, if offered and accepted into the market during shortage periods, should be assessed penalties if the RTO calls on them and they do not comply.[226]

174. Several commenters support the Commission's proposal to recognize regional differences by adopting a flexible regional approach, rather than a general mandate.[227] These commenters state that given the market design and rule variations among organized markets, a one-size-fits-all approach may not be appropriate. They believe that it is reasonable for the Commission to establish fundamental principles and necessary elements for promoting demand responsiveness, while leaving the specifics of implementation to each RTO or ISO market. Therefore, they support the Commission's proposal to allow each region to choose its own shortage pricing approach from the four offered or to choose another developed through the stakeholder process.

175. EEI also strongly supports the Commission's regional approach; stating that, given the regional differences in market design, each region should have the flexibility to propose its own approach or demonstrate that its existing market rules satisfy this requirement.[228] Similarly, California PUC states that implementation of this rule should be done through collaborative efforts between the state commission and its respective RTO or ISO (*e.g.*, how the shortage price is set, at what level it is set, and under what circumstances the shortage price is triggered).[229]

176. Several regional entities assert that they are in compliance or will be in compliance with the proposed rule. For instance, CAISO states that it will be in compliance with the proposed plans to incorporate a demand curve for reserves within 12 months of the roll-out of MRTU, as directed by the Commission.[230] Midwest ISO states that it is in compliance with the proposed rule because its recently-approved ancillary services market incorporates a demand curve for operating reserves.[231] NYISO maintains that it intends to demonstrate in its compliance filing that

[215] *E.g.*, Mr. Borlick; BP Energy; CAISO; California PUC; Comverge; Constellation; DC Energy; Dominion Resources; DRAM; Duke Energy; EEI; EPSA; Exelon; FirstEnergy; Integrys Energy; Ohio PUC; OMS; Potomac Economics; PJM Power Providers; PPL Parties; and Reliant.

[216] *E.g.*, BP Energy at 22; Mr. Borlick at 5; Comverge at 20, 22; Dominion Resources at 7; Exelon at 11; OMS at 6; PPL Parties at 5; and PJM Power Providers at 3.

[217] Comverge at 20, 23; PPL Parties at 5. PPL Parties notes that ''customers will be protected because the price signal will encourage more robust bilateral contracting, self-supplied generation, the improved use of hedging and financial instruments, and increased amounts of demand responsive load.'' PPL Parties at 6.

[218] PPL Parties at 5.

[219] OMS at 6.

[220] EEI at 19.

[221] PJM Power Providers at 3. *See also* PPL Parties at 5 (''implementing appropriate [shortage] pricing will require permitting energy prices to rise when warranted to reflect the average value of lost load'').

[222] Reliant at 8.

[223] For example, in Midwest ISO and CAISO, Reliant notes that market revenues were not sufficient to support new generation investment. *Id.* at 9.

[224] *Id.* 9–10.

[225] PPL Parties at 5; First Energy at 11; and OMS at 6.

[226] OMS at 6.

[227] *E.g.*, CAISO; EEI; EPSA; ISO/RTO Council; Midwest ISO; PJM Power Providers; Old Dominion; Wal-Mart; ISO New England; NYISO; NY TOs; Detroit Edison; Dominion Resources; and SPP.

[228] EEI at 19.

[229] California PUC at 19. CAISO also states that it supports the Commission's proposal to require RTOs and ISOs to study shortage pricing market reforms and report back to the Commission.

[230] CAISO at 3.

[231] Midwest ISO at 16.

its rules fully satisfy the NOPR's requirements.[232] ISO New England also states that it has a demand curve for operating reserves and thus is in compliance with the proposal.[233]

177. Many commenters object to the Commission's proposed rule on pricing reform during periods of operating reserve shortages, and they proffer various reasons.[234] Some of these commenters oppose the proposed rule on grounds that it will result in exercise of market power because the organized markets are not competitive,[235] leading to unjust and unreasonable rates. APPA argues that the prices produced by RTO or ISO markets do not reflect the actual economic costs of providing service because the rates are not the product of competitive markets.[236] According to APPA, the only restraint on generation suppliers' ability to extract the maximum amount of profits from regional markets is the RTO's and ISO's market mitigation rules. It states that exposing retail consumers directly to unmitigated price signals would result in unjust and unreasonable rates. Therefore, APPA urges the Commission to first address market deficiencies, including market competitiveness and proper demand response infrastructure, in order to enable consumers to respond to higher prices.[237] NRECA argues that the Commission would violate its duty under FPA if it were to subject customers to unjust and unreasonable rates, even if those excessive rates were limited to emergency situations.[238]

178. LPPC is opposed to proposals that would permit generation prices to rise above rate cap levels during scarcity situations.[239] According to LPPC, the proposed rule would undermine the Commission's core mission to ensure just and reasonable rates and would result in an unjust and unreasonable transfer of wealth from customers to generators. It notes that the Commission has long approved the use of price caps in RTO and ISO markets in order to mitigate market power and to protect customers from unreasonable prices during periods of capacity deficiency or emergency.[240] It asserts that removing these price caps would be inconsistent with Commission precedent that market-based rates may be relied on only where the Commission has determined that the market is sufficiently competitive.[241] It further argues that the Commission is abdicating market mitigation by abandoning price caps when it has previously determined that price caps are needed to restrain prices in times of scarcity.[242] Therefore, instead of removing bid caps, LPPC believes that the Commission should promote demand response through payments for demand reduction.

179. Several commenters dispute the Commission's premise that customers will be able to respond to higher prices.[243] For instance, Steel Manufacturers asserts that the vast majority of end users do not see hourly price signals because they are retail customers regulated by state commissions.[244] According to Steel Manufacturers, only a small percentage of loads, typically large manufacturing loads, who take electric service through advanced meters will be able to respond to price signals during periods of scarcity. Therefore, they argue that there is no rational justification for imposing all market risks only on such a small pool of retail loads.[245] Further, New Jersey BPU states that demand-side resources that pay a fixed seasonal or annual retail price for electricity will have no reason to respond to any dramatic increase in hourly prices.[246]

180. Similarly, TAPS argues that the proposed rule is not supported by sufficient evidence that lifting such bid caps will attract demand response sufficient to protect consumers from market power.[247] It asserts that when the Commission is relying on demand response to provide the competitive response necessary to keep rates just and reasonable, there must be sufficient empirical proof that actual prices will be just and reasonable.[248] TAPS contends that the Commission has not provided such evidence, and is prepared to ''unleash market forces without making factual findings that the demand response necessary to restrain prices is ready, willing and able to be called upon.''[249] TAPS also disputes the Commission's statement that artificial bid caps inhibit price signals needed to attract entry by both generation and demand response resources. It asserts that high spot market prices do not correlate with entry in RTO and ISO markets.[250]

181. Pennsylvania PUC states that demand response must be fully integrated into existing markets before price caps can be removed in RTOs and ISOs. It asserts that the Commission wrongly concludes that price caps are inhibiting an otherwise competitive market. It also argues that without infrastructure improvements that permit load to see shortages being priced, removing bid caps would promote the exercise of market power.[251]

182. Similarly, Industrial Coalitions argue that necessary technology and demand response capability must be in place before any changes to mitigation rules can be contemplated. They also state that there are barriers to demand response such as inadequate federal-state coordination, utilities' ability to preclude and frustrate customer participation, and complex participation requirements. Industrial Coalitions ask that the Commission demonstrate how any change in shortage pricing rules will result in lower prices to consumers.[252] SMUD also states that while the elimination of every barrier to demand response is not a prerequisite to easing bid caps for demand response, the problem is that there are still significant barriers to demand response participation that must be addressed first.[253] SMUD reports that there were deficiencies in technology that led the Commission not to allow bid caps to be

[232] NYISO at 4.

[233] ISO New England at 12; *see also* NEPOOL Participants at 16; NSTAR at 3; and Maine PUC at 4–5.

[234] *E.g.*, Alcoa; APPA; California Munis; Industrial Coalitions; Industrial Consumers; LPPC; North Carolina Electric Membership; NRECA; OLD Dominion; TAPS; Steel Manufacturers; SMUD; Public Interest Organizations; New Jersey BPU; and National Grid.

[235] *E.g.*, Alcoa; APPA; NRECA; TAPS; North Carolina Electric Membership; Pennsylvania PUC; LPPC; and Steel Manufacturers.

[236] APPA at 53.

[237] *Id.* at 30–31. The California Munis adopt the comments of APPA on these issues and incorporate them by reference into their comments. California Munis at 17.

[238] NRECA at 16.

[239] LPPC at 3.

[240] *Id.* at 9–10.

[241] *Id.* at 12 (citing *California ex re. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004, *cert denied, Coral Power, LLC v. Cal. ex rel. Brown*, 127 S. Ct. 2972, 168 L. Ed. 2d 719 (2007); *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 30–31 (DC Cir. 2002); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (DC Cir. 1993); *Louisiana Energy & Power Auth. v. FERC*, 10 F.3d 866 (DC Cir. 1998)).

[242] LPPC 12–13.

[243] *E.g.*, North Carolina Electric Membership; New Jersey BPU; Old Dominion; Steel Manufacturers; and Pennsylvania PUC.

[244] Steel Manufacturers at 12–13.

[245] *Id.*

[246] New Jersey BPU notes that virtually all New Jersey residential customers and commercial and industrial customers below 100 kW pay fixed retail prices. Therefore, a major increase in wholesale electricity prices during peak hours cannot be expected to attract new demand resources from the large majority of New Jersey customers. New Jersey BPU at 3.

[247] TAPS at 24.

[248] *Id.* at 24–25.

[249] *Id.* at 26. TAPS asserts that the Commission must protect customers from excessive rates and charges, and if it acts without the requisite empirical proof, the Commission will fail to protect consumers. TAPS at 29 (citing, *Atl. Ref. Co.* v. *Pub. Serv. Comm'n of N. Y.*, 360 U.S. 378, 388 (1959)).

[250] TAPS at 26–27.

[251] Pennsylvania PUC at 14–15.

[252] Industrial Consumers at 19.

[253] SMUD at 3 (citing NOPR, FERC Stats. & Regs. ¶ 32,628 at P 109).

lifted previously, and these technologies are still insufficiently developed today.

183. Old Dominion also opposes removing price caps and asserts that efforts to increase demand response should not come at the expense of a customer base that cannot respond to price signals.[254] It states that the Commission should adopt a presumption that such pricing incentives are not necessary and require the RTOs and ISOs that believe otherwise to make a factual demonstration that they are. This would include demonstrating that non-price barriers to demand response have been removed and that current market power mitigation rules will suffice to deal with any gaming behavior.

184. North Carolina Electric Membership states that there is no evidence that generators require higher scarcity payments if the region already has a capacity market.[255] National Grid states that the Commission's proposal to shift revenue from capacity markets to energy markets should not be implemented because it conflicts with the market designs approved by the Commission and implemented in NYISO and ISO New England.[256] New Jersey BPU does not share the Commission's belief that such shortage pricing reforms will automatically lead to lower prices in capacity markets.[257] PG&E states that any proposed shortage pricing rules must be coordinated with other mechanisms that provide similar reliability benefits to electrical systems, including resource adequacy requirements and DR programs.[258] This must include capacity pricing mechanisms. An explanation of such coordination should be a requirement of the filing that RTOs and ISOs make as part of their proposal. PG&E is particularly concerned about the CAISO's implementation of reserve shortage pricing, along with its relaxation of price caps, before meaningful demand response products are available.

185. Comverge and DRAM state that they support the Commission's proposal to reflect the value of energy during times of scarcity. However, they note that they are concerned about how the proposal would impact existing capacity markets, particularly in the longer term.[259] Comverge states that where capacity markets are, or will be, in place each of the four approaches may reduce capacity market prices because revenues from energy and ancillary services would be subtracted from capacity payments. This may discourage participation by some demand response resources in capacity markets.[260] According to DRAM, demand response resources need the ''stable revenue stream'' from the capacity market, and any energy payment received during reliability events is of secondary importance.[261] DRAM states that shortage pricing should not be pursued in a way that requires demand response providers to participate in the energy market because not all customers are suited to, or interested in, energy market participation. Instead, it notes that these customers may participate in a reliability-based demand response program that helps preserve reliability, allowing them to be paid to be a reliability resource. EnerNOC asks the Commission to fashion a policy on shortage pricing that encourages demand response resources to interact in both energy and capacity markets, or in either one, in a manner that is most appropriate for the demand response resource.[262]

186. The FTC encourages the Commission to require that proposals from RTOs and ISOs to lift wholesale bid caps during periods of operating reserve shortages be accompanied by an analysis of how the proposed change in the wholesale bid caps will change the totality of regulatory restrictions on wholesale prices during these periods.[263] Industrial Consumers also state that capacity markets should be suspended prior to any shortage pricing changes to prevent the gaming of multiple markets. They add that shortage pricing without competition is ''monopoly pricing in disguise'' and assert that conditions of true competition must be demonstrated before shortage price is used.[264]

187. PJM Power Providers agrees with the Commission that existing market rules do not accurately reflect the value of energy during periods of shortage and, therefore may deter new entry of demand response and generation resources.[265] They also agree that many of the problems in wholesale electric markets stem from mitigation policies and market design features that suppress prices during shortage conditions below the value of lost load (VOLL). PJM Power Providers notes that in addressing these issues, a balance must be struck to encourage supplies to enter the market while minimizing market power concerns.

188. In this regard, PJM Power Providers notes that scarcity pricing mechanisms need to be integrated into the overall market design in order to be effective, so that prices reflect actual system operation.[266] It states that in the PJM market, pricing does not always match operating procedures. For example, they note that due to startup limitations the system operator may keep a peaking unit operating during non-peak hours so that the unit may be used again later in the day to meet increasing load. While operators should have the flexibility to make these types of decisions, it is critical that prices accurately reflect these operating procedures. Thus, PJM Power Providers states that if the system operator compensates the generator for the cost of keeping a peaking unit operating during non-shortage periods through an uplift charge rather than through the market-clearing price, as is currently the practice in PJM, this practice ''must be fixed.'' It states that the shortage pricing mechanism should be coupled with a new ''reserve product'' so that the scarcity price reflects the opportunity cost of held reserves (the cost of operating the peaking unit during no-scarcity periods) in a manner that is consistent with the overall shortage pricing rules. Finally, PJM Power Providers states that to achieve the intended results, the Commission must provide that when a contingency or constraint related to operations and reserves is seen in either the day-ahead or real-time market, shortage pricing should be reflected in the energy market as well.

189. Finally, TAPS makes two recommendations. The first is that the Commission should maintain some type of ''safety net cap'' that will protect consumers against ''stratospheric'' prices.[267] The second is that if the Commission does approve some shortage pricing rules, it must also revisit its approval of RTO and ISO capacity markets that were justified on the basis that such caps prevented generators from earning revenues needed to recover investment costs.[268] It argues that if spot market prices can rise to the levels claimed to be needed to recover generator investment costs, a

[254] Old Dominion at 14.

[255] North Carolina Electric Membership at 9.

[256] National Grid at 23.

[257] New Jersey BPU at 5.

[258] PG&E at 11.

[259] DRAM at 23.

[260] Comverge at 21–23.

[261] DRAM at 24.

[262] EnerNOC at 14.

[263] FTC at 29.

[264] Industrial Consumers at 19.

[265] PJM Power Providers at 3.

[266] *Id.* at 4.

[267] TAPS at 43.

[268] For example, TAPS notes that a primary justification of ISO New England's locational installed capacity market proposal was that caps take away revenues needed for cost recovery. *Id.* 43–44.

principal justification for organized capacity markets is eliminated, and consumers will be subjected to the high energy prices that the capacity market was intended to replace.

190. Several commenters address the Commission's requirement that RTOs and ISOs proposing shortage pricing reforms address the adequacy of any market power mitigation measures and that the Commission will solicit the views of the Independent Market Monitor for each RTO and ISO on any proposed reforms. EEI states that the Commission is correct to address concerns regarding the exercise of market power by requiring that any proposed reforms be supported by an adequate record demonstrating that provisions exist for mitigating market power and deterring gaming behavior.[269] EEI agrees that the Commission should solicit input from the Independent Market Monitor on any proposed rule changes in this area. Old Dominion states that the Commission should adopt a presumption that such pricing incentives are *not* necessary and require the RTOs and ISOs that believe otherwise to make a factual demonstration that they are.[270] This would include demonstrating that non-price barriers to demand response have been removed and that current market power mitigation rules will suffice to deal with any gaming behavior. Public Interest Organizations urge that before current market mitigation rules are relaxed, resource adequacy requirement must be in place and that an independent market monitor must be able to monitor shortage pricing behavior very closely.[271] TAPS states that the Commission needs to strengthen the factual showing that RTOs and ISOs must make with respect to shortage pricing reforms [272] to include at least six analyses: (1) Address market power under scarcity conditions; (2) measure whether demand response successfully mitigates market power, including empirical evidence, such as critical loss analyses; (3) examine the incentive and ability of demand response resources to engage in withholding of their demand response resources; (4) demonstrate that market power mitigation methods are effective during shortage periods for any resource, demand or generation, that can affect prices; (5) determine if there is enough demand response available to respond under scarcity conditions; and (6) prepare statistics on past and expected frequency of scarcity events as an indication of the effectiveness of policies to ensure resource adequacy.

191. Comverge and DRAM express concerns about ''price averaging'' and its possible adverse impact on demand response resource participation in organized markets. DRAM recommends time-differentiated capacity payments based on loss-of-load probability or loss-of-load expectation as an alternative to raising price caps during a period of operating reserve shortage as a means of removing a barrier to demand response resources.[273]

ii. Commission Determination

192. In this Final Rule, the Commission adopts the proposed rule on price formation during times of operating reserve shortage. The Commission continues to find that existing rules that do not allow for prices to rise sufficiently during an operating reserve shortage to allow supply to meet demand are unjust, unreasonable, and may be unduly discriminatory. In particular, they may not produce prices that accurately reflect the value of energy and, by failing to do so, may harm reliability, inhibit demand response, deter entry of demand response and generation resources, and thwart innovation.

193. When bid caps are in place, it is not possible to elicit the optimal level of demand or generator response, thereby forgoing the additional resources that are needed to maintain reliability and mitigate market power. This, in turn, increases the likelihood of involuntary curtailments and contributes to price volatility and market uncertainty. Further, by artificially capping prices, price signals needed to attract new market entry by both supply- and demand-side resources are muted and long-term resource adequacy may be harmed. Without accurate prices that reflect the true value of energy, we cannot expect the optimal integration of demand response into organized markets.

194. Therefore, we are taking action to remove such barriers to demand response by requiring price formation during periods of operating shortage to more accurately reflect the value of such energy during such shortage periods. Each RTO or ISO is required to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage. The RTO or ISO is required to provide, as part of its compliance filing, a factual record that includes historical evidence for its region regarding the interaction of supply and demand during periods of scarcity and the resulting effects on market prices, an explanation of the degree to which demand resources are integrated into the various markets, the ability of demand resources to mitigate market power,[274] and how market power will be monitored and mitigated, among other factors.

195. Some commenters oppose price reforms during periods of shortages on grounds that such reforms may lead to the exercise of market power and will result in unjust and unreasonable rates. They argue that the Commission is abdicating market mitigation by allowing price caps to be removed during a power shortage. We disagree. To the contrary, the Commission is not taking any action to remove market mitigation in regional markets. Each of the Commission's proposed reforms includes some form of mitigation, either bid caps, administratively-determined prices, or prices tied to payments made in emergency demand response programs administered by RTOs or ISOs (and thus approved by the Commission). RTOs and ISOs are free to propose other pricing reforms and associated mitigation that meet the criteria herein. Moreover, these reforms to enhance demand responsiveness further mitigate seller market power by allowing demand to choose to not consume power when the price is higher than they wish to pay. Allowing buyers to respond to prices reduces incentives for a seller to manipulate market prices.[275]

196. To guard the consumer against exploitation by sellers, we adopt the proposal to require RTOs and ISOs to adequately address market power issues in the compliance filings directed herein. We require an adequate factual record demonstrating that provisions exist for mitigating market power and deterring gaming behavior to be part of a compliance filing for price reform during periods of operating reserve shortage. This could include, but is not limited to, the use of demand resources to discipline bidding behavior to competitive levels during an operating reserve shortage. We also intend to closely monitor market behavior during periods of operating reserve shortage to

[269] EEI at 19.

[270] Old Dominion at 15.

[271] Public Interest Organizations at 9.

[272] TAPS at 29.

[273] Comverge at 10; DRAM at 10.

[274] As discussed further below, demand resources are the set of demand response resources and energy efficiency resources and programs that can be used to reduce demand or reduce electricity demand growth.

[275] *See* B.F. Neenan *et al.,* Neenan Associates, *2004 NYISO Demand Response Program Evaluation,* at E–5, (Feb. 2005); David B. Patton, Potomac Economics, *2006 State of the Market Report—The Midwest ISO,* at 44 (May 2007).

ensure that market participants are following market rules and to guard against the exercise of market power.

197. For purposes of providing the Commission with an adequate factual record regarding its shortage pricing proposal, the RTO or ISO must address the six criteria that we adopt below,[276] several of which refer to demand resources. For these purposes, ''demand resources'' refers to the set of demand response resources and energy efficiency [277] resources and programs that can be used to reduce demand or reduce electricity demand growth. Although the Final Rule requires provisions related to RTO or ISO ancillary services markets, aggregation by ARCs and deviation penalties to be implemented for demand response resources, we believe it is appropriate to allow the RTO or ISO to support its shortage pricing proposal with reference to the broader set of demand resources.

198. We note that this Final Rule does not eliminate or otherwise revise the market power mitigation measures that remain in place during times when operating reserves are insufficient. For example, conduct and impact tests are applied in ISO New England, NYISO, and Midwest ISO. A pivotal supplier test is used in PJM. Further, PJM and CAISO mitigate bids by generators that are chosen out-of-merit order.

199. Existing rules should combine effectively with the more vigilant monitoring required in this rule to dissuade the exercise of market power. Further, as noted in the NOPR, the pricing reform established in this Final Rule is only one part of the continuing effort by the Commission and RTOs and ISOs to improve the functioning of organized markets.

200. TAPS recommends a ''safety net cap'' to protect against very high prices and for a review of the need for capacity markets if there is shortage pricing. As stated earlier, none of the four approaches suggested by the Commission precludes a limit on prices. For example, the first approach does not propose necessarily to eliminate bid caps; instead, ''bid caps would be allowed to rise above existing caps'' (as stated in the NOPR) during an operating reserve shortage. No explicit amount of increase is stated or required under the first suggested approach. Under the second approach, a demand curve for operating reserves is commonly capped at some multitude of the expected cost of new entry (for instance, one and a half times the cost of new entry). The market-clearing price under the fourth approach—allowing the payment made to emergency demand response providers to set the market-clearing price—depends on that payment. As such, the approaches already account for a ''safety net'' cap.

201. TAPS and others also recommend examining the need for capacity markets under shortage pricing and whether customers would be charged twice. Under all existing capacity market rules, the revenues earned from the sale of energy and ancillary services are accounted for in the calculation of capacity payments so that customers will not be double charged. Comverge and DRAM suggest addressing price averaging in capacity markets as an alternative to raising price caps during periods of operating reserve shortages. The Commission has noted previously that this rulemaking is not designed to address capacity market issues and, therefore, finds their comments to be outside the scope of this proceeding.

202. Some commenters argue that end users are not able to see hourly prices and, therefore, will not respond to a shortage price signal. Similarly, several commenters argue that demand response capability must be in place before changes to mitigation rules are considered. Demand response programs that currently allow a fraction of the load to respond can have a positive effect on system reliability and market demand and help reduce prices for all. Full deployment of advanced meters and complete participation by all load is not needed to help cope with operating reserve shortages.[278] In addition, the Commission establishes six criteria, as discussed below, to evaluate an RTO's or ISO's proposal—criteria designed to ensure that the shortage pricing proposal achieves the objectives of this requirement while protecting customers from market power.[279]

203. Further, with better price signals, more buyers would find it worthwhile to invest in technologies that allow them to respond to prices. Also, while some customers may not be able to respond to hourly prices, they will see monthly bills and have an incentive to reduce use of power in general by, for example, setting air conditioning thermostats higher during peak periods or simply when the weather forecast calls for high temperatures, or engaging in energy efficiency, which can lead to an overall reduction in market demand, reduced need for marginal resources, and fewer periods of shortage. Further, we reiterate that such price signals would encourage entry by generators, investment in new technology, and more participation in demand response programs.

204. Several commenters are concerned that some demand response resources would be negatively affected by the shift of revenues from capacity markets to energy markets. In general, giving resource suppliers and customers more choices for how they participate in markets is beneficial. Shortage pricing in an emergency and capacity markets for long-term resource adequacy assurance serve largely distinct purposes, but we agree that they should not work at cross purposes. Adding any new element to a market design can have effects on the other elements. We require that each RTO and ISO address in its compliance filing how its selected method of shortage pricing interacts with its existing market design.

205. We disagree with LPPC's claim that higher prices during shortage periods will destabilize long-term arrangements. Allowing prices to rise during emergencies should instead provide an incentive for customers to increase their hedging through long-term contracting. Further, as noted above, it should also encourage investment in demand response technology and provide an incentive to market participants to participate in load response programs, thereby mitigating the expected higher prices.

206. Our requirement that RTOs and ISOs provide a factual record to demonstrate the adequacy of market power mitigation measures, coupled with the Commission's solicitation of the views of each RTO's and ISO's Market Monitoring Unit on proposed shortage pricing reforms, as supported by EEI, should address the concerns of

[276] *See* discussion *infra* P 247.

[277] The Commission's Staff has defined energy efficiency to refer to using less energy to provide the same or improved level of service to energy consumers in an economically efficient way. Energy efficiency uses less energy by employing products, technologies, and systems to use less energy to do the same or better job than by conventional means. Energy efficiency saves kilowatt-hours on a persistent basis, rather than being dispatchable for peak hours, as are some demand-response programs. Energy efficiency can include switching to energy-saving appliances (such as Energy Star(r) certified products) and advanced lighting (compact fluorescent or LED lighting); improving building design and construction (better insulation and windows, tighter ductwork, use of high-efficiency heating, ventilation, and air conditioning); and redesigning manufacturing processes (advanced electric motor drives, heat recovery systems) to use less energy, thus reducing use of electricity and natural gas. Federal Energy Regulatory Commission, *Assessment of Demand Response & Advance Metering: Staff Report at A–4 (September 2007).*

[278] *See* Federal Energy Regulatory Commission, *Assessment of Demand Response and Advanced Metering: Staff Report,* Docket No. AD06–2–000, at 7. As little as five percent of load responding to a high price can avert a system emergency and may help to lower the market price.

[279] *See* discussion *infra* at P 247.

Old Dominion, Public Interest Organizations, and TAPS regarding the ability of market participants to exercise market power during periods of operating reserve shortages.

207. Finally, we address PJM Power Providers' concerns that shortage pricing mechanisms be integrated into the overall market design of the RTO, perhaps with a new ''reserve product,'' and the need for contingencies or constraints related to reserves that is seen in the day-ahead or real-time market to be reflected in the energy market. We share PJM Power Providers' concern about out-of-merit order generation, such as the example they cite, and it being reimbursed through up-lift charges. A market works more efficiently when all decisions of the system operator that affect costs, *e.g.,* running peaking units, are reflected in market prices rather than in uplift charges. We encourage all RTOs and ISOs to consider this when evaluating their existing shortage pricing rules or developing new ones. This might include, as PJM Power Providers describes it, the development of ''new reserve products.'' As to their second concern, we also agree that the better integrated markets are with one another, the more efficiently they will operate. However, the aim of this rulemaking, maintaining reliability through entry of new generation and demand response resources, need not be achieved through one particular market rule structure.

b. Four Approaches

208. In the NOPR, the Commission proposed to require each RTO or ISO to make a compliance filing proposing any necessary reforms to ensure that the market price for energy accurately reflects the value of such energy during an operating reserve shortage. Given regional differences in market design, the Commission did not propose to require one particular approach to achieving this reform. Rather, the Commission stated that each RTO or ISO may propose one of four suggested approaches or another approach that achieves the same objectives. The four approaches are: (1) RTOs and ISOs would increase the energy supply and demand bid caps above the current levels only during an emergency; (2) RTOs and ISOs would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; (3) RTOs and ISOs would establish a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short; and (4) RTOs and ISOs would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program.

i. Comments

209. Many commenters spoke for or against all four approaches collectively. Those in support state that each of the four approaches is an appropriate means for achieving the goals of the NOPR's proposal on shortage pricing. Supporters of all four approaches typically did not address each approach individually, and their comments are included above among those who spoke in support of the overall proposal. Similarly, many of the commenters that oppose the overall proposal and all four approaches are also summarized above, but a few of these make more detailed collective comments on the NOPR's four suggested approaches, which are presented next. For example, NRECA and APPA state that they are firmly opposed to the Commission's four approaches to change pricing rules during shortage situations and base their opposition on the fundamental disagreement that current prices during shortage periods are unjust and unreasonable.[280] NRECA states that the approaches put forward by the Commission would result in rates that are unjust and unreasonable, and would, at a minimum, grant windfall profits to those suppliers that have been found by the RTOs' and ISOs' market monitors to possess market power. APPA also states that it does not support any of the four proposed shortage pricing approaches.[281] Public Interest Organizations state that it cannot support any of the Commission's proposed approaches at this time because demand response participation is not at a level that will assure customers that prices will be just and reasonable.[282] Public Interest Organizations urge that before current market mitigation rules are relaxed, a resource adequacy requirement must be in place and market access and effective demand response resource participation must be demonstrated. It also states that an independent market monitor must be able to monitor shortage pricing behaviors very closely.

210. Numerous commenters spoke for or against some of the four approaches, and their comments on each approach are discussed next.

211. Among those who favored one or more of the four approaches, the demand curve for operating reserves (the third approach) received the most and strongest support.

212. Under the first approach, RTOs and ISOs would increase energy bid caps (for each bidder) and the price cap (for the market-clearing price) above the current level, but only during an operating reserve shortage.[283] PJM Power Providers supports this approach and notes that to avoid market power concerns, bids may be assessed for the potential of economic withholding by considering the value of lost load multiplied by the increased probability of outages. FirstEnergy supports lifting bid caps during a shortage if the shortage is genuine, wholesale prices are reflected in retail rates, and energy and demand response are treated on a comparable basis.[284] Ohio PUC states that it would recommend this approach only where there are a sufficient number of suppliers or enough demand response to check the exercise of market power.[285] In commenting on the four approaches, Mr. Borlick notes that the Commission has correctly concluded that energy prices during periods of supply shortage fail to accurately reflect the value of load reduction.[286] Mr. Borlick states that approach 1 would produce energy prices high enough to accurately reflect the marginal value of consumption but would also encourage generators to exercise market power both through economic and physical withholding. Of the four approaches proposed in the NOPR, Mr. Borlick states that this is the least desirable. He states that approach 2 is superior to approach 1 because it would allow the demand side to set economically efficient clearing prices while controlling economic withholding by generators, although generators could still physically withhold capacity. Its drawback is that it does not provide a vehicle for efficiently trading off operating reserves for energy production.

213. NRECA opposes the first approach because it would remove price caps that have been established to mitigate market power, exposing consumers to the price bid by the marginal resource. NRECA asserts that the market-clearing price during a

[280] NRECA at 23.

[281] APPA at 29.

[282] Public Interest Organizations at 17.

[283] For example, PJM may choose to increase its current market-wide price cap. Another RTO or ISO could lift individual generator bid caps while keeping its market-wide price cap at its existing level. What exactly will be changed under this proposal depends on existing rules and what the RTO or ISO stakeholders consider for that region's market design and on what the RTO or ISO then proposes in its compliance filing.

[284] FirstEnergy at 11.

[285] Ohio PUC at 10–11.

[286] Mr. Borlick at 5.

system emergency could potentially exceed the cost of the marginal resource dispatched and the cost of new entry.[287] Similarly, TAPS opposes the first approach because it offers consumers no protection against the exercise of market power and thus would only produce unjust and unreasonable rates.[288] TAPS notes that if demand response is insufficient to restrain prices, the Commission would have to rely on generators, who have neither the ability nor the incentive to set a price that is just and reasonable under shortage conditions.[289]

214. Other commenters present a variety of reasons for not supporting the first approach. NEPOOL Participants argues that imposing either of the first two approaches in ISO New England could have unintended effects on New England markets because many market participants agreed to the forward capacity market with the understanding that the $1000/MWh cap on ''energy offers and bids'' would not be removed.[290] Maine PUC claims that in New England, it is particularly unreasonable to impose a requirement to remove bid caps from the energy market or take other steps that remove consumer protections prior to a showing that consumers can change their behavior to avoid being harmed.[291]

215. Comverge asserts that the first approach may invite gaming: generators could withhold capacity so that emergency conditions occur and then take advantage of the ensuing higher prices. However, it states that if a much more dispatchable demand response and voluntary price-response were in place the potential for gaming would be substantially reduced.[292] Duke Energy states that it is unrealistic to expect resources to accurately predict emergency conditions and tailor their bids appropriately. Thus, it states that this approach would provide generation owners with an incentive to bid above cost, putting upward pressure on prices.[293]

216. Potomac Economics recommends that the Commission not encourage this approach because it believes that the theory implicit in this approach is flawed. It states that when the system is in a shortage, relying on supply offers is not the action generally taken by system operators. Also, if suppliers do not have market power, they will not have an incentive to raise the price of their offers. Therefore, it concludes that pursuing an approach that relies on suppliers to raise their offers to achieve efficient price signals during shortage conditions would not be reliable.[294]

217. NRECA states that, in presenting the first and second approaches, the NOPR uses the terms bid caps, offer caps, and price caps interchangeably and asks the Commission to specifically define these terms. North Carolina Electric Membership also notes that the NOPR does not clearly distinguish between a generation offer cap in place as a result of mitigation procedures and the $1,000/MWh umbrella energy offer cap ceiling in place in most RTOs and ISOs.[295]

218. Under the second approach, RTOs and ISOs would raise bid caps above the current levels only for demand bids, that is, for bids by customers expressing their willingness to pay more than the market price cap to continue to receive power during an emergency and hence perhaps avoid being curtailed. Ohio PUC states that lifting the caps for only demand bids during system emergencies is a reasonable approach for creating transparent price signals in shortage situations.[296]

219. NRECA opposes this approach because these demand bids would set the market-clearing price paid to all resources, including generators. This would result in customers paying rates to generators that exceed the costs of the most expensive generator available on the system, even if those generators do nothing unusual to alleviate the emergency condition.[297] TAPS states that this approach could also raise market power concerns if the market participant submitting a demand bid also had generation that could benefit from a price increase.[298]

220. Duke Energy and FirstEnergy do not support this approach because generation resources would be treated differently from load, which is inconsistent with the comparability principle the Commission proposes for demand resources.[299]

221. Under the third approach, RTOs and ISOs would establish a demand curve for operating reserves, which establishes a predetermined schedule of prices according to the level of operating reserves. As operating reserves become shorter, the price increases. Many commenters support this approach and state that it should be implemented.[300] Several commenters assert that this approach: (1) Is the most efficient means of moving prices toward the value of lost load during emergency situations; [301] (2) would promote reliability by providing greater and timely incentives for market participants to provide capacity; [302] (3) can allow RTOs and ISOs to set prices that more accurately reflect the costs of meeting demand and reserve requirements during power shortages; [303] and (4) avoids various concerns regarding the exercise of market power. PPL Parties note that the Commission has already approved this approach for the ISO New England, NYISO, and Midwest ISO markets.[304] Dominion Resources also emphasizes that the demand curve for operating reserves has proved to be a workable method in ISO New England.[305] Of the four approaches, Mr. Borlick states that approach 3 is the most appealing based on economic theory; however, it poses implementation problems because of the computational burden involved in developing a demand curve that would accurately reflect the value of consumption.[306]

222. Potomac Economics states that implementing a demand curve for operating reserve is critical for achieving efficient shortage pricing and should be a required element for RTO or ISO markets.[307] It states that such demand curves are most effectively implemented in the context of jointly-optimized energy and ancillary services markets. It believes that effective shortage pricing requires jointly-optimized markets with operating reserve demand curves set at levels that reflect the value of reliability that the operating reserves provide to consumers.[308] However, Potomac

[287] NRECA at 20.

[288] TAPS at 40.

[289] *Id.*

[290] NEPOOL Participants at 17.

[291] Maine PUC at 5.

[292] Comverge at 21.

[293] Duke Energy at 9.

[294] Potomac Economics at 4–5.

[295] *Id.*

[296] Ohio PUC at 12.

[297] NRECA at 20.

[298] TAPS at 41–42.

[299] Duke Energy at 9; First Energy at 11.

[300] *E.g.*, Ameren; Mr. Borlick; Constellation; Duke Energy; Exelon; FirstEnergy; Potomac Economics; PJM Power Providers; and PPL Parties.

[301] Duke Energy at 10. Duke Energy explains that the use of predetermined demand curves provides a structure under which the price of energy rises to the level of the value of lost load when firm loads are interrupted. As the probability of falling below target reserve levels rises, the price of energy and reserves also rises. Any load that wishes to respond to higher prices would take appropriate action to curtail demand. Duke Energy believes that the use of such shortage pricing is essential to elicit broader demand response. *Id.* (citing Robert Stoddard Affidavit, Duke Energy ANOPR Comments).

[302] PJM Power Providers at 6.

[303] Ameren at 28.

[304] PPL Parties at 6.

[305] Dominion Resources at 7.

[306] Mr. Borlick at 8.

[307] Potomac Economics at 5.

[308] *Id.* at 6.

Economics states that the third approach alone is not sufficient and that the fourth approach, allowing payments to emergency demand response resources to set the market-clearing price is a valuable complement.[309] It notes that RTOs and ISOs can call on emergency demand response or interruptible retail load to maintain reliability. These forms of demand response are not integrated into the market, and therefore some form of the fourth approach is needed to set efficient shortage prices when the demand response of emergency demand response providers is called on in an emergency.[310]

223. PJM Power Providers proposes that PJM should use a downward-sloping operating reserve demand curve simultaneously for both energy and operating reserves, instead of having a fixed operating reserve requirement. It notes that this would (1) remove certain anomalies that occur with the current fixed requirement, (2) provide an adequate incentive for ''increased energy demand bidding,'' and (3) improve reliability by providing greater and timely incentives for market participants to provide capacity.[311] Constellation supports the approach of using a demand curve for operating reserves. While acknowledging this approach presents practical problems associated with developing the demand curve, Constellation states that these can be addressed and the benefits of this solution justify efforts to deal with these challenges.[312] Exelon states that the demand curve for operating reserves, the Commission's third approach, would be the most effective of the four approaches (although it recommends an alternative approach, reported below) because it would help induce additional demand response during periods of peak demand. FirstEnergy states that an administratively set demand curve is an acceptable way to set the operating reserve price in times of shortage because the demand side of the market is underdeveloped and cannot respond to market forces on the same scale as supply-side resources. It states that a demand curve can effectively mitigate market power where one market participant becomes the last available supplier in a shortage.[313]

224. NRECA opposes the demand curve for reserves approach because it is designed to raise the price above the current maximum level allowed. TAPS states that the third approach risks mandating a particular type of reform, an RTO-run ancillary services market, rather than a reform that originates with stakeholders.[314]

225. Ohio PUC does not support the third approach because a demand curve for operating reserves may not ensure that any new generation will be built.[315] Comverge states that the third approach is difficult to implement because it requires an administrative determination of the demand curve's characteristics.[316]

226. Under the fourth approach, RTOs or ISOs would set the market-clearing price during an operating reserve shortage at the payment made to participants in an emergency demand response program. PJM Power Providers states that this fourth approach is reasonable, but notes that when operating reserves and locational reserve requirements decline below target levels despite use of the fourth approach, the question of how to set and adjust the price must then be addressed.[317]

227. TAPS states that the fourth approach appears to allow market-clearing prices to be set by the RTO or ISO at whatever payment an RTO or ISO makes to a demand response resource that reduces consumption during emergencies in return for a contractually established payment that, perhaps, was determined by a regulatory body other than the Commission and, therefore, would be outside of the Commission-approved market-clearing mechanism and on that basis rejects it.[318] Comverge believes that the fourth approach presents two issues: (1) Participants are likely to ignore the market value of demand response before an emergency is declared; and (2) the emergency value of demand response would be substituted for the market value of power, which may reinforce the use of demand resource as an emergency-only resource.[319] Similarly, Duke Energy states that this proposal is questionable because it would be difficult to determine exactly what price would be paid to non-demand response market participants, and the program price paid to participating demand response resources may not actually reflect these participants' or other parties' economic assessment of the hourly value of power. Emergency demand response resources do not submit bids, but just receive a payment, against which they must judge the cost of forgoing energy. Because there is no solicitation of value from resources, it would be difficult and unreliable to determine a single price that would be suitable both for the interrupted emergency demand response providers and for payment to other resource providers.[320] Mr. Borlick gives approach four the most favorable review on the basis that it creates an incentive of demand response to bid its true interruptible cost and, therefore is more likely to produce economically efficient prices.[321]

228. Ameren particularly objects to the fourth approach because of the market distortion and unintended consequences it could cause. It states that load should receive payments for demand response only if the load clears in the day-ahead market, and its payment should be based on the bid that the market participant submitted.[322] Ohio PUC does not support the fourth approach, stating that it falls short of resolving the problem at hand.[323]

229. A few commenters offer new approaches or variations on one of our four suggested approaches. EPSA points to the 2007 PJM State of the Market Report to assert that other approaches besides these four should be considered. Specifically, in that report PJM's market monitor, Joseph Bowring, recommended that shortage pricing should be defined in several stages with different pricing in each stage. While EPSA does not specifically endorse this proposal, it states that such a proposal should be considered.[324]

230. Exelon suggests a variation on the Commission's proposed shortage pricing approaches. Exelon proposes a price cap in the market that would ratchet up as shortage conditions worsen.[325] This price cap would rise to predetermined levels as a shortage situation approaches. In essence, this would work like a demand curve, with the price cap increasing as the amount of available operating reserves diminished. Under this approach, the administratively set price levels would function as a moving cap and the market would determine the value of supply, up to that administratively set price cap.[326] Exelon maintains that this approach would elicit demand response to alleviate the shortage before it becomes a real crisis. It makes the point

[309] *Id.* at 7.

[310] *Id.*

[311] PJM Power Providers at 7.

[312] Constellation at 13.

[313] FirstEnergy at 11–12.

[314] TAPS at 42.

[315] Ohio PUC at 11.

[316] Comverge at 22.

[317] PJM Power Providers at 8.

[318] TAPS at 42.

[319] Comverge at 22.

[320] Duke Energy at 10 (citing Robert Stoddard Affidavit, Duke Energy ANOPR Comments at 16).

[321] Mr. Borlick at 9.

[322] Ameren at 28–29.

[323] Ohio PUC at 12.

[324] EPSA at 10.

[325] Exelon at 11.

[326] *Id.* at 12.

that no bids under this cap would be subject to mitigation procedures. Exelon believes that this approach is superior because it allows the market to determine the value of supply, within the cap, rather than requiring the market administrator to impose a value.

231. NRECA offers what it says is a variation on the second approach, and APPA and TAPS support this alternative. They propose allowing only demand response resources to bid higher than the current caps. Demand response resources would be paid the resulting clearing price, but generating resources would not. Instead, generators would receive the highest clearing price among the generating resources. NRECA explains that this approach would encourage additional demand response by allowing demand response resources to obtain a higher price for their response during emergencies. Specifically, it states that this proposal would: (1) Encourage additional demand response; (2) contribute to maintaining reliability; (3) help achieve the needed balance between demand and supply on a real-time basis; and (4) not shift rents from consumers to those generators whose market power must be mitigated by supply bid caps in the first place.[327] TAPS states that if properly implemented, this proposal should not incent generators to create emergencies because they would not profit from them and, although this proposal would add to the uplift consumers must bear, it would not exact the same degree of extreme hardship on consumers as elevating the market-clearing price across ''swaths of the nation.'' [328] TAPS asserts that this alternative proposal is an effective way for the Commission to gather data on the willingness of demand response to come to market and on the relative costs of the uplift associated with this method versus allowing the demand response price to be the market-clearing price. In order to guarantee that such a proposal would be allowable, TAPS suggests changes to the proposed regulatory language and the definition of ''operating reserve shortage.'' [329] Like NRECA, Steel Manufacturers indicates that it would support the removal of bid caps for demand response resources during a system emergency if the higher bids do not set the market-clearing prices.[330]

232. Comverge recommends an alternative approach that allows price caps to be relaxed as the market adds more dispatchable, price-responsive demand response. It states that this would allow for use of the best forms of market power mitigation: dispatchable demand response and customer price response.[331]

233. Potomac Economics states that the Commission should add to the four approaches provisions that would set efficient prices when the RTOs and ISOs take other emergency actions under shortage conditions, including emergency transactions, export curtailments, voltage reductions, and other emergency actions.[332]

ii. Commission Determination

234. Although we require RTOs and ISOs to modify, where necessary, their market rules governing price formation during periods of operating reserve shortage, we will not mandate any specific approach to this reform. Rather, because each market design is different, the changes to market rules should reflect each region's market design. To that end, each RTO or ISO may propose one of four approaches or another approach that achieves the same objectives. Each RTO or ISO should work with its stakeholders to develop a program that is appropriate for its region. Each of the four suggested approaches can be fashioned in a reasonable way upon compliance to achieve the objectives of the reform required here.

235. We address comments on the four approaches below. We will not address individually each comment on the four approaches provided by the Commission because we are not mandating one specific approach that all RTOs and ISOs must follow, and because each RTO and ISO must demonstrate that it currently complies with the rule or has a proposal that will put it in compliance. We cannot make a determination at this point that any particular approach as offered by an RTO or ISO is superior to another. Indeed, that is why a menu of options is offered here. One method of pricing during shortage situations may work better than another for any one RTO or ISO. All four of the approaches presented by the Commission have the potential to meet the goals of this rulemaking: maintaining reliability, eliminating barriers to the comparable treatment of demand response, and allocating energy during a shortage to those who value it most. Any filing by an RTO or ISO will be judged according to the criteria set forth in this Final Rule. We are also requiring the Independent Market Monitor for each RTO and ISO to provide us with its view on any proposed reforms. Finally, any proposal put forth by an RTO or ISO that follows a path different from the four approaches offered here must meet the same criteria set forth above. Only when an RTO or ISO submits a compliance filing can and will the Commission determine if its pricing rules are just and reasonable, not unduly discriminatory and sufficient to meet the stated goals of this rulemaking.

236. NRECA and North Carolina Electric Membership seek clarification on the terms bid cap, offer cap, and price cap. Bid cap refers to the maximum price that a seller (generation or demand response resource) or buyer may bid (*i.e.*, offer to sell or buy) energy.[333] The term price cap refers to a limit on the price of energy in an organized market.[334] In this rulemaking we have restricted our usage to bid cap or price cap, as appropriate.

237. Several commenters offer alternative approaches to modifying shortage pricing rules. In the NOPR we asked commenters to provide us with, not just barriers, but potential solutions, and these commenters have done just that. While we will not adopt any of these proposed changes explicitly in this rule, we note that RTOs and ISOs and their stakeholders are free to consider these and other possible solutions and propose to us their own method of shortage pricing reform that satisfies the criteria as well as our four approaches.

c. The Commission's Proposed Criteria

238. The Commission proposed to adopt further requirements to ensure that any proposed reforms of shortage pricing rules or demonstrations of the adequacy of existing rules in the area of shortage pricing have adequate factual support and that RTOs and ISOs show how the proposed reforms are designed to protect consumers against the exercise of market power.[335] First, each RTO or ISO proposing to reform or demonstrate the adequacy of its existing market rules in this area must provide an adequate factual record for the Commission to evaluate its proposal. This factual record will allow the Commission to discharge its duty to ensure that any reform is just and reasonable, not unduly discriminatory, and appropriately tailored to the

[327] NRECA at 17.

[328] TAPS at 37.

[329] *Id.* at 39.

[330] NRECA at 17; Steel Manufacturers at 13.

[331] Comverge at 22.

[332] Potomac Economics at 7.

[333] Although bid cap and offer cap have the same meaning in the NOPR, we use only the term bid cap to avoid confusion.

[334] For example, a particular generator may have a bid cap of $100 and bid $100 but be paid a higher market-clearing price. A price cap is a limit on the market-clearing price.

[335] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 118.

circumstances in the RTO's or ISO's region. Second, the Commission proposed that any change in market rules to implement the proposed reforms must consider the issue of market power and the RTO or ISO proposing reform must address the adequacy of any market power mitigation measures that would be in place during an operating reserve shortage. In addition, to ensure an adequate record on the issue of market power mitigation, the Commission proposed to solicit the views of the Independent Market Monitor for each RTO or ISO region on any proposed reform.

239. Further, the Commission stated that it would consider the factual record compiled by the RTO or ISO to determine whether its proposal, or its demonstration of the adequacy of its existing market rules, meet six criteria, namely, that the proposal would:

- Improve reliability by reducing demand and increasing generation during periods of operating reserve shortage;
- Make it more worthwhile for customers to invest in demand response technologies;
- Encourage existing generation and demand resources needed during an operating reserve shortage to remain in business;
- Encourage entry of new generation and demand resources;
- Provide comparable treatment and compensation to demand resources during periods of operating reserve shortages; and
- Have provisions for mitigating market power and deterring gaming behavior, including, but not limited to, use of demand resources to discipline bidding behavior to competitive levels during periods of operating reserve shortages.

240. The Commission requested comment on whether these criteria are appropriate and whether there are additional criteria that we should consider in evaluating a proposal for pricing during a period of operating reserve shortage by RTOs and ISOs.

i. Comments

241. Duke Energy supports the proposed criteria to evaluate RTO's and ISO's filings on proposed reforms for shortage pricing. Wal-Mart states that the criteria are a reasonable approach to providing guidance to RTOs and ISOs in their reform proposals.[336] EPSA states that the Commission must be clear in the Final Rule on the principles and the criteria which underpin its proposal.[337]

242. Comverge states that it supports each of the six proposed criteria to demonstrate the merits of new energy market rules and the Commission's proposed rulemaking approach for each respective RTO or ISO. However, it recommends that the Commission add the following criterion: ''where applicable, require a detailed assessment of the impact of new energy market rules on the respective capacity market participants.'' [338]

243. North Carolina Electric Membership states that if the Commission adopts the proposed rule on price reform during shortage periods, the Commission should adopt additional criteria to protect consumers against the exercise of market power, similar to the minimum protections included in the PJM shortage pricing settlement.[339] It suggests that the Commission should also require RTOs and ISOs to show that any shortage pricing will: (1) Protect consumers in the most vulnerable and smallest load pockets where access to available resources is significantly constrained even in non-shortage conditions; (2) define explicit triggers for when shortage prices will apply; (3) ensure that the extra revenues received by generators will be included in the energy and ancillary service revenue offset to capacity market clearing prices paid in forward capacity markets; and (4) require that RTOs and ISOs work with stakeholders to develop a program for setting prices during a power shortage that is acceptable to all.[340]

244. Similarly, PG&E states that the proposed criteria should be expanded to include the following: (1) A demonstration that any proposed market rule changes are cost effective, including an evaluation of the impact on reliability and an estimation of the cost of the program; (2) an evaluation that the operating reserve shortage pricing mechanism is adequately coordinated with other key market mechanisms; and (3) an assessment of the readiness of demand response programs that will be called upon to reduce the number and severity of shortage pricing events and help mitigate market power.[341]

245. TAPS asserts that the Commission needs to strengthen the factual showing that RTOs and ISOs must make with respect to shortage pricing reforms. It states that each RTO's or ISO's compliance filing should include the following: (1) Market power analysis specifically addressing scarcity conditions, including pivotal supplier, market share, and the delivered price test; (2) an analysis of whether demand response successfully mitigates market power, including empirical evidence, such as critical loss analyses; (3) market power analyses addressing the ability of generation owners to withhold demand response; (4) a demonstration that the RTO has methods for mitigating market power that are effective during shortage periods, for any resources, demand or generation, that can affect prices; (5) an analysis of whether there is enough demand response available to respond under scarcity conditions, given reliance on demand response for capacity reserves and ancillary services; and (6) prepared statistics on past power shortages and expectations of future power shortages.

ii. Commission Determination

246. In this Final Rule, the Commission adopts the proposal to require each RTO or ISO to support its proposed reform in shortage pricing or its demonstration of the adequacy of its existing rules with adequate factual support. This factual record will allow the Commission to discharge its duty to ensure that any reform is necessary and narrowly tailored to address the circumstances in that region, and that it is designed to protect consumers against the exercise of market power. The Commission here adopts the six criteria proposed in the NOPR, as modified below, and will use these six criteria to consider whether the factual record compiled by the RTO or ISO meets the requirements adopted in this Final Rule.

247. After further review of the criteria identified in the NOPR, we revise the criteria. The RTO or ISO must describe how its proposal would:

- Improve reliability by reducing demand and increasing generation during periods of operating reserve shortage;
- Make it more worthwhile for customers to invest in demand response technologies;
- Encourage existing generation and demand resources to continue to be relied upon during an operating reserve shortage;
- Encourage entry of new generation and demand resources;
- Ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage; and

[336] Wal-Mart at 8.

[337] EPSA at 8.

[338] Comverge at 23.

[339] North Carolina Electric Membership at 12–13.

[340] *Id.* at 12.

[341] PG&E at 13.

• Ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages including, but not limited to, showing how demand resources discipline bidding behavior to competitive levels.

248. The criteria we adopt are not significantly different from the criteria proposed in the NOPR. Our intention in revising the criteria is to further clarify what we expect from an RTO's or ISO's compliance filing.[342] Under the revised criteria, we expect an RTO or ISO to explain how its market rules will reduce or avoid periods of operating reserve shortages as well as how its market rules will reliably reduce demand and increase generation during periods of operating reserve shortage. Nothing in this Final Rule dictates the particular market rules or mechanisms an RTO or ISO must adopt. For example, we do not require regions that have not adopted a capacity market to develop such markets. We are intentionally providing latitude to the RTOs and ISOs to work with their stakeholders to determine the appropriate mechanisms for their regions and then explain how those mechanisms meet the revised criteria.

249. Some commenters propose expanding or modifying the criteria. However, we conclude that the following suggestions are already either explicitly part of the required filing or are implicitly required. For example, North Carolina Electric Membership suggests a specific criterion that the Commission should adopt to protect consumers against the exercise of market power. Such a requirement, however, is already implicit in the required analysis of market power mitigation adopted here. Requiring that energy and ancillary services revenues be accounted for in the settlement of capacity market payments also is already an explicit requirement for existing capacity markets. Further, all RTOs and ISOs have established procedures by which market rule changes are developed, which generally include consultations with their stakeholders. We expect that RTOs and ISOs will work with their stakeholders to develop any new proposed rules and decline to make this an explicit criterion.

250. Similarly, the changes requested by PG&E are already addressed in the six criteria, as modified above. We note that an explicit requirement to evaluate the effect of a rule change on reliability is not needed. We are firmly of the opinion that the changes mandated in this Final Rule will increase system reliability by inducing additional response by demand- and supply-side resources and that RTO and ISO compliance will not result in a decrease in reliability. Second, requiring an explicit accounting of the costs of the program will not be included. We do not see the usefulness of this exercise. While there will be costs involved, the long-term benefits of maintaining grid reliability are evident.

251. As to when these pricing rules would go into effect, it is when the RTO or ISO has an operating reserve shortage. The reliability standards of the North American Electric Reliability Corporation, which have been approved by the Commission, or of other authorized reliability body, specify system operating reserve requirements, and these standards are well known to system operators such as RTOs and ISOs, as well as to the many stakeholders who helped develop them. The level of operating reserves required by the reliability standards depends on the characteristics of each system and cannot be correctly reduced to a single number that applies to every system, such as seven percent of peak load. Further, if we were to repeat the reliability standard definition here in our regulations, it would be cumbersome for reliability organizations to improve their definition of operating reserve requirements over time without also having to seek a change in our regulations. We find that this is the best definition of when these price reforms apply; we do not adopt a second, different definition, here, because having two definitions of operating reserve shortage would only cause confusion for system operators.

252. We decline to accept all other suggested criteria because they would represent a level of burden to the RTO or ISO that would exceed the benefit of doing the analysis.

253. We find that the criteria proposed in the NOPR, as modified above, are sufficient to show whether a region's proposed changes to its existing market rules meet the requirements of this rule, while protecting consumers from market power.

d. Phase-In of New Rules

254. In the NOPR, the Commission stated that each RTO or ISO may also consider a ''phase-in'' of its specific emergency pricing method over a period of years, giving three years as an example. This would serve to introduce customers gradually to pricing increases during an emergency and allow them to develop ways to reduce demand and avoid higher prices.[343]

i. Comments

255. Duke Energy states that while it prefers that any shortage pricing program start immediately, if a phase-in is deemed worthwhile, this phase-in should not be indefinite.[344] EEI also states that these rule changes may best be implemented through a phase-in, provided that it is not protracted.[345] It also notes that it is appropriate for the Commission to allow such a phase-in to be linked to key factors such as the deployment of advanced metering. Old Dominion supports a phase-in of emergency pricing.

256. FirstEnergy supports the Commission's proposed phase-in approach because it can allow the Market Monitor to evaluate the market reform, mindful of any unintended consequences including the exercise of market power and gaming.[346]

257. Industrial Consumers recommends that the Commission require a phase-in period of at least three to five years, together with benchmarks that measure the ability of specific market factors to protect consumers from the exercise of market power at the time of shortages. It urges that the shortage price levels only be allowed to increase in conjunction with and proportional to four benchmarks: (1) Measured and verified amount of new net incremental demand response resources entering the market; (2) net incremental reductions in congestion, whether through enhancement of generation or transmission resources, in the zones where such shortage pricing is implemented; (3) sustained increases in the volume of load hedged in long-term forward markets; and (4) development of credible forward price curves of power delivered at RTO and ISO hubs published in support of the third benchmark that are regularly relied upon by market participants.[347]

[342] For example, the third criterion in the NOPR sought an explanation of how the market rules encourage existing generation and demand resources needed during an operating reserve shortage to ''remain in business.'' Upon review, the Commission is concerned that this could have been read to require shortage pricing provisions that would subsidize or give preferences to resources to ensure they ''remain in business.'' Instead, our intention is for the RTO or ISO to explain how its shortage pricing proposal, together with existing market rules,encourages existing generation and demand resources to be available in an emergency. Similarly, the fifth criterion in the NOPR could have been read to limit comparable treatment and compensation for all resources to periods of operating reserve shortage. Because neither of these implications was our intention, we clarify the wording of these criteria.

[343] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 128.

[344] Duke Energy at 11.

[345] EEI at 20.

[346] FirstEnergy at 12.

[347] Industrial Consumers at 19.

ii. Commission Determination

258. The Commission will allow an RTO or ISO to phase in any new pricing rules for a period of a few years, provided that this period is not protracted. Any phase-in period must be justified as part of the RTO's or ISO's overall proposal to change its pricing rules. No RTO or ISO is required to use a phase-in period, and we will not adopt by rule a requirement that any such phase-in be tied to certain benchmarks as Industrial Consumers and EEI propose. However, an RTO or ISO in consultation with its stakeholders, may propose to tie the phase-in period to certain benchmarks, and we will consider these in the compliance filing. We caution, however, that it should not choose to tie implementation to benchmarks that will not be met over a few years. This would not be consistent with our requirement that the phase-in period must not be protracted.

6. Reporting on Remaining Barriers to Comparable Treatment of Demand Response Resources

259. In the NOPR, the Commission recognized that further reforms may be necessary to eliminate barriers to demand response in the future. The Commission did not wish to delay the adoption of the specific reforms proposed in the NOPR while the Commission and the industry continue to study and consider other advances in this area. Rather, the proposed reforms were to proceed while the Commission and stakeholders studied what additional efforts were necessary and developed a record to support further reform.

260. The Commission directed staff to hold a technical conference to consider the following issues for demand response participation in the wholesale markets: (1) Whether there are barriers to comparable treatment of demand response that have not previously been identified, and what they are; (2) potential solutions to eliminate any potential barriers to comparable treatment of demand response; (3) appropriate compensation for demand response; and (4) the need for and the ability to standardize terms, practices, rules and procedures associated with demand response, among other things.[348]

261. In the NOPR, the Commission also proposed to require each RTO and ISO to assess and report on the barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction, including those listed above. The RTOs and ISOs would be required to submit their findings and any proposed solutions, along with a timeline for implementation to address barriers, to the Commission within six months of the Final Rule's publication in the **Federal Register**. The Commission also proposed to require the Independent Market Monitor for each RTO or ISO to provide its views on this issue to the Commission. To ensure that minority views are adequately represented, the Commission proposed to require that the RTO or ISO identify any significant minority views in its filing.

262. The Commission sought comment on the proposed approach to identify and assess remaining barriers to comparable treatment of demand response as well as any particular issues or areas that should be addressed in the RTO and ISO reports.

a. Comments

263. A number of commenters indicate their support for the Commission's intention to continue to address barriers to demand response resources, and/or the Commission's proposal to require each RTO and ISO to report on the barriers they currently perceive.[349] Some offer suggestions for how the Commission should proceed toward this goal.

264. For example, APPA cautions the Commission, as it seeks to remove barriers to demand response resources, not to unintentionally endanger existing and planned demand response and energy efficiency programs at the retail level.[350] EnerNOC is encouraged by the Commission's objective to continue its oversight, to review and approve implementation of reforms for demand response programs and to consider future reforms.[351] However, it believes the Commission's continued involvement and active engagement may be necessary to eliminate barriers to demand response resources.

265. EEI agrees that the Commission should not delay the adoption of specific reforms for demand response while the Commission and industry stakeholders evaluate additional reforms in this area. However, EEI suggests that the Commission provide additional specification of the parameters of these studies, suggesting that the Commission clarify that such studies should not ignore existing work and should be conducted in a cost-effective manner. EEI also urges the Commission to have RTOs and ISOs study whether demand response is cost-effective and to quantify benefits.[352]

266. Regional entities report that they are already engaged in some of the issues the Commission described. With regard to future demand response reforms, the ISO/RTO Council says that it is working to develop standards for incorporating small demand response resources into organized markets, and that it is actively engaged with NAESB to standardize measurement and verification protocols.[353] These efforts, in combination with the Commission's technical conference, in which the ISO/RTO Council participated, should benefit future discussions on barriers, pricing, and standardization. The ISO/RTO Council looks forward to sharing the results of its standardization initiative.

267. Midwest ISO supports the Commission's approach to identifying additional demand response barriers and solutions, and states that many issues regarding barriers and solutions to demand response resources are already being addressed as part of the Midwest ISO's ongoing emergency demand response and long-term resource adequacy proceedings.[354] Through the rest of 2008, the Midwest ISO's Demand Response Working Group will facilitate many activities to further identify measures to advance demand response resources.

268. NYISO agrees that this Final Rule should not mark the end of the Commission's efforts in the demand response area and that further improvements and additional enhancements should be explored. NYISO has no objection to preparing the post-Final Rule report that the NOPR proposes.[355]

269. SPP notes that it is currently studying what further reforms are necessary to eliminate barriers to demand response in its organized markets. This process is done through its working groups and task forces as well as participating in groups such as the ISO/RTO Council.[356]

270. The California PUC believes that two important areas that could be improved are the evaluation of the cost-effectiveness of demand response and how it impacts load. The California PUC is working with stakeholders on both of these issues. The California PUC would

[348] NOPR. FERC Stats. & Regs. ¶ 32,628 at P 95. The technical conference was held on May 21, 2008. *See infra* note 12.

[349] *E.g.,* Exelon at 9; Pennsylvania PUC at 12; PG&E at 11; Public Interest Organizations at 8; Reliant at 6; and Steel Producers at 6.

[350] APPA at 51.

[351] EnerNOC at 22.

[352] EEI at 18.

[353] ISO/RTO Council at 8.

[354] Midwest ISO at 14–15.

[355] NYISO at 3.

[356] SPP at 6.

also like to see more effective load-shifting and the technology that allows for that to be encouraged to a greater degree.[357]

271. Old Dominion supports the Commission's proposal to continue discussions on demand response through RTO and ISO studies and suggests that RTOs and ISOs be required to identify all minority views and not just ''significant minority views'' as currently required by the NOPR. Old Dominion sees lack of telemetry, high implementation costs, institutional barriers related to cost recovery, insufficiently detailed business rules, and demand response gaming as impediments to demand response that should be discussed further.[358]

272. Old Dominion also suggests that each RTO and ISO should be directed to work with its stakeholders to develop by a specific date a prioritized list of barriers to demand response and a timeline for developing solutions to the same; that demand response should be considered in the transmission planning process in accordance with engineering-based transmission planning principles; and that implementation of demand response should be evolutionary in accordance with the sufficiency and certainty of business rules and availability of necessary measurement and verification infrastructure. Similarly, California DWR asks the Commission to require RTOs and ISOs to provide a listing of barriers identified by market participants, state or local regulators, the RTO or ISO market monitor, and the RTO or ISO itself; further, the RTOs and ISOs would provide information on their response to each barrier and let the Commission know if additional action is needed.[359]

273. Public Interest Organizations recommend that the Commission schedule a technical conference in each region to address both general and region-specific barriers.[360] Public Interest Organizations also recommend that RTOs and ISOs be required to: (1) Assess the potential of other demand-side resources in their control areas, including demand response, energy efficiency, and environmentally benign and efficient behind-the-meter distributed generation; (2) analyze and quantify all local and regional benefits as well as costs and risks of demand side resources available to address grid needs; and (3) assess and report on the longer-term impacts of demand resource participation on wholesale price levels and volatility, grid congestion, and system reliability.

b. Commission Determination

274. The Commission adopts the requirement that each RTO or ISO assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction and to submit its findings and any proposed solutions, along with a timeline for implementation, to the Commission within six months of the Final Rule's publication in the **Federal Register**. We further adopt the requirement that each RTO's or ISO's Independent Market Monitor must submit a report describing its views on these issues to the Commission. To ensure that minority views are adequately represented, the Commission requires that the RTO or ISO, in its report, identify any significant minority views; this does not, however, require reporting every opinion of every individual stakeholder.

275. The Commission appreciates the many thoughtful comments received in response to this proposal. RTOs and ISOs have a duty to remove unreasonable barriers to treating demand response resources comparably with other resources and the required report will help RTOs, ISOs, and the Commission to identify and address such barriers. The report should identify all known barriers, and provide an in-depth analysis of those that are practical to analyze in the compliance time frame given and a time frame for analyzing the remainder. As commenters have noted, this should include (but is not limited to) technical requirements as well as performance verification limitations. It need not contain, however, a formal cost-benefit analysis of each barrier and a proposal to overcome it. Public Interest Organizations suggest that RTOs and ISOs might hold regional conferences on this topic, and while we agree this may have merit, we leave to each region the means of developing its report.

276. Energy efficiency and distributed generation are valuable resources, as commenters point out; however, the scope of this rule is limited to removing barriers to comparable treatment of demandresponse resources in the organized markets. Hence, we will not require RTOs and ISOs to study these resources in the report we require. Nevertheless, nothing here precludes RTOs and ISOs from analyzing barriers to energy efficiency measures and distributed generation in their markets and proposing revisions to their tariffs that integrate these measures into their markets.

B. Long-Term Power Contracting in Organized Markets

277. In this section of the Final Rule, the Commission establishes a requirement that RTOs and ISOs dedicate a portion of their Web sites for market participants to post offers to buy or sell electric energy on a long-term basis. This requirement is designed to improve transparency in the contracting process to encourage long-term contracting for electric power. The Commission requires each RTO or ISO to submit a compliance filing describing actions the RTO or ISO has taken, or plans to take, to comply with the requirement and providing information on the bulletin board the RTO or ISO has chosen to implement.

1. Background

278. Long-term power contracts are an important element of a functioning electric power market. Forward power contracting allows buyers and sellers to hedge against the risk that prices may fluctuate in the future. Both buyers and sellers should be able to create portfolios of short-, intermediate-, and long-term power supplies to manage risk and meet customer demand. Long-term contracts can also improve price stability, mitigate the risk of market power abuse, and provide a platform for investment in new generation and transmission.

279. As the Commission noted in the NOPR, having an organized market in a region should facilitate long-term contracting by eliminating pancaked rates for long-distance power sales, eliminating loop flow problems within its footprint, and ensuring reliable transmission operation over a large area.[361] RTO and ISO transmission services also expand the size of the markets available to buyers and sellers of long-term power contracts, and provide independent and unified transmission scheduling and operation services over a large area.

280. The Commission has already taken action in other areas to facilitate long-term contracting. In Order No. 681, the Commission adopted a Final Rule on long-term transmission rights for organized market regions designed to assure availability of long-term transmission at a predictable cost.[362] The Commission then adopted transmission planning reforms in Order

[357] California PUC at 20.

[358] Old Dominion at 16–19.

[359] California DWR at 37.

[360] Public Interest Organizations at 8.

[361] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 130.

[362] *Long-Term Firm Transmission Rights in Organized Electricity Markets,* Order No. 681, FERC Stats. & Regs. ¶ 31,226 (2006), *order on reh'g,* Order No. 681–A, 117 FERC ¶ 61,201 (2006).

No. 890 to provide an open and transparent process for wholesale entities and transmission providers to plan for the long-term needs of their customers. Interconnection rules for large, small and wind generators in Order Nos. 2003, 2006 and 661 have provided a uniform and transparent interconnection process and provided for interconnection with network integration service to facilitate long-term reliance on new generation.[363] The Commission has also reformed capacity markets in several regions to shift reliance from short-term purchases to forward markets held sufficiently in advance of delivery (*e.g.*, three years) to be more consistent with the time necessary to construct new generation.[364]

281. The Commission did not find that there is a fundamental problem with long-term contracting for electric power, either inside or outside of organized markets. The interest among buyers and sellers in engaging in long-term contracting fluctuates depending upon the balance of resources and demand in the market for power. Interest among buyers for long-term arrangements was low when excess generation was readily available. Although demand for long-term contracting by buyers has increased as reserve margins have shrunk, buyers are still able to enter into long-term contracts. These contracts may be at higher prices than in the past, but this is a result of market factors, such as changes in fuel prices and shifting supply and demand. Finding no fundamental problem preventing parties from contracting on a long-term basis, the Commission proposed to limit its action in this proceeding to improving transparency in long-term contracting in organized markets.

282. In the NOPR, the Commission stated that further transparency in long-term electric energy markets would facilitate efforts by both sellers and buyers to include long-term contracts in their energy portfolios. This is especially true for market participants that may not be aware of the full range of contract options available to them, including the full range of potential contract counterparties. While the market has the most important role to play in disseminating information, an RTO or ISO can also promote greater transparency and liquidity in long-term power markets,[365] and thus help reduce possible over-reliance on spot markets. In the NOPR, the Commission proposed that regional organizations play a supporting role in encouraging voluntary contracting by providing an online forum in which potential buyers and sellers may exchange information.[366]

2. Commission Proposal

283. In the NOPR, the Commission proposed to require that RTOs and ISOs dedicate a portion of their Web sites for market participants to post offers to buy or sell electric energy on a long-term basis.[367] The Commission stated that the proposal for an RTO or ISO Web site ''bulletin board'' for posting long-term offers to sell or buy electric energy is designed to facilitate the long-term contracting process by increasing the transparency of the availability of potential sellers and buyers for market participants. The Commission did not propose to mandate the specific type of bulletin board that each RTO and ISO must post, but proposed to require each to work with its stakeholders to design a solution that works for its market participants.[368] The Commission also encouraged RTOs and ISOs to work with stakeholders to facilitate long-term power contracting.

284. The Commission proposed to require RTOs and ISOs to make a compliance filing within six months of the date of publication of the Final Rule in the **Federal Register**. This filing should explain the actions the RTO or ISO has taken or plans to take to comply with the long-term contracts bulletin board requirement and provide information on the bulletin board the RTO or ISO has chosen to implement.[369]

285. The Commission also sought public comment on a number of questions related to its proposal, including comment on minimum necessary features and processes for the Web page and the proposal that the RTO or ISO should not be responsible for the content of the offers on its bulletin board. Further, the Commission solicited comment on provisions for the disclaimer of liability by the RTO or ISO and by market participants.[370]

3. Comments

286. A majority of commenters either support[371] or do not object[372] to the Commission's proposal to require RTOs and ISOs to implement bulletin boards to facilitate long-term power contracts. Most commenters note that the Commission should not impose conditions on the format of the bulletin board, but should instead leave the creation to RTOs and ISOs in conjunction with their stakeholders.[373] Some commenters also state that the Commission should act to ensure that RTOs or ISOs should not be held liable for postings on their bulletin boards.[374] For instance, NYISO states that the Commission should allow posted disclaimers against liability by the RTOs on their bulletin board Web sites. Midwest ISO also requests that the Commission provide assurance that RTOs and ISOs will not be exposed to antitrust liability for providing a contracting forum. Finally, commenters generally believe that the cost of a bulletin board will be low for RTOs and ISOs.[375]

287. Those commenters who do not support the Commission's proposal generally argue that a bulletin board would be an unnecessary requirement. Both CAISO and California Munis state that CAISO is busy with other projects, and that a bulletin board would be low

[363] *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g,* Order No. 2003–A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g,* Order No. 2003–B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003–C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC,* 475 F.3d 1277 (DC Cir. 2007); *Standardization of Small Generator Interconnection Agreements and Procedures,* Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh'g,* Order No. 2006–A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification,* Order No. 2006–B, FERC Stats. & Regs. ¶ 31,221 (2006), *appeal pending sub nom. Consolidated Edison Co. of New York, Inc., et al. v. FERC* Docket No. 06–1018, *et al.; Interconnection for Wind Energy,* Order No. 661, FERC Stats. & Regs. ¶ 31,186, *order on reh'g,* Order No. 661–A, FERC Stats. & Regs. ¶ 31,198 (2005).

[364] *Devon Power, LLC,* 115 FERC ¶ 61,340, *order on reh'g,* 117 FERC ¶ 61,133 (2006), *aff'd in part and rev'd in part sub nom. Maine Pub. Utils. Comm'n v. FERC,* 520 F.3d 464 (DC 2008); *PJM Interconnection, LLC,* 117 FERC ¶ 61,331 (2006).

[365] Transcript of Conference at 117, Conference on Competition in Wholesale Power Markets, Docket No. AD07–7–000 (May 8, 2007).

[366] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 137.

[367] *Id.* P 155.

[368] *Id.* P 156–57.

[369] *Id.* P 158.

[370] *Id.* P 159.

[371] *See, e.g.*, APPA at 72; DC Energy at 8; EEI at 4; Exelon at 15; LPPC at 4; Midwest ISO at 18; NEPOOL at 19–20; New York PSC at 4; NIPSCO at 15; NRECA at 47; NSTAR at 5; NYISO at 11; OMS at 7; Pennsylvania PUC at 16; Steel Producers at 10; and Xcel at 11. NIPSCO notes that its support is contingent on the bulletin boards having common elements or generic features across all organized markets, and the boards not burdening the RTO.

[372] *See, e.g.*, Ameren at 29–30; EPSA at 12; FirstEnergy at 12; Indianapolis P&L at 4; Industrial Coalitions at 32–35; Industrial Customers at 21; North Carolina Electric Membership at 13–15; Ohio PUC at 16; Old Dominion at 19–20; OMS at 7–8; PJM at 2; and TAPS at 3.

[373] *See, e.g.*, Ameren at 30; APPA at 72; CAISO at 19; DC Energy at 9; EEI at 20; EPSA at 12; Exelon at 15; NEPOOL Participants at 19–20; North Carolina Electric Membership at 13–15; NYISO at 12; Old Dominion at 19; PJM at 2; and Xcel at 11.

[374] *See, e.g.*, Ameren at 30; CAISO at 19; Exelon at 15; Midwest ISO at 18; NRECA at 48; NYISO at 12; Ohio PUC at 16; Reliant at 11; and SPP at 7.

[375] *See, e.g.*, Ameren at 30; CAISO at 19; EEI at 20; Midwest ISO at 18; and PJM at 2.

on the list of necessary items.[376] CAISO is concerned over the proposed deadline for implementation, and argues that any deadline should be after the launch of its MRTU. It also believes that regions should be allowed to be flexible on whether to develop bulletin boards and how many features the board should have. California PUC agrees that a federal requirement is unnecessary, and that the Commission should authorize, rather than require, action on bulletin boards. SPP also advocates that the Commission should make its proposal a voluntary one, rather than a regulatory requirement. Some commenters, such as EPSA, NIPSCO, Ohio PUC, Steel Producers and North Carolina Electric Membership, who do not object to the proposal, indicate that they do not believe that bulletin boards will have a significant effect on long-term contracting. FirstEnergy indicates that, although it does not object to the proposal, it believes that sufficient information on the market is already provided by private companies and thus RTOs do not need to be further involved. Reliant states that bulletin boards would not resolve any of the current impediments to long-term contracts, as there are already sufficient mechanisms in the market to provide information for buyers and sellers.

288. Commenters' suggestions for implementing the bulletin board requirement include: (1) A requirement that posts should not be viewed as binding offers but rather as voluntary postings; [377] (2) a suggestion that price information not be required in postings to the bulletin board; [378] (3) a requirement that any significant costs of the bulletin board should be borne by its users; [379] (4) an expansion of the data posted to include percentage and volume of bilaterally contracted energy; [380] (5) an expansion of the bulletin board to cover other products such as ancillary services; [381] (6) a requirement that RTOs and ISOs collect and disseminate information on the usefulness of bulletin boards; [382] (7) a requirement that bulletin boards provide common elements or generic features across all organized markets; and (8) a mandated cost analysis of the bulletin board by the RTO/ISO.[383]

289. Midwest ISO states that it already has an early version of a portal in place on its Web site, and that it would involve minimal costs to create a bulletin board for long-term contracts. Midwest ISO recommends that, as an intermediate measure prior to the implementation of a web portal, contracting parties provide essential terms—including price, quantity, term, and receipt and delivery points—to the RTO or ISO and fill out a form indicating the data they wish to be kept confidential.[384]

290. NEPOOL Participants raises some legal and other issues for the Commission to consider when developing its bulletin board requirement. These include: (1) Ensuring that postings are not considered binding offers under the Uniform Commercial Code; (2) not allowing the board to substitute for regulated markets; and (3) ensuring that the same antitrust and market manipulation rules that apply to market behavior also apply to activity on the bulletin board.[385]

291. NSTAR states that it is concerned that data from the bulletin board containing prices for long-term power could influence market prices. Accordingly, it asks the Commission to consider additional requirements to ensure that information posted on the boards is from a representative cross-section of market participants, to reduce the impact of the bulletin board on market prices.[386]

292. Industrial Customers state that the Commission should define ''long-term'' as substantially more than one year and consistent with building cycles of new or expanded production capacity. They argue that any entity making construction decisions on new facilities needs knowledge of prices going forward to make investment decisions.

293. Many commenters argue that the Commission did not address in its proposed regulations the actual causes behind the lack of long-term contracts in the market. Several commenters point to the structure of markets within the RTO system, which they assert causes an over-reliance on spot markets and a lack of long-term contracts. They say this structure includes LMP pricing, which provides a disincentive for producers to contract for lower prices on a long-term basis. For instance, APPA points to studies including one performed by Synapse Energy Economics, Inc., indicating that there are structural barriers to long-term contracting in the organized markets. Other commenters point to the need for stability of market rules and uncertainty about climate change policies as key factors in keeping parties from contracting on a long-term basis.[387] Reliant indicates that the issue is actually a difference in perceptions between buyers and sellers about the appropriate price of energy and the allocation of risk between the buyers and sellers. NRECA points to several other issues that affect long-term contracting in organized markets, including price volatility, price risk, delivery risk and resource availability. Ohio PUC echoes some of these concerns, noting that risks with recovering capital costs are preventing new generation from being built in states with retail access, and that unpredictable congestion charges and uncertainty surrounding the working of RTO markets are also hurting long-term contracting.

294. Commenters suggest several actions that the Commission should take to remedy these broader concerns. Commenters, including NRECA, Industrial Coalitions and Blue Ridge, ask the Commission to do its own investigation of the bilateral contracting process and over-reliance on the spot markets. North Carolina Electric Membership notes that a requirement of ''full support'' from stakeholders for more complex RTO or ISO market design changes may increase the stability and predictability to these markets, which may facilitate longer term contracting. Constellation states that the Commission should promote rules to encourage contracting across seams and take measures to provide sufficient transparency, information and regulatory certainty to manage transactional risk. Cogeneration Parties argue that the Commission should take action to improve price transparency in organized markets, and assist in the creation of standard products and contracting terms for long-term contracting. SoCal Edison-SDG&E argue that local measures to improve regulatory stability would do more to support long-term contracting than a Commission rulemaking. They point to the California PUC proceeding to develop long- term resource adequacy requirements as one such local measure, and argue that the Commission should focus on the merits of individual RTO or ISO proposals rather than a nationwide rulemaking. Finally, TAPS notes that an important way to facilitate long-term contracts is to ensure that load-serving entities can access necessary transmission resources.

[376] CAISO at 19; California Munis at 18.

[377] Ameren at 30–31.

[378] Xcel at 11–12.

[379] CAISO at 18–20; EEI at 21.

[380] Industrial Coalitions at 33–35.

[381] NEPOOL Participants at 18–21.

[382] Pennsylvania PUC at 16.

[383] Old Dominion at 19–20.

[384] Midwest ISO at 19.

[385] NEPOOL Participants at 20.

[386] NSTAR at 5–6.

[387] *See, e.g.*, SoCal Edison-SDG&E at 4; EPSA at 11–12.

However, TAPS is concerned by recent orders indicating that the Commission may relieve RTOs of certain responsibilities they have under Order No. 681 [388] to plan for resource adequacy and maintain simultaneous feasibility of financial rights. It argues that if the Commission is serious about facilitating long-term contracts, it should require RTOs and ISOs to live up to the letter and spirit of Order No. 681.

295. Several commenters call on the Commission to hold a technical conference and require a stakeholder process to address the lack of certain financial hedging instruments so as to reduce price uncertainty for long-term contracts. For instance, both California Munis and SMUD argue that buyers in CAISO lack options-type instruments for hedging LMP congestion costs and lack a means to hedge against the cost of marginal losses. Providing these hedges, they argue, would encourage long term contracting.

296. Commenters raise a variety of other issues related to long-term contracting. Midwest Energy states that it is concerned about the impact of a Day-2 market on long-term contracts, and appreciates that the Commission is not imposing Day-2 market structures on all RTOs and ISOs.

297. California PUC notes that it is presently addressing long-term contracting within its procurement proceedings. For instance, under the California PUC's Resource Adequacy program, all California PUC jurisdictional LSEs are required to procure necessary capacity on a year-ahead basis. Additionally, California PUC requires LSEs to identify longer-term needs and procure energy necessary to meet those needs through a request for offer process that includes both long and short-term contracts. California PUC questions the Commission's legal basis for intervening in long-term contracting, stating that the NOPR does not explain the statutory authority for the Commission's proposed involvement in long-term energy supply contracts between generators and LSEs. It notes that FPA section 215 does not authorize the Commission to set or enforce compliance with standards for resource adequacy, and that EPAct 2005 ''expressly retains state authority to assure the reliability of the energy supply within their jurisdictions.'' [389] It seeks assurance that the Commission does not intend to exercise jurisdiction over the wholesale energy market as a method of indirectly modifying California's reliability processes.

298. Both New York PSC and NARUC state that the Commission should not attempt to standardize long-term contracts. NARUC argues that standardization would hurt state policy objectives such as integrated resource planning, renewable portfolio standards and resource adequacy requirements. New York PSC notes that any standardized forward products should be developed through the RTO or ISO stakeholder process.

299. PJM notes that it held a stakeholder forum in January 2008 to discuss greater opportunities for long-term contracting in PJM. This forum resulted in identification of areas for future action, which included: (1) Education of policy makers and the public on the need for new infrastructure; (2) improved coordination of various agency and regulatory decision makers on market issues; (3) predictability and stability in regulatory rules; (4) improvements in siting for transmission and generation; (5) ways of steering revenue to increase the amount of new generation; (6) more effective demand response programs to increase market elasticity and reduce potential for exercise of market power; (7) a portfolio of purchases to vary prices and terms for state-sanctioned auctions; (8) further examination of existing market models such as the AF&PA proposal; and (9) additional credit support for parties interested in long- term contracting, through methods such as syndication of credit risk and government guarantees.[390]

300. Finally, APPA notes that although it appreciates the effort that PJM put into holding its long-term contracting forums, APPA understands that no concrete proposals for improving long-term contracting have emerged as a result of the forums. Accordingly, APPA cannot endorse the idea of similar efforts by other RTOs as suggested by the Commission in the NOPR, given the scarce resources of RTOs and market participants. Instead, APPA supports preparation of an in-depth analysis of long-term contracting practices for each RTO region by the RTO's MMU, given the MMU's knowledge of conditions ''on the ground.'' This analysis should consider impediments to long-term contracting and measures that could be taken to support long-term contracts of sufficient length to support the building of new generation.

4. *Commission Determination*

301. We will require each RTO and ISO to dedicate a portion of its Web site for market participants to post offers to buy or sell power on a long-term basis. The Commission defines ''long-term'' as one year or more for the purposes of this rule, but RTOs and ISOs may include offers for contracts of less than a year on their Web sites as well. The Web site should allow both buyers and sellers to post and read offers for long-term power transactions. A majority of commenters support this proposal, and we conclude that greater transparency from a bulletin board for long-term power sales will benefit long-term contracting.

302. We are convinced by the comments that the costs involved for creation and upkeep of the bulletin board are likely to be minimal and are justified by the increased transparency for potential sellers and buyers, and should thus be recovered similarly to other Web site costs. A few commenters suggest that bulletin board costs should be borne by its users. If an RTO or ISO in consultation with its stakeholders believes that costs of the bulletin board will be significant, it may explain in its compliance filing how it plans to recover the costs, including whether it plans to charge users of the bulletin board.

303. The Commission is not mandating any specific form for the Web site beyond the requirements above. We will instead leave the implementation to RTOs and ISOs and their stakeholders. This discretion includes decisions over the type and amount of data to be posted by participants, whether participants must include a proposed price in their posting, as well as password and security requirements. Commenters who have specific suggestions about the form and content of the Web site bulletin boards, or concerns over cost issues, should raise these suggestions with their RTOs or ISOs through the stakeholder process. The compliance filing of each RTO or ISO will provide an opportunity for interested persons to comment to the Commission on each RTO's and ISO's method of compliance, such as the legal and other concerns raised by NEPOOL Participants and others. The Commission does not find it necessary to make a generic determination about these concerns.

304. The Commission agrees with commenters that RTOs and ISOs should not be held liable for the postings of contracting parties.[391] Significant

[388] *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226 (2006), *order on reh'g*, Order No. 681–A, 117 FERC ¶ 61,201 (2006).

[389] California PUC at 28 (citing 16 U.S.C. 824o(i)).

[390] PJM at 3–4.

[391] The Commission does not see why having such a bulletin board should necessarily expose an RTO or ISO to antitrust liability, as suggested by

liability protection for message board operators is already provided under federal law by the safe harbor provisions of the Communications Decency Act.[392] We anticipate that these provisions will apply to RTOs and ISOs. Consistent with comments received, however, we encourage RTOs and ISOs to post a disclaimer on their Web sites indicating that they are not responsible for the content posted by users, and outlining the terms and conditions under which users may post offers to buy or sell under long-term agreements.

305. In response to comments from NSTAR, the Commission is not persuaded to forego the advantages of posting long-term contract term proposals just because an entity might attempt to use the bulletin board inappropriately. Further, we see no reason to mandate in this proceeding specific limits on types of posting on RTO or ISO Web sites. However, any attempt by posters to use this new feature to manipulate the market price or market price indices will be subject to Commission penalty or referral to other agencies having jurisdiction.[393]

306. In response to the concerns raised by California PUC, New York PSC and NARUC, the Commission notes that it is not taking any action at this time to standardize long-term contracts, nor does the Commission intend this bulletin board posting requirement to be a reliability standard, to set a resource adequacy requirement, or to infringe on state regulatory jurisdiction.

307. We anticipate that this requirement will enhance transparency and help foster long-term contracting without standardizing RTO and ISO approaches or intruding unduly into matters more appropriate for markets and the private sector. The comments provide strong support for the bulletin board proposal, and do not persuade us that there is any reason to delay implementation of this requirement, despite CAISO's request that we postpone it until after MRTU is complete. Some of the other requirements commenters propose would require more standardization and set requirements that are better left to the free market and to the private sector. We do not wish to delay or undermine this process by imposing too many requirements. Therefore, the Commission will not require in this rulemaking other actions related to long-term contracting recommended by some commenters.

308. As discussed in the NOPR, many of the broader issues commenters raise herein regarding the structure and functionality of organized markets are beyond the scope of this proceeding and would require further development to be ripe for inclusion in a rulemaking.[394] The Commission further explored many of the issues during the recent technical conference held to discuss the proposals of American Forest and Portland Cement Association, *et al.* [395] The Commission continues to review the information it received at the technical conference for possible action.

309. RTOs and ISOs are required to make a compliance filing within six months of the date of publication of this rule in the **Federal Register**. The filing should explain the actions the RTO or ISO has taken or plans to take to comply with the long-term contracts bulletin board requirement and provide information on the bulletin board the RTO or ISO has chosen to implement. The Commission appreciates concerns of commenters that RTOs and ISOs, such as CAISO, have market reforms in progress, and these entities may take into account the timetable of reforms in progress when developing their compliance plans. We find that the compliance period of six months is an adequate time to make any necessary adjustments to planned reforms and explain them in the compliance filings.

C. Market-Monitoring Policies

310. In this section of the Final Rule, the Commission makes reforms to enhance the market monitoring function and thereby improve the performance and transparency of organized RTO and ISO markets. The two principal areas addressed are the independence and functions of the MMU, and information sharing. The Final Rule requires tariff provisions that will remove the MMU from the direct supervision of RTO or ISO management, and requires, in most instances, that the MMU report directly to the RTO or ISO board of directors.

311. The Final Rule also imposes obligations on the RTOs and ISOs to provide the MMU with adequate tools with which to carry out its duties. The Final Rule broadens the reporting duties of the MMU, clarifies that it is to refer to Commission staff any instances of misconduct by the RTO or ISO, as well as by a market participant, and expands the MMU's referral obligations to include perceived market design flaws as well as instances of tariff or rule violations.

312. In the area of mitigation, the Final Rule separates the duties of internal and external MMUs in the case of RTOs and ISOs that employ a hybrid structure, and provides that for non-hybrid MMUs, mitigation by the MMU should center on retrospective mitigation and the calculation of inputs required for the RTO or ISO to conduct prospective mitigation. Given the critical nature of MMU duties, the Final Rule requires RTOs and ISOs to include in their tariffs ethical standards for their MMUs. The Final Rule also requires RTOs and ISOs to consolidate all of their MMU provisions into one section of their tariffs.

313. In the area of information sharing, the Final Rule expands the category of recipients for the information gathered by the MMU, and broadens MMU reporting requirements. It also expands the abilities of state commissions to obtain additional and more tailored information from MMUs, while preserving confidentiality protections. The Final Rule also reduces the lag time for the release of offer and bid data.

1. Background

314. Since the inception of organized energy markets, the Commission has required RTOs and ISOs to employ a market monitoring function. MMUs have consistently played a vital role in reporting on the state of the markets and ferreting out wrongdoing by market participants. In May of 2005, the Commission issued a Policy Statement on Market Monitoring Units,[396] which set forth the tasks MMUs were expected to perform, and established a procedure for MMU referral of suspected violations to Commission staff.

315. Concerns raised by interested entities in the context of individual RTOs and ISOs led the Commission to undertake a generic examination of MMUs at a technical conference held on April 5, 2007.[397] At that conference, the

Midwest ISO. However, the Commission suggests that RTOs and ISOs explain any such concerns in their compliance filings.

[392] 47 U.S.C. 230(c)(1) (''No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.''). *See, e.g., Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (dismissing a suit against a content provider for liability for posts on a community message board based on the safe harbor provisions of the Communications Decency Act).

[393] *See Price Discovery in Natural Gas and Electric Markets*, 104 FERC ¶ 61,121, at P 38 (2003).

[394] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 153, 161.

[395] Supplemental Notice of Technical Conference, Capacity Markets in Regions with Organized Electric Markets, Docket No. AD08–4–000 (April 25, 2008).

[396] *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 (2005) (Policy Statement).

[397] Notice and Agenda for the Conference, Review of Market Monitoring Policies, Docket No. AD07–8–000 (Mar. 30, 2007).

issues receiving the bulk of the attention centered on the perceived need for, and suggested methods of achieving, independence on the part of MMUs so they can perform their assigned functions, and the content and proper recipients of the MMUs' market data and analysis. These issues accorded with the Commission's perception of the areas within the market monitoring function that needed review and strengthening.

316. In the ANOPR and the NOPR, the Commission proposed numerous reforms designed to strengthen MMU independence and broaden information sharing by the MMUs. Many of these proposed reforms have been carried forward to this Final Rule, while others have been modified or, in a few cases, eliminated, based on the comments received from interested entities. The resulting reforms set forth in the Final Rule provide the MMUs with enhanced ability to monitor the markets and provide interested entities with the ability to receive additional market information, thereby improving market performance and transparency.

2. Independence and Function

317. In the NOPR, the Commission acknowledged the importance of MMU independence, and stated that there are several means by which to balance independence and accountability. The Commission proposed a balanced and flexible approach that included oversight protection, tariff safeguards and tools, the elimination of conflicts of interest, and certain changes in the functions MMUs are expected to perform. The Commission solicited comments on the proposed changes.

a. Structure and Tools

i. Commission Proposal

318. The Commission proposed that each RTO and ISO decide for itself, through its appropriate stakeholder process, whether it will have an external, internal or hybrid MMU structure. The Commission declined to remove MMUs from oversight by their RTOs and ISOs, as the MMU's principal duties involve monitoring RTO and ISO markets and advising the RTO or ISO on market performance. The Commission noted that the fact that MMUs also have reporting obligations to outside parties does not change their relationship with the RTOs and ISOs, which are, by Commission policy, required to maintain a market monitoring function.

319. The Commission further proposed that each RTO or ISO include in its tariff a provision imposing upon itself the obligation to provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions. The Commission noted that the RTO or ISO should, in addition, be mindful of these obligations in developing its market monitoring budget. Furthermore, to ensure independence of the MMU and its analyses, the RTO or ISO tariff should specifically provide that the MMU shall have access to the RTO's or ISO's database of market information. The tariff should also specify that any data created by the MMUs, including reconfiguring of the RTO or ISO data, be kept within the MMU's exclusive control.

ii. Comments

320. Constellation states the Commission's proposals are on the right track.[398] Dominion Resources and EPSA agree.[399] Potomac Economics states that the Commission's proposals appear generally to be consistent with the nature of the existing relationship between Potomac Economics and the Midwest ISO, which allows Potomac Economics sufficient independence to monitor both the market participants and the market operator. Further, Potomac Economics, the Midwest ISO and state regulators all see the current structure as providing needed independence while ensuring responsiveness to regional needs.[400]

321. Most commenters agree that the Commission should allow each RTO or ISO to determine its own structural relationship with its MMU through its stakeholder process.[401]

322. PG&E endorses the use of hybrid MMU structures (internal MMU reporting to RTO or ISO management and external MMU reporting to the RTO or ISO board), but emphasizes the RTO or ISO must meet the following conditions: (1) both MMUs must have access to all data and the ability to request data and information from market participants if needed to perform market analysis functions; (2) both MMUs should cooperate in assessing any issues regarding the markets, including sharing identification of market problems developed by either MMU, and sharing complaints or requests for investigation raised by any market participant to either MMU; and (3) both MMUs must have adequate resources and authority to refer matters to the Commission and its Office of Enforcement.[402]

323. Industrial Consumers believe the Commission should mandate the hybrid structure for all RTOs or ISOs, reasoning that the external MMU, if not dependent for its main salary or contract on services performed for the RTO or ISO, is presumed to be independent. It cites the California ISO's Market Surveillance Committee as a successful example.[403]

324. Most commenters agree that the Commission should require each RTO or ISO to include a tariff provision imposing on itself the obligation to provide its MMU with access to market data, resources and personnel sufficient to enable the MMU to carry out its functions. They also agree that to ensure the MMU's independence, the MMU should have access to the RTO's or ISO's database of market information. Further they agree that any data created by the MMUs should be kept within the exclusive control of the MMU.[404] Three commenters state that the Commission should consider the provisions of a recent settlement agreement it approved as constituting ''best practices.''[405] Further, APPA states that the Commission must specifically incorporate all of the MMU-related provisions of the PJM MMU Settlement Order into the Final Rule because the provisions now appear in a settlement agreement and have no precedential value.[406] CAISO asks the Commission to clarify that ''exclusive control'' means that an MMU has the right to keep data it creates within its control, but has the option to share such data. CAISO states it appears this right is implicit in the Commission's proposal, but the Commission should make it explicit.[407] Reliant suggests that the Commission should clarify that MMUs should have full access to RTO or ISO operational information to determine if RTO operational decisions are negatively impacting appropriate price signals.[408]

325. APPA and Ohio PUC state that MMU offices should be at the RTO or ISO site.[409] APPA, California PUC and TAPS believe that the Commission should require a tariff provision

[398] Constellation at 16.

[399] Dominion Resources at 8; EPSA at 12–13.

[400] Potomac Economics at 7–8.

[401] Ameren, California PUC, EEI, EPSA, FirstEnergy, and North Carolina Electric Membership.

[402] PG&E at 14–15.

[403] Industrial Consumers at 21.

[404] Ameren, APPA, Exelon, California Munis, CAISO, EPSA, FirstEnergy, Industrial Consumers, ISO New England, Midwest Energy, Midwest ISO, Old Dominion, Pennsylvania PUC, PJM Power Providers, Reliant, and SPP.

[405] APPA, Exelon and Pennsylvania PUC (citing *Allegheny Electric Cooperative, Inc., et al. v. PJM Interconnection, LLC,* 122 FERC ¶ 61,257 (2008) (PJM MMU Settlement Order)).

[406] APPA at 6–7, 78–80.

[407] CAISO at 12–13.

[408] Reliant at 13.

[409] APPA at 80–81; Ohio PUC at 23.

directing an MMU to report to the Commission any concerns it has with inadequate access to market data, resources, or personnel.

iii. Commission Determination

326. The Commission adopts the NOPR proposal that each RTO or ISO should decide for itself the structural relationship it desires for its MMU. Regional variances and preferences in this regard should be respected, and we decline to mandate any one structure for the MMU function.

327. We therefore reject the suggestion from Industrial Consumers that we mandate a hybrid-type MMU structure consisting of both an internal and an external monitor. While the hybrid structure can provide many benefits, we have not observed that any RTOs or ISOs with purely internal or external MMUs suffer deficiencies in performance as a result. Nor would a hybrid MMU necessarily be more or less independent than an internal or an external MMU: Hybrid MMUs receive funding from their RTOs or ISOs, just as do internal and external MMUs. Neither Industrial Consumers nor other commenters have presented examples of dysfunctional MMUs, much less a dysfunction that can be attributed to a particular organizational structure.

328. We also adopt the NOPR proposal that RTOs and ISOs include provisions in their tariffs: (1) Obliging themselves to provide their MMUs with access to market data, resources and personnel sufficient to enable them to carry out their functions; (2) granting MMUs full access to the RTO or ISO database; and (3) granting MMUs exclusive control over any MMU-created data. Without the proper tools, it would be impossible for MMUs to perform their functions.

329. We clarify, in accordance with CAISO's request, that MMUs may share data under their exclusive control, subject to pertinent confidentiality provisions. We also clarify, as requested by Reliant, that access to the RTO or ISO database includes access to RTO or ISO operational information.

330. We decline to adopt as ''best practices'' the provisions of the recent settlement agreement entered into by PJM and a number of interested parties concerning the structure, function and independence of PJM's MMU (PJM/MMU Settlement Agreement).[410] The provisions of that agreement were specific to one RTO, and represented a negotiated balancing of interests. It would be inappropriate to impose the specifics of that settlement on all other RTOs and ISOs, and especially to do so without notice and the opportunity to comment. However, we observe that the PJM/MMU Settlement Agreement is in accord with our determinations in this Final Rule regarding the appropriate MMU structure and tools.[411]

331. We decline to require that MMU offices be at the RTO or ISO site. While such a location may well have its advantages, it is also possible that, in this age of electronic communications, other forms of access may be satisfactory. In any event, this is a level of detail that is best worked out on a case-by-case basis.

332. We find it unnecessary to require inclusion of a tariff provision directing the MMU to report to the Commission any concerns it may have with inadequate access to market data, resources or personnel. As we noted in the NOPR, there are already adequate mechanisms for the MMU to bring any noncompliance in this regard to the Commission's attention.[412]

b. Oversight

i. Commission Proposal

333. The Commission proposed in the NOPR that the MMU, for purposes of supervision over its market monitoring functions, should report to the RTO or ISO board rather than to management. The Commission further proposed that management representatives on the board be excluded from this oversight function. However, the Commission noted that, if RTOs and ISOs deem it appropriate, they may have the MMU report to management for administrative purposes, such as pension management, payroll and the like. The Commission also proposed that, if an RTO or ISO has a hybrid MMU structure with two market monitoring bodies, an internal and an external one, the RTO or ISO may have the internal market monitor report to management with respect to both its market monitoring and administrative functions, and the external market monitor report to the board. The Commission rejected the suggestion that the MMU should report to a body outside of the RTO or ISO structure.

334. The Commission also declined to impose a blanket requirement that major changes in MMU status, such as termination of employment, be made subject to Commission review. Such requirements are included in the contractual arrangements of certain RTOs or ISOs, but the Commission rejected imposing a ''one size fits all'' requirement on the remaining RTOs or ISOs absent their consent.

ii. Comments

335. Commenters addressing the subject generally agreed that an MMU should report to an RTO or ISO board rather than to management.[413] APPA cautions that an RTO or ISO board must be prepared to take appropriate oversight action when an MMU reports to it.[414] FTC states that given the importance of MMU independence and recent concerns in this area, the Commission may wish to earmark this topic for periodic review, including an analysis of best practices both in the United States and abroad.[415]

336. With respect to the proposed exception for hybrid MMUs, five commenters support the proposal.[416] For hybrids, most commenters agree that the internal monitor may report to management if the external monitor reports to the board. Another commenter, DC Energy, opposes this proposal, arguing that all market monitors should report to the board to ensure independence. TAPS states that the mix of duties between internal and external market monitors varies from region to region, with the external market monitor being ''weak'' in some cases and the internal market monitor performing the essential duties. TAPS proposes that the Commission require that the external market monitor be responsible for the MMU duties spelled out in the NOPR (*e.g.*, identifying ineffective market rules, reviewing the performance of the market, and making referrals to the Commission).

337. On the issue of reporting to a body other than the RTO or ISO, Ohio PUC believes that an external MMU should report to the RTO's or ISO's board of directors only as an interim step. It states that the Commission's long-term goal should be total MMU independence, with the MMUs reporting as consultants to a Federal-State Joint Board on Market Monitor Oversight or to some other form of a joint-board construct, manned by a Commissioner and state commissioner

[410] *See* PJM MMU Settlement Order, 122 FERC ¶ 61,257.

[411] In the event of any inconsistencies, the requirements imposed in this Final Rule, which have the force of regulation, would control. Indeed, the PJM/MMU Settlement Agreement itself so acknowledges, as the Commission noted in its order approving the settlement. *Id.* P 24.

[412] NOPR at P 182.

[413] American Forest, APPA, CAISO, DC Energy, EPSA, FTC, Industrial Consumers, ISO New England, LPPC, Midwest ISO, New York PSC, North Carolina Electric Membership, NRECA, NYISO, Old Dominion, PJM Power Providers, Reliant, SPP and TAPS.

[414] APPA at 81.

[415] FTC at 30.

[416] CAISO; California PUC; EEI; NYISO; and Reliant.

or their designees. Ohio PUC believes this construct would provide MMU autonomy and relieve the board of directors of the RTO or ISO from arbitrating disputes between an RTO or ISO and the MMU.[417]

338. Four commenters disagree with the Commission's proposal not to impose a blanket requirement that major changes in the MMU's employment arrangements be subject to Commission review and approval.[418] APPA states that substantial changes such as contract termination and renewal for external market monitors, or major changes in employment arrangements for internal market monitors, should be subject to Commission review and approval. It also suggests that the Commission adopt the pertinent provision of the PJM/MMU Settlement Agreement as a ''best practice,'' reasoning that this would give MMUs a measure of job security that might allow them to be more independent in their assessments.[419] California PUC and Steel Producers agree that significant relational changes should be subject to Commission review, including changes to the structure of an MMU or the dismissal of key MMU personnel.[420] TAPS states that Commission review of important changes would provide a backstop to ensure MMU independence, and would give market participants and the Commission a mechanism to assess whether an RTO or ISO has fulfilled its obligations toward the MMU. It argues that the Commission has not provided a valid reason not to require approval of such MMU changes.[421]

iii. Commission Determination

339. We adopt the NOPR proposal requiring MMUs to report to the RTO or ISO board of directors, with management representatives on the board excluded from this oversight function. Removing the MMU from reporting to management will give it the separation needed to foster independence. If occasion demands, we will revisit this decision. However, we decline to ''earmark'' it for periodic review as requested by the FTC. We also adopt the NOPR proposal allowing RTOs and ISOs, if they deem it appropriate, to permit the MMU to report to management for administrative purposes, such as pension management, payroll and the like.

340. Commenters generally agreed with our proposed exception for hybrid MMUs, in which we suggested that the internal market monitor may continue to report to management, while the external market monitor should report to the board. But TAPS points out that in some hybrid structures, the most important functions of the MMU are performed by the internal market monitor, with the external market monitor playing a much ''weaker'' role. We agree that such a division of labor presents a problem, and could result in the rule being swallowed by the exception.

341. However, we decline to adopt TAPS's suggested solution of requiring the external market monitor to assume responsibility for the core MMU duties spelled out in this order (identifying ineffective market rules, reviewing the performance of the markets, and making referrals to the Commission). This solution might impose upon the RTO or ISO an MMU structure that it does not want. Instead, we will require that if the internal market monitor is responsible for carrying out any or all of the above-cited core MMU functions, it must report to the board (as must the external market monitor). This solution allows the RTO or ISO to structure its MMU function in the way it deems most suitable, while also ensuring that the market monitor that performs the core MMU functions enjoys the independence from management that reporting to the board accomplishes.

342. Ohio PUC suggests that reporting to the RTO or ISO board should be an interim step only, and that ultimately MMUs should report to a Federal-State Joint Board on Market Monitor Oversight. Not only does an arrangement of this type raise jurisdictional concerns, it is difficult to see how such a potentially cumbersome structure could oversee MMUs in a timely and responsive manner. It is also doubtful that such an arrangement could effectively replicate the existing close exchange of data between the RTO or ISO and its MMU. Should the reforms we adopt in this Final Rule fail to achieve the needed independence we envision for MMUs, we will not hesitate to rectify the situation.

343. Several commenters propose that changes in the RTO/ISO/MMU relationship, such as contract termination or the dismissal of key MMU personnel, should be made subject to Commission review.[422] We noted in the NOPR that as of the date of its issuance, three of the RTOs and ISOs had agreements in place that provided for such review.[423] Since that date a fourth has been added, that of PJM.[424]

344. These RTOs and ISOs have voluntarily consented to such review. In the absence of such consent, we decline to impose a blanket requirement that RTOs and ISOs make their MMUs' contractual and employment arrangements subject to Commission review. Should the situation arise in which an RTO or ISO terminates its MMU in such a way as to violate its tariff requirements concerning MMU independence, the Commission will address such a violation on case-by-case basis.

c. Functions

i. Commission Proposal

345. In the NOPR, the Commission proposed updating and expanding the core tasks that our May 2005 Policy Statement on Market Monitoring Units required MMUs to perform. We proposed that the MMU be responsible for evaluating market rules, tariff provisions and market design elements for their effectiveness, and proposing recommended changes; reviewing and reporting on the performance of the wholesale markets; and referring suspected wrongdoing to the Commission.

346. In furtherance of its goal of ensuring independent analysis on the part of MMUs, the Commission also proposed that RTOs and ISOs include a provision in their tariffs specifying that they may not alter the reports generated by the MMUs or dictate the conclusions reached by the MMUs, although they may establish a reasonable mechanism for review and comment on MMU reports that are still in draft form. The

[417] Ohio PUC at 16–21.

[418] APPA; California PUC; Steel Producers; and TAPS.

[419] APPA at 82.

[420] California PUC at 34; Steel Producers at 11–12.

[421] TAPS at 49.

[422] To the extent commenters request that structural changes be made subject to Commission review, we note that such matters are governed by tariff and any change to the MMU structure (such as whether an MMU is internal, external or a hybrid) would require a tariff filing.

[423] Midwest ISO cannot terminate its agreement with its market monitor (an independent contractor) without Commission approval. Open Access Transmission and Energy Markets Tariff for the Midwest Independent Transmission System Operator, Inc., Attachment S–1, FERC Electric Tariff, Third Revised Volume No. 1, Second Revised Sheet No. 1659 (2005). SPP cannot terminate its agreement with its external market monitor without Commission approval. Southwest Power Pool Open Access Transmission Tariff, FERC Electric Tariff Fourth Revised Volume 1, Attachment AJ, § 11, Second Revised Sheet No. 699 (2006). The same is true for ISO New England. Participants Agreement among ISO New England, Inc. and the New England Power Pool, *et al.*, § 9.4.5.

[424] Settlement Agreement and Explanatory Statement of the Settling Parties, Docket Nos. EL07–56–000 and EL07–58–000 (December 19, 2007), Attachment M, PJM Market Monitoring Plan, III.F.3.e. This agreement was approved by the Commission in the PJM MMU Settlement Order.

Commission noted that this proposal will enable the MMU to receive potentially helpful comments, while removing the ability of the RTO or ISO to unreasonably influence or impede the MMU's analysis.

ii. Comments

347. All but two commenters support the Commission's proposal regarding the three core functions of an MMU.[425] ISO New England would add a fourth function, that of regular daily monitoring of the wholesale market in order to obtain timely access to information that would provide a broader context for evaluating particular types of conduct, and that could speed and enhance detection of manipulative behavior.[426] TAPS would also add a fourth function, that of assessing whether RTO benefits flow to consumers. It suggests that the MMU could make this consumer-value assessment by examining, for example, whether in LMP markets investment in transmission, generation and demand response is occurring in areas with higher prices, and whether FTRs are available, and are being used, to hedge transmission congestion costs experienced by LSEs.[427]

348. CAISO requests clarification that when an MMU evaluates existing and proposed market rules, the Commission expects it to employ its best judgment about effective use of resources, and does not expect a formal evaluation for every existing market rule.[428] California PUC agrees that an MMU should identify ineffective market rules and tariff provisions and recommend proposed rule and tariff changes; however, it suggests the MMU's participation be limited to an advisory role.[429] NY TOs and PJM state that MMUs should evaluate changes, but should not get involved in implementing changes.[430] PG&E believes the Final Rule should authorize MMUs to access data necessary to assess the impact of behavior outside of an RTO's or ISO's geographic footprint, commenting that such access is needed in California because the state is very dependent on imports. It also states that MMUs should report on the effectiveness and comprehensiveness of mitigation as part of their duties, even when they are not themselves directly involved in implementation of such mitigation.[431]

349. Two commenters agree with the Commission's proposal that MMUs should limit dissemination of information in those cases where disclosure of a market design loophole could be exploited.[432] APPA believes MMUs should disclose such information at an appropriate time, such as when tariff changes or software upgrades are adopted, in order to maintain transparency.[433] Reliant requests clarification as to whether MMUs should provide the RTO or ISO, stakeholders and the Commission with their views as to whether existing operations interfere with appropriate market signals.[434]

350. All three commenters addressing the subject agree that MMUs should report violations of Standards of Conduct (18 CFR Part 158) or Affiliate Restrictions rules (18 CFR 35.39) rules if uncovered in the ordinary course of business.[435] California PUC states that violations should be referred to the appropriate state commission as well as to the Commission.[436]

351. Commenters agree that RTOs should not be allowed to alter reports generated by an MMU.[437] APPA does not support a tariff provision allowing MMUs to submit their reports in draft form to RTOs for review and comment. It states that the Commission approved a specific prohibition against such review in the PJM/MMU Settlement Agreement, and should adopt such a prohibition in this proceeding.[438]

352. Old Dominion suggests that if the MMU disagrees with a tariff change that the RTO or ISO proposes to the Commission, the RTO or ISO should file both its proposal and that of the MMU.[439]

iii. Commission Determination

353. We adopt the MMU functions proposed in the NOPR, with clarifying rewording. These functions expand and update the functions already performed by MMUs in accordance with the Policy Statement and codify the protocols for referrals to the Commission discussed therein.[440] The revised functions should provide MMUs with ample authority to evaluate any needed changes to the markets and bring them to the attention of concerned entities, to review and report on the performance of the markets, and to refer suspected wrongdoing to the Commission.

354. As we have previously acknowledged:

> MMUs perform an important role in assisting the Commission in enhancing the competitiveness of ISO/RTO markets. Competitive markets benefit customers by assuring that prices properly reflect supply and demand conditions. MMUs monitor organized wholesale markets to identify ineffective market rules and tariff provisions, identify potential anticompetitive behavior by market participants, and provide the comprehensive market analysis critical for informed policy decision making.[441]

Thus, the MMU functions we adopt are as follows:

(1) Evaluating existing and proposed market rules, tariff provisions and market design elements, and recommending proposed rule and tariff changes not only to the RTO or ISO, but also to the Commission's Office of Energy Market Regulation staff and to other interested entities such as state commissions and market participants, with the caveat that the MMU is not to effectuate its proposed market design itself (a task belonging to the RTO or ISO), and with the further caveat that the MMU should limit distribution of its identifications and recommendations to the RTO or ISO and to Commission staff in the event it believes broader dissemination could lead to exploitation, with an explanation of why further dissemination should be avoided at that time;

(2) Reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities such as state commissions and market participants; and

(3) identifying and notifying the Commission's Office of Enforcement staff of instances in which a market participant's behavior, or that of the RTO or ISO, may require investigation, including suspected tariff violations, suspected violations of Commission-approved rules and regulations, suspected market manipulation, and inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

355. We decline to add as a fourth function ISO New England's proposal regarding daily monitoring of the wholesale market, as this function is included in the existing requirement to review and report on the performance of the wholesale markets.

356. CAISO requests clarification that the Commission does not expect an MMU to make a formal evaluation of every existing market rule. We agree. The MMU's role is one of monitoring, not auditing, and we do not expect it to

[425] CAISO; California PUC; DC Energy; EEI; Industrial Consumers; ISO New England; Midwest ISO; North Carolina Electric Membership; NY TOs; PG&E; PJM; Reliant; SPP; and TAPS.

[426] ISO New England at 18.

[427] TAPS at 51–52.

[428] CAISO at 14.

[429] California PUC at 34–35.

[430] NY TOs at 3; PJM at 6.

[431] PG&E at 15–16.

[432] APPA; Reliant.

[433] APPA at 83.

[434] Reliant at 12–13.

[435] California PUC; EPSA; and Midwest ISO.

[436] California PUC at 36–37.

[437] APPA; NRECA; NSTAR; Old Dominion; PJM; and SPP.

[438] APPA at 83–84.

[439] Old Dominion at 21–22.

[440] Policy Statement, 111 FERC ¶ 61,267 at Appendix A.

[441] *Id.* P 1.

make a systematic and comprehensive review of every one of the thousands of existing market rules. For this reason, we decline to adopt TAPS's suggested fourth function of assessing whether RTO or ISO benefits flow to consumers. Finally, we expect MMUs to be vigilant in identifying problems and bringing them to the attention of the RTO or ISO, the Commission, and other interested entities.

357. We agree that the MMU's role in recommending proposed rule and tariff changes is advisory in nature, and that the MMU should not become involved in implementing rule and tariff changes (unless a tariff provision specifically concerns actions to be undertaken by the MMU itself). Both the filing of proposed rule and tariff changes, and the implementation of rule and tariff changes, are within the purview of the RTO or ISO. However, we do expect the MMU to advise the Commission, the RTO or ISO, and other interested entities of its views regarding any needed rule and tariff changes. Likewise, in the event an RTO or ISO files for a proposed tariff change with which the MMU disagrees, we expect the RTO or ISO to inform the Commission of that disagreement, although not necessarily to include a written MMU proposal with its filing.

358. We also concur with PG&E that where data concerning activity outside the geographical footprint of the RTO or ISO would be helpful to the MMU in carrying out its functions, the MMU should seek out such data. Likewise, where an MMU believes market design flaws interfere with appropriate price signals, these flaws should be brought to the attention of concerned entities. And, where information about a market design flaw was not broadly disseminated because the MMU felt such information could alert market participants to a market loophole, such information can, and should, be provided once the danger of exploitation of the loophole is past.

359. The California PUC requests that violations of the Standards of Conduct or Affiliate Restrictions should be reported to the appropriate state commission as well as to the Commission. We decline to adopt this proposal. These are violations of Commission rules, not of state rules or statutes, and therefore the Commission is the proper body to investigate them.

360. We adopt the NOPR proposal that, by tariff, each RTO or ISO may require its MMU to submit its report in draft form to the RTO or ISO for review and comment, but may not alter the reports generated by the MMU or dictate the MMU's conclusions. RTOs or ISOs need not require submission of draft reports, but if they do, input from knowledgeable employees may serve to strengthen the end product or catch errors of fact or reasoning. In any event, the MMU is free to disregard any suggestions with which it disagrees.

d. Mitigation and Operations

i. Commission Proposal

361. In order to strengthen MMU independence, the Commission proposed in the NOPR that MMUs be removed from tariff administration, including mitigation. This proposal was designed to free MMUs from a role that might make them subordinate to the RTO or ISO. The Commission regulates public utilities, and it is the public utilities that we hold accountable for tariff implementation. To the extent this function is performed by MMUs, the MMUs are assisting the RTOs and ISOs in the administration of their tariff, which places the MMUs in a subordinate position to the RTOs and ISOs. The proposal was also designed to remove the bias that might arise from the MMUs' analyzing the health of the markets they themselves had affected. The Commission solicited comments on the activities that would be needed to make the transition to RTO or ISO-administered mitigation, on any difficulties the MMU might be anticipated to experience in monitoring mitigation performed by the RTO or ISO, and any additional sensitivities that commenters wished to raise regarding the proposal.

ii. Comments

362. Several commenters support the Commission's proposal to remove MMUs from RTO and ISO tariff administration, including mitigation.[442] However, many more oppose it.[443]

363. The commenters who agree with the Commission's proposal advance several arguments in support of it. Two entities cite two conflicts of interest that may arise when an MMU is involved in mitigation and tariff administration, the first occurring when an MMU both evaluates market performance and conducts mitigation,[444] and the second occurring when an MMU assists in designing and finalizing a rule for filing with the Commission and subsequently evaluates the effectiveness of the rule in practice.[445] Another commenter states that an MMU should be limited to the three core functions the Commission enunciated in the NOPR, leaving it free to advise the Commission of perceived instances where the RTO or ISO itself has failed to conduct economic dispatch in an efficient manner.[446] Other commenters state that the rules and actions related to mitigation should be made explicit and, to the extent possible, be automated and implemented via bright-line tests, in order to eliminate discretion in their application.[447]

364. The commenters who oppose the Commission's proposal advance several arguments why RTOs and ISOs should not perform mitigation. Commenters suggest that the RTO or ISO staff and personnel who have designed and implemented the markets, and whose compensation is based upon those tasks, may have a vested interest in not identifying or correcting problematic behavior, and may have an interest in not imposing enforcement measures on what in effect are their customers, or in refraining from mitigating a member that threatens to leave the RTO or ISO.[448] Other commenters remark that removing the MMU from mitigation activities may deprive the MMU of much of the hands-on administrative interaction with participants that is essential to consumer protection.[449] One commenter suggests that a better way to address the issue is to issue additional orders limiting discretion in applying mitigation, rather than removing MMUs from mitigation activities.[450] Other commenters argue that moving mitigation responsibility from an MMU to the RTO or ISO would deprive the MMU of timely, first-hand access to crucial information that could speed and enhance detection of manipulative behavior, noting that after-the fact mitigation (settlement price adjustment) would not be a function of the market that the MMU would be able to view once it was removed from tariff administration.[451] ISO New England states that mechanistic application of mitigation criteria by RTOs or ISOs would not readily address shifts in bidding behaviors, and that as market participants continuously search for

[442] Ameren; EPSA; FirstEnergy; Industrial Consumers; PG&E; PJM; Reliant; SoCalEdison-SDG&E; and SPP.

[443] American Forest; California PUC; Indianapolis P&L; Industrial Coalitions; Maine PUC; NARUC; NEPOOL Participants; New York PSC; North Carolina Electric Membership; Ohio PUC; Old Dominion; OMS; Potomac Economics; and Xcel.

[444] Ameren at 33; PJM at 4–6.

[445] Ameren at 33; PJM at 5–6.

[446] FirstEnergy at 14–15.

[447] Reliant at 13; Potomac Economics at 8–9.

[448] American Forest at 6; California PUC at 37–38; Indianapolis P&L at 4; Industrial Coalitions at 21–22; Midwest ISO at 24–26; Ohio PUC at 24–25; and OMS at 16–17.

[449] American Forest at 7; ISO New England at 19–22; and NARUC at 12–13.

[450] American Forest at 7.

[451] ISO New England at 20–21; Xcel at 12–13.

more profitable bidding strategies, the discretion of a skilled MMU to investigate unusual bidding behavior inhibits experimentation with deviant strategies and enhances deterrence.[452] ISO New England states that the Commission's conflict of interest concern is inconsistent with grounding MMU independence and objectivity in its code of conduct and contractual obligations, and notes that the MMU has nothing to gain financially from mitigation.[453] ISO New England and Maine PUC state that moving the mitigation activity to the RTO or ISO could require additional operational staff to perform tasks that MMU employees can accomplish on an integrated basis and more efficiently, thereby increasing RTO or ISO costs.[454] NYISO estimates that an additional five to eight employees would be required because of the need to duplicate some functions in order for the MMU to monitor the RTO or ISO's conduct of mitigation.[455]

365. Indianapolis P&L states that moving the mitigation function to the RTO or ISO raises the potentially serious problem of retaliation, because if RTO or ISO stakeholders disagree with the direction in which the RTO or ISO wishes to move, the RTO or ISO could be tempted to use the market mitigation power as a tool of persuasion.[456] OMS states that in the absence of a specific showing that an MMU is incapable of applying mitigation measures appropriately, the Commission should respect the decision of the RTO or ISO and stakeholders in this regard. It also observes that RTOs and ISOs have greater incentive than MMUs not to mitigate, as an entity might be inclined to withdraw from membership in response. It does not regard a referral to the Commission of an RTO's or ISO's failure to properly mitigate as a sufficient remedy, as such referrals are kept confidential.[457]

366. SoCal Edison-SDG&E support the Commission's proposal only if the following conditions occur: (1) Adequate assurance of effective mitigation is provided; (2) MMUs have full access to data used for mitigation; and (3) MMUs are allowed to participate in all activities used to develop mitigation rules and specific mitigated bid levels for individual generators.[458] PG&E supports it only if: (1) RTO and ISO tariffs are modified to include sufficient staff resources to perform mitigation; (2) mitigation staff are free from the influence of other RTO staff; and (3) mitigation staff has the right to report to the Commission and its Office of Enforcement any loopholes or deficiencies in mitigation design or implementation.[459]

367. EEI, ISO New England, Maine PUC and New York PSC oppose the proposal for cases where the RTO or ISO has a hybrid MMU structure.[460] Midwest ISO opposes the proposal when it is applied mechanically to all RTOs and ISOs.[461] NRECA states that any changes in the Final Rule should not weaken mitigation, should not supersede the PJM/MMU Settlement Agreement, and should follow the Final Rule in Order No. 697.[462] CAISO notes that its internal monitor does not administer mitigation, but does administer an Enforcement Protocol related to late fees and the untimely submission of outage reports and meter data,[463] and seeks guidance as to whether these activities would constitute ''tariff administration'' under the Final Rule.[464] TAPS does not oppose the proposal, but thinks MMUs can function better doing mitigation.[465]

368. Potomac Economics and APPA offer compromise positions and clarifications. APPA suggests that the MMU continue to review bids, but refrain from participating directly in drafting proposed changes to the mitigation rules; rather, the MMU would comment on the proposed rules and, if necessary, become a separate intervenor in a Commission proceeding if one were to occur.[466]

369. Potomac Economics observes that the aspects of mitigation that the Commission appears to find objectionable are those that are applied prospectively to participant offers and thus affect market outcomes (such as altering the prices of offers or altering the physical parameters of offers such as ramp rates and start-up time). Potomac Economics proposes that the Commission clarify that the RTO or ISO should be responsible for implementing these prospective mitigation measures, while the MMU be allowed to be responsible for implementing retrospective measures such as calculation of after-the-fact mitigation true-ups for billing purposes and settlement price adjustments. Potomac Economics also suggests that MMUs continue to be responsible for the production of inputs into the mitigation process, such as reference levels and the identification of system constraints, which rely on the MMUs' intimate knowledge of the market and their software capabilities. Potomac Economics believes that this bifurcation of labor would avoid the wasteful duplication of software, staff and expertise that would be needed for the RTO or ISO to mirror all of the MMU's mitigation capabilities, that it contends the MMU would have to retain in order to satisfy its market monitoring obligations.[467]

iii. Commission Determination

370. The proposal in the NOPR to remove MMUs from tariff administration, and in particular from mitigation, engendered heated disagreement amongst the commenters. Several supported the proposal, although the majority disagreed with removing the MMU from mitigation. The Commission has given careful consideration to the comments, and acknowledges that there are valid concerns on both sides.

371. As we observed in the NOPR, and as many commenters noted as well, there is an inherent conflict of interest in an MMU conducting mitigation and also opining on the state of the market, the health of which may in part reflect the results of its mitigation. We also observed that by supporting RTOs and ISOs in tariff administration, MMUs become subordinate to the RTO or ISO, thus weakening their independence.

372. Many commenters, however, raise substantial concerns over removing MMUs from mitigation, including the following: (1) There is a greater conflict of interest for the RTO or ISO to administer mitigation, as it has a vested interest in keeping its market participants happy, especially the larger players who can threaten to leave the

[452] ISO New England at 21.

[453] *Id.* at 21–22 (citing *ISO New England Inc.,* 119 FERC ¶ 61,045, at P 123 (2007), *reh'g granted in part and denied in part,* 120 FERC ¶ 61,087 (2007)); NEPOOL Participants at 23 (citing *ISO New England Inc.* 106 FERC ¶ 61,280, P 187 (2004), reh'g *granted in part and denied in part,* 109 FERC ¶ 61,147 (2004); *Order Authorizing RTO Operations;* 110 FERC ¶ 61,111 (2005); *order on reh'g,* 111 FERC ¶ 61,344 (2005); *ISO New England Inc.,* 120 FERC ¶ 61,087, at P 52 (2007)).

[454] ISO New England at 22; Maine PUC at 7.

[455] NYISO at 16.

[456] Indianapolis P&L at 4.

[457] OMS at 8–9.

[458] SoCal Edison-SDG&E at 4.

[459] PG&E at 17.

[460] EEI at 24–25, ISO New England at 19–22; Maine PUC at 7; and New York PSC at 6–8.

[461] Midwest ISO at 24–26.

[462] *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity, And Ancillary Services By Public Utilities,* Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 241 (2007), *order on reh'g,* Order No. 697–A, 73 FR 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008).

[463] *Calif. Indep. Sys. Operator Corp.,* 106 FERC ¶ 61,179, at P 154; *order on reh'g,* 107 FERC ¶ 61,118; *reh'g denied,* 109 FERC ¶ 61,089 (2004); *order on reh'g,* 110 FERC ¶ 61,333 (2005).

[464] CAISO at 15–16.

[465] TAPS at 52–53.

[466] APPA at 84–85.

[467] Potomac Economics at 8–10.

RTO or ISO if they choose; (2) the MMU serves as a useful buffer between the RTO or ISO and the market participants, performing what is often viewed as a hostile act; (3) there is an inherent tension between mitigation and the RTO or ISO goal of promoting new markets; (4) the MMU is better equipped by training and market access to detect the need for mitigation; (5) removing the MMU from mitigation would distance it from the market insights it needs to perform its monitoring functions; (6) if removed from tariff administration, the MMU would not have access to the mitigation settlement process and thus could not adequately monitor the RTO's or ISO's mitigation performance; (7) there would be much duplication of costs, since the MMU would have to retain most of its mitigation capabilities in order to monitor the RTO's or ISO's conduct of mitigation; (8) there would be extensive transition costs and software licensing concerns; and (9) there is no empirical evidence of an existing problem with the MMUs performing mitigation.

373. We find many of the objections raised by commenters meritorious. However, we remain concerned that the unfettered conduct of mitigation by MMUs makes them subordinate to the RTOs and ISOs and raises conflict of interest concerns. Therefore, we adopt a compromise approach, one that strikes the appropriate balance between allowing modified participation by the MMUs in mitigation, while protecting against the conflict of interest and subordination inherent in their unfettered participation.

374. As the first element of this approach, we direct that in the event an RTO or ISO employs a hybrid MMU structure, it may authorize its internal MMU to conduct mitigation. An internal MMU is a part of the RTO or ISO, and allowing it to conduct mitigation adequately separates it from the monitoring duties of the external market monitor and places mitigation within the RTO or ISO itself. However, this solution only works if the external market monitor is charged with the responsibility of reviewing the quality and appropriateness of the mitigation conducted by the internal market monitor. We therefore require that in the event an RTO or ISO with a hybrid MMU structure permits its internal market monitor to conduct mitigation, it must assign its external market monitor the responsibility, and give it adequate tools, to monitor the quality and appropriateness of that mitigation.

375. As the second element of our approach, we find useful Potomac Economics' distinction between prospective and retrospective mitigation. It is only prospective mitigation that affects the operation of the market, and therefore it is only prospective mitigation that creates a potential conflict of interest for an MMU. Therefore, we direct that RTOs and ISOs may allow their MMUs, regardless of whether it uses a hybrid structure, to conduct retrospective mitigation. For these purposes, we consider prospective mitigation to include only mitigation that can affect market outcomes on a forward-going basis, such as altering the prices of offers or altering the physical parameters of offers (*e.g.*, ramp rates and start-up times) at or before the time they are considered in a market solution. All other mitigation would be considered retrospective. We also determine that the MMU may provide the inputs required by the RTO or ISO to conduct prospective mitigation, including determining reference levels, identifying system constraints, cost calculations and the like. This will enable the RTO or ISO to utilize the considerable expertise and software capabilities developed by their MMUs, and reduce wasteful duplication.

376. As noted by Potomac Economics and by PJM in its supplemental comments, a number of our orders specifically lodge elements of mitigation and administration within the MMUs. Many of these may properly be considered retroactive mitigation, and the RTOs' or ISOs' tariffs would not need to be adjusted to remove these responsibilities from the MMU's purview. Should there be any question of categorization, whether for existing or proposed tariff provisions, the RTO or ISO may seek guidance from the Commission in its compliance filing.

377. We also direct that purely administrative matters, such as those identified by CAISO (enforcement of late fees and the untimely submission of outage reports and meter data), should be conducted by the RTO or ISO, rather than the MMU. Such activities are remote from the core duties that this Final Rule assigns to the market monitoring function.

378. We also direct that the tariffs of RTOs and ISOs clearly state which functions are to be performed by MMUs, and which by the RTO or ISO. This separation of functions will serve to eliminate RTO or ISO influence over the MMUs, and remove the concern that MMU assistance in mitigation makes it subordinate to the RTO or ISO.

379. Finally, we direct the RTOs and ISOs to review their mitigation tariff provisions with a view to making them as non-discretionary as possible, whether performed by the MMU or by the RTO or ISO, and to reflect any needed changes in their compliance filings. This will go a long way toward removing the ability of either entity to act in a discriminatory manner, and will facilitate the monitoring and review of mitigation activities.

e. Ethics

i. Commission Proposal

380. In the NOPR, the Commission proposed that development of particular ethics standards to be applied to MMUs should be left in the first instance to the discretion of the RTOs and ISOs. However, the Commission noted that these standards should include certain minimum requirements, as follows: (1) Employees shall have no material affiliation (to be defined by the RTO or ISO) with any market participant or affiliate; (2) employees shall not serve as an officer, employee, or partner of a market participant; (3) employees shall have no material financial interest in any market participant or affiliate (allowing for such potential exceptions as mutual funds and non-directed investments); (4) employees shall not engage in any market transactions other than the performance of their duties under the tariff; (5) employees shall not be compensated, other than by the RTO or ISO, for any expert witness testimony or other commercial services to the RTO or ISO or to any other party in connection with any legal or regulatory proceeding or commercial transaction relating to the RTO or ISO or to the RTO or ISO markets; (6) employees may not accept anything of value from a market participant in excess of a *de minimis* amount, to be decided on by the RTO or ISO; and (7) employees must advise their supervisor (or, in the case of the MMU manager, advise the RTO or ISO board) in the event they seek employment with a market participant and must disqualify themselves from participating in any matter that would have an effect on the financial interest of such market participant.[468]

ii. Comments

381. All commenters addressing the subject agree that ethical standards should be imposed on MMU

[468] The Commission noted that some external MMUs may currently have business associations that would be prohibited under these proposed minimum requirements, such as unrelated consulting work for participants in its RTO's or ISO's markets. If that is the case, the Commission proposed that the RTO or ISO should propose a suitable transition plan in its compliance filing. NOPR, FERC Stats. & Regs. ¶ 32 ,628 at n.200.

employees.[469] All but one of these commenters agree that the standards should appear in a tariff provision, thus making the MMU subject to an enforcement action. However, FirstEnergy, stating that it is opposed to collecting from RTO or ISO members any penalties assessed to an RTO or ISO, prefers that the MMU adopt ethics standards internally and implement them by managing and disciplining its employees.[470] APPA and Ohio PUC suggest adding a provision to the standards covering post-employment activities.[471] Midwest ISO states its market monitor performs independent work for other entities under Commission-approved monitoring plans, and requests clarification that the minimum guidelines the Commission proposes would not prohibit other employees of the MMU's firm from performing independent monitoring for other entities. Potomac Economics, the Midwest ISO's MMU, requests the same clarification, noting that the work is not done on behalf of the company.[472] NRECA asserts that ethics standards should include civil penalties.[473]

382. Potomac Economics proposes that the Commission should include the phrase ''other than the RTO or ISO'' after the first clause in proposed minimum requirement (5), as omission of the phrase would prohibit compensation of MMU employees for any expert witness testimony or other commercial services on behalf of the Commission-approved RTO or ISO, thus preventing the MMU from performing many of the required market monitoring functions.[474]

iii. Commission Determination

383. There was widespread agreement among the commenters that ethics standards should be imposed, and the importance of such standards calls for their inclusion in the RTO's or ISO's tariff, subject to enforcement by the Commission. (The manner of such potential enforcement, including whether civil penalties might be imposed and the avenue by which any such penalties might be collected, is beyond the scope of this Final Rule.[475]) Therefore, we direct that each RTO and ISO include in its tariff the minimum ethics standards set forth in the NOPR, with certain modifications as set forth below.

384. We note that the requirements we impose are minimums, and an RTO or ISO is free to propose more stringent ones. Therefore, the appropriate place to request additional requirements, such as the suggested extension of the standards to post-employment activities, would be in stakeholder meetings, or before the Commission when the RTO or ISO makes its tariff compliance filing.

385. Midwest ISO and Potomac Economics request clarification that the ethics standards do not prohibit employees of the MMU from performing monitoring for entities other than RTOs or ISOs. We clarify that if the employing entity is not a market participant in the particular RTO or ISO for whom the MMU already performs market monitoring, such engagement is permissible. However, if the employing entity is a market participant in the RTO or ISO for whom the MMU already performs market monitoring, the proposed work would entail the same conflict of interest as would any other consulting services. We are cognizant of the fact that if an MMU currently has such engagements in place, it will take a certain amount of time to unwind the association or make other suitable arrangements. We direct the RTO or ISO to apprise the Commission of such engagements in its compliance filing, and to propose a transition plan for dealing with them in a manner consistent with the aims expressed in this Final Rule, as the Commission proposed in the NOPR.[476]

386. We agree with Potomac Economics that the NOPR's regulatory text inappropriately omitted the phrase ''other than the RTO or ISO'' after the first clause of proposed minimum ethical requirement (E). (The phrase was included in the body of the NOPR itself). We direct that the RTO and ISO tariffs should include the omitted phrase, and we correct the regulatory text in this Final Rule.

387. We also note that both the body of the NOPR and the regulatory text refer to ''employees,'' whereas the intent of the provision encompasses both the MMU itself as well as its employees. We therefore direct the RTOs and ISOs to specify that their MMU ethics standards apply to the MMU itself as well as to its employees.

f. Tariff Provisions

i. Commission Proposal

388. The Commission proposed in the NOPR that RTOs and ISOs be required to include in their tariffs, and centralize in one section, all of their MMU provisions. We noted that including all MMU provisions in the tariff will ensure they are made subject to the compliance requirements that attach to tariff provisions, and thus will give to interested parties notice and an opportunity to intervene when a tariff filing is made.

389. The Commission also proposed that RTOs and ISOs include an MMU mission statement in the introductory portion of its MMU tariff section, setting forth the goals to be achieved by the MMU, including the protection of both consumers and market participants by the identification and reporting of market design flaws and market power abuses.

390. The Commission further proposed that the RTOs and ISOs meet these requirements at the time they make their compliance filings in connection with this proceeding.

ii. Comments

391. Commenters support the proposal to locate all MMU provisions in one section of the RTO or ISO tariffs.[477] Two commenters agree these provisions should include a mission statement.[478] APPA states the best starting point for this kind of statement is Attachment M to the PJM/MMU Settlement Agreement.[479] FirstEnergy opposes the option of leaving existing MMU provisions in their current location in addition to placing them in a new section of the tariff, since it believes this would be administratively inconvenient and has the potential to create inconsistencies.[480] PG&E does not oppose posting MMU provisions elsewhere than in the MMU section, so long as appropriate cross-referencing is made.[481]

iii. Commission Determination

392. We adopt the NOPR proposal and direct RTOs and ISOs to include in their tariffs, and centralize in one section, all of their MMU provisions. We also direct RTOs and ISOs to include a mission statement in the

[469] Ameren; APPA; CAISO; California PUC; DC Energy; EEI; FirstEnergy; Industrial Consumers; ISO New England; Midwest ISO; North Carolina Electric Membership; NRECA; Ohio PUC; PG&E; PJM Power Providers; Potomac Economics; Reliant; SPP; and TAPS.

[470] FirstEnergy at 15–16.

[471] APPA at 86; Ohio PUC at 25–26.

[472] Midwest ISO at 26–27; Potomac Economics at 13.

[473] NRECA at 53–54.

[474] Potomac Economics at 11–13.

[475] *See Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008) (discussing the factors to be considered in determining what, if any, remedies are to be imposed in the case of violations of Commission rules and regulations).

[476] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 200.

[477] Ameren; APPA; California PUC; Constellation; DC Energy; EEI; FirstEnergy; Industrial Consumers; ISO New England; Midwest ISO; North Carolina Electric Membership; Old Dominion; PG&E; Reliant; SPP; and Xcel.

[478] APPA at 87; EEI at 25.

[479] APPA at 87.

[480] FirstEnergy at 14.

[481] PG&E at 18–19.

introductory portion of their MMU tariff section, which is to set forth the goals to be achieved by the MMU, including the protection of both consumers and market participants by the identification and reporting of market design flaws and market power abuses.

393. We adopt the suggestion that RTOs and ISOs may include various MMU provisions elsewhere in their tariff as well as in the centralized MMU section, if they believe context and clarity so require. However, we are sympathetic to the concern that this duplicative listing may create confusion. Therefore, we require RTOs and ISOs, if they make such a duplicative listing, to clearly note that the provision in question is also found in the centralized MMU section. We also direct the RTO or ISO to include in its tariff a provision stating that in the event of any inconsistency between provisions in the centralized MMU section and provisions set forth elsewhere, the provisions in the centralized MMU section control. Of course, the RTO or ISO should attempt to avoid any such inconsistencies.

394. We direct RTOs and ISOs to include their centralized MMU tariff sections in their compliance filings to be made in connection with this Final Rule.

3. Information Sharing

a. Enhanced Information Dissemination

i. Commission Proposal

395. The Commission carried forward proposals in the NOPR that had been advanced in the ANOPR, and which were designed to enhance the dissemination of information by MMUs in several areas. Specifically, the Commission proposed that MMUs report on aggregate market performance on no less than a quarterly basis to Commission staff, to staff of interested state commissions, and to the management and board of directors of the RTOs or ISOs. The Commission also proposed the MMUs make one or more of their staff members available for regular conference calls with representatives from the Commission, state commissions and the RTO or ISO. In the NOPR, the Commission stated that the type of information to be released by the MMU may most fruitfully continue to be developed on a case-by-case basis, so long as it generally consists of market analyses of the type regularly gathered by the MMUs in the course of business, and so long as it remains subject to appropriate confidentiality restrictions.

396. The Commission proposed that market participants be included in the dissemination of reports, which could be accomplished via posting them on the RTO or ISO Web site. However, the Commission stated that including market participants on conference calls would be unwieldy, and proposed limiting participation on such calls to Commission staff, RTO and ISO staff, staff of interested state commissions, and staff of state attorneys general should they express a desire to attend.

397. While the Commission noted that quarterly reports should not be as extensive as the annual state of the market report, it also stated that the annual state of the market reports have proven to be useful documents, and proposed that the RTOs and ISOs include in their tariffs a requirement for the MMUs to produce them, with the same dissemination (or broader, if desired) as the quarterly reports.

398. The Commission also proposed that the time period for the release of offer and bid data be reduced to three months, but that an RTO or ISO could propose a shorter period with accompanying justification or, if it demonstrates a potential collusion concern, a four-month lag period or some other mechanism to delay the release of a report if the release were otherwise to occur in the same season as reflected in the data.

399. Additionally, the Commission proposed to retain the practice of masking the identity of participants when releasing offer and bid data. The Commission further proposed that the RTO or ISO include in its compliance filing a justification of its policy regarding the aggregation or lack thereof of offer data and of cost data, discussing the manner in which it believes its policy avoids participant harm and the possibility of collusion, while fostering market transparency.

ii. Comments

400. Commenters in general support information sharing policies for MMUs,[482] and many commenters noted that the Commission struck a good balance between the need for information and the limitations of the MMUs.[483]

401. Several commenters generally support the approach of developing the types of material to be disseminated on a case-by-case basis.[484] EEI supports this flexible approach as long as the information is developed in the ordinary course of business by the MMU and is subject to the same confidentiality restrictions that are applied to release of information as determined by each RTO or ISO, or the Commission.[485] Midwest Energy comments that as regulators of retail markets, state commissions should be aware of how the market is functioning.[486] New York PSC states that the Commission should clarify that its proposed rule is the minimum standard for the dissemination of information and the MMUs that currently provide information to state commissions under working procedures will not be limited by the proposal.[487]

402. APPA does not oppose this proposal but comments that a provision like the one in PJM's tariff, which allows the MMU to respond to requests for studies or reports by states, should be included in all RTO/ISO/MMU tariff sections.[488] PG&E believes that to the extent that state commissions need information about markets and market monitoring reports, it should be made clear that if the MMUs have data available as part of their overview of markets or preparation of reports, such data should be made available to state commissions for their use in analysis and oversight of market efficiency and trends.[489] Joint Commenters support an evaluation of the type of data each RTO or ISO should provide, stating that RTOs and ISOs can further improve their markets by describing in their compliance filings additional information they will disseminate.[490] Joint Commenters urge the Commission to require each RTO or ISO to engage in a stakeholder process to develop a detailed document governing the identification of the type of additional information the RTO or ISO will disseminate, and to describe the information to be disseminated in the compliance filing. Joint Commenters recommend that the Commission require each RTO or ISO to apply the following criteria: (1) RTOs and ISOs should provide information to the extent it reasonably can be expected (a) to facilitate improved market transparency, reliability or efficiency; (b) to assist stakeholders in detecting market design or software flaws and/or suspected market manipulation; or (c) to assist market participants in their transaction activity; (2) provided that (a) the dissemination of the information will not harm the competitive dynamics

[482] *See, e.g.*, DC Energy; EEI; EPSA; Exelon; NEPOOL Participants; and Northeast Utilities.

[483] *See, e.g.*, EEI; EPSA.

[484] *See, e.g.*, EEI; FirstEnergy; Midwest Energy; Ohio PUC; and PJM Power Providers.

[485] EEI at 26.

[486] Midwest Energy at 4–5.

[487] New York PSC at 10.

[488] APPA at 87.

[489] PG&E at 20.

[490] Joint Commenters at 5.

of the market and (b) it is feasible from a resource allocation standpoint for the RTO to disseminate the information.[491]

403. NARUC believes that the Commission's proposal is a mistake, commenting that the Commission should provide explicit standards that assure that the states have the same access to data as does the Commission.[492] NARUC comments that (1) by granting such access, the Commission can leverage market oversight while, as explicitly acknowledged in the NOPR, giving state regulators access to data they need to fulfill their statutory responsibilities; (2) states need underlying data imbedded in aggregate information to verify and analyze MMU findings; and (3) states also recognize the need to protect from public disclosure information that could harm market participants or facilitate collusion.[493]

404. Commenters support the proposal to include market participants in the dissemination of reports.[494] NRECA, while supporting the proposal, is concerned that these reports may be insufficient if they do not provide the underlying data and assumptions used by the MMU to reach its conclusions, on the ground recipients may only be getting the RTO's or ISO's ''spin'' on the situation. NRECA suggests that the Commission should ensure the MMU reports provide sufficient information or provide a process whereby stakeholders can obtain access, subject to appropriate confidentiality restrictions, to the data and findings underlying MMU reports.[495] NSTAR strongly supports including market participants in the dissemination of information on market abuses, and states that the reporting should be transparent as a deterrent and so market participants can assess how well the markets are working and whether changes are necessary.[496]

405. Several commenters do not support the Commission's proposal to limit access by market participants to conference calls.[497] APPA recommends that conference calls be archived and posted on the RTO or ISO Web site for market participants who cannot be on the call.[498] Steel Producers and TAPS comment that the exclusion of market participants from such conference call is inappropriate, and that RTO or ISO stakeholder conference calls with numerous participants are commonplace.[499]

406. Commenters generally supported the Commission's proposal and conclusions regarding quarterly and state of the market reports.[500] APPA comments that certain annual state of the market reports are both over-inclusive with the amount of data reported and under-inclusive in terms of relevant data provided, and that MMUs should strive for quality as well as quantity in the data provided. EPSA supports the Commission's conclusion that the quarterly reports should not be as extensive as the annual state of the market reports.[501]

407. Most commenters supported the reduction in lag time for offer and bid data to three months.[502] Several others wanted a shorter lag time: one month,[503] one week or less,[504] or immediate disclosure.[505] Several commenters suggested giving RTOs and ISOs flexibility to propose shorter or longer times.[506] Citing two studies, APPA argues that system lambdas should be disclosed at the same time as bid and offer data.[507] If the Commission requires a shorter period of time to release offer and bid data, EEI argues it should maintain and enhance the masking and aggregation features.[508] Although it supports the three-month period, Midwest ISO prefers leaving the decision to the stakeholders.[509]

408. PG&E states that it is important that information about offer and bid data be increasingly available as prices and price caps rise, with disclosure of bid data sufficiently timely to permit review of bids before the necessity to undertake any challenge to such sales. PG&E also states that there is a need for increased market transparency when prices hit established bid or price caps, as such bidding may be designed to manipulate market prices and take advantage of temporary conditions. PG&E requests the Commission to consider modifying its disclosure requirements to provide for greater market transparency for bids at caps, with discretionary authority to disclose participants who bid in the region of any applicable price cap.[510]

409. TAPS proposes immediate disclosure, arguing that competitive markets thrive on information, not secrecy. More information in the hands of a larger number of competitors, in its opinion, would reduce the likelihood of collusion. TAPS cites competitive electric markets operating successfully in Australia, England and Wales, where the markets provide near real-time and historical data, including bid and offer data. TAPS also asserts that large generation-portfolio holders already know their offers for each of their multiple resources, and allowing RTOs or ISOs to make it available for free and more quickly would enable smaller market participants to compete on a level playing field and assist with market monitoring.[511]

410. A few commenters opposed the Commission's proposal to reduce the lag time from six to three months.[512] Ameren states that six months is a more appropriate time period to protect commercially sensitive data and guard against abuse.[513] Constellation does not support the reduction in lag time for release of information, but says if the Commission decides to do so, it should apply this policy to all areas of the market and require MMUs to post bid and offer data for demand and virtual markets under the same confidentiality provisions.[514] Ohio PUC states that the entities most likely to use the data are the market participants themselves, and believes there is little protection offered by masking the bidders' identities. It agrees with the Commission's analysis of the tradeoffs in reducing the lag period.[515]

411. All but two commenters support masking participant identity.[516] Ameren emphasizes the need to protect sensitive

[491] *Id.*

[492] NARUC at 13–14.

[493] *Id.*

[494] *See, e.g.,* APPA; California PUC; Midwest ISO; Old Dominion; and NSTAR.

[495] NRECA at 54–55.

[496] NSTAR at 8.

[497] *See, e.g.,* APPA; Steel Producers; and TAPS.

[498] APPA at 88.

[499] Steel Producers at 12; TAPS at 57.

[500] *See, e.g.,* EPSA; California PUC.

[501] EPSA at 14–15.

[502] *See, e.g.,* EEI; California PUC; Industrial Consumers; ISO New England; Joint Commenters; Midwest ISO; North Carolina Electric Membership; NRECA; Reliant; SCE-SDG&E; and SPP.

[503] Industrial Consumers at 23.

[504] TAPS at 53–56.

[505] APPA at 89–91.

[506] EEI at 26–27 (citing regional factors); California PUC at 44; Joint Commenters at 4; and North Carolina Electric Membership at 19 (citing the need to prevent collusion); National Grid at 9; and SoCalEdison-SDG&E at 4.

[507] APPA at 89–91 (citing McCullough and Stewart, Ann, *The Missing Benchmark in Electricity Deregulation,* McCullough Research (Dec. 20, 2007); Dunn, William, *Data Required for Market Oversight—A Concept Paper for the Electric Market Reform Initiative of the American Public Power Association,* Sunset Point LLC (Dec. 8, 2007) (Dunn Study)).

[508] As an example, bid data should be aggregated in categories of size and the coding used to describe bidders should be changed periodically. EEI at 26–27.

[509] Midwest ISO at 28–29.

[510] PG&E at 20–22.

[511] TAPS at 53–56 (citing the Dunn Study).

[512] *See, e.g.,* Ameren; Constellation; and Ohio PUC.

[513] Ameren at 36.

[514] Constellation at 17.

[515] Ohio PUC at 28.

[516] *See, e.g.,* Ameren; California PUC; Dominion Resources; EEI; ISO New England; Midwest ISO; SoCalEdison and SDG&E; and SPP.

market data.[517] Dominion Resources and EEI oppose unmasking, Dominion Resources stating that masking is needed to avoid the possibility of bid or offer fixing, collusion, or other behavior detrimental to the market.[518] California PUC suggests unmasking after two years; it also proposes to change masking on January 1 of each year to prevent market participants from being able to figure out the market participants in current data.[519] SPP requests guidelines from the Commission on aggregating the data to protect the participant's identity.[520] Ameren proposes a mechanism where MMUs could give parties who have submitted false or inaccurate data the opportunity to correct any inaccuracies before the report is made final and submitted to the Commission.[521]

412. Two commenters oppose masking bidders' identities. Ohio PUC and OMS believe there is little protection offered by such masking, arguing that the more sophisticated market participants will infer those identities and thus gain some further advantage over less sophisticated market participants. These commenters further assert that allowing third-party analysts to access data would increase the number of parties examining the bid and offer data to determine if collusive behavior exists.[522] APPA states that market bid and offer data should not be kept confidential, and the term ''commercially sensitive'' should not be used as a blanket exception.[523]

iii. Commission Determination

413. We adopt the proposal made in the NOPR, with certain modifications. The Commission's goal of broadening information sharing by the MMUs met with widespread approval, with a number of commenters expressing the opinion that the Commission had struck the right balance between the need for information on the one hand while recognizing the MMUs' inability to provide unrestricted and unlimited amounts and types of information on the other.

414. The information to be disseminated should consist of market trends and the performance of the wholesale market, with details to be developed on a case-by-case basis. In response to our request for comments on whether there were a generic standard or test that could be used to determine what specific information should be provided to state commissions, Joint Commenters propose a two-part test, which we find generally helpful. However, the test does not include some of the confidentiality protections we have determined to be necessary, and we decline to adopt it. We also hesitate to require RTOs and ISOs to include in their tariffs specific details of the types of information that an MMU might find useful to provide, or that stakeholders might request. The nature of the information that may be helpful may vary from region to region, and may well evolve over time. Therefore, while an RTO or ISO is free to propose in its tariff details of the information it desires its MMU to provide, we will not require any particular menu. We are confident that MMUs will be responsive to reasonable requests from interested parties, subject to time and resource commitments.

415. Moreover, the degree of inclusion of underlying data and assumptions is an area also best dealt with on a case-by-case basis. It is not to be expected that MMUs would include all the raw data in their possession. However, we would expect that they would provide, or make available on request, sufficient data to enable users of their reports to reasonably test the validity of their conclusions.

416. We also clarify that our proposed rule is not intended to limit existing arrangements between MMUs and state commissions regarding the provision of information, subject to appropriate restrictions related to confidentiality concerns. Such arrangements are an example of the sort of case-by-case determination we envision developing in the area of information dissemination.

417. We disagree with NARUC's suggestion that explicit standards be put in place guaranteeing that states have the same access to data as does the Commission. While we favor the enhanced dissemination of information to the states, there are some matters that are uniquely within the purview of the Commission, such as referrals by MMUs of suspected tariff violations or manipulation. We therefore decline to adopt such explicit standards.

418. We agree with EPSA that quarterly reports should not be as extensive as the annual state of the market reports. It was not our intention that MMUs should be required to spend all their time on report preparation, which could easily be the case if quarterly reports were too extensive. Rather, we envision such quarterly reports as serving the function of timely updates to the annual state of the market report, emphasizing issues of concern. The details of what should be included in these reports can be worked out by the MMUs with input from interested stakeholders. We also agree with APPA that quality rather than quantity is crucial, and urge MMUs to ensure that the data they include in both their quarterly and their annual reports meets the anticipated needs of the extended community that will make use of them.

419. Several commenters object to the Commission's suggestion that market participants be excluded from conference calls regarding market updates. They note that stakeholder conference calls are commonplace, and see no reason why a similar practice should not be adopted with respect to MMU briefings. Upon reflection, we agree that the current state of the technology permits such calls with little difficulty. Therefore, we determine that market participants should not be excluded from such calls, absent pressing technical concerns in any given situation.

420. Our proposal to reduce the lag time for release of offer and bid data to three months was supported by most commenters. Some commenters requested a shorter lag time or immediate release. Others proposed the release of additional information, such as system lambda.

421. Our proposal cuts the current lag time for most RTOs and ISOs in half. Because this is a substantial change, RTOs and ISOs should become accustomed to the new release time and observe its effects before committing to an even shorter time. However, as we proposed in the NOPR, we permit the RTOs and ISOs to propose a shorter time, with accompanying justification, or a longer time of four months if they can demonstrate a collusion concern. Alternatively, they may propose an alternative mechanism if release of a report were otherwise to occur in the same season as reflected in the data. These options provide the flexibility requested by commenters.

422. We assume the data to be released would consist not only of physical offers and bids but demand and virtual offer and bids as well. However, if RTOs and ISOs object to such inclusion, they may address it in their compliance filings. Likewise, if they desire to release additional data such as system lambda, they may propose it in their filings.

423. We adopt the NOPR proposal to retain the masking of identities. The objection that sophisticated market participants may be able to infer identities of those submitting offers and

[517] Ameren at 36.

[518] Dominion Resources at 8; EEI at 26.

[519] California PUC at 44.

[520] SPP at 9.

[521] Ameren at 36–37.

[522] Ohio PUC at 28; OMS at 9–10.

[523] APPA at 93.

bids does not resolve confidentiality concerns; if anything, it argues for more protection, rather than less. We decline to establish a time period for the eventual unmasking of identities, but invite RTOs and ISOs to propose a period when such unmasking might be permitted, if they believe it to be desirable.

424. We therefore adopt the proposals advanced in the NOPR, modified as indicated. Each RTO and ISO is to include in its tariff a requirement that the MMU is to prepare an annual state of the market report on market trends and the performance of the wholesale market, as well as less extensive quarterly reports, all of which are to be disseminated to Commission staff, to staff of interested state commissions, to the management and board of directors of the RTOs or ISOs, and to market participants, with the understanding that dissemination may be accomplished by posting on the RTO's or ISO's Web site. MMUs are also to make one or more of their staff members available for regular conference calls, which may be attended, telephonically or in person, by Commission and state commission staff, by representatives of the RTO or ISO, and by market participants. The information to be provided in the MMU reports and in the conference calls may be developed on a case-by-case basis, but is generally to consist of market data and analyses of the type regularly gathered and prepared by the MMU in the course of its business, subject to appropriate confidentiality restrictions. We also determine that the lag time for the release of offer and bid data be reduced to three months; however, an RTO or ISO may propose a shorter period with accompanying justification. Furthermore, if the RTO or ISO demonstrates a potential collusion concern, it may propose a four-month lag period or, alternatively, some other mechanism to delay release of the data if it were otherwise to occur in the same season as reflected in the data. The identity of market participants is to remain masked, although the RTO or ISO may propose a time period for eventual unmasking. The RTO or ISO is to include in its compliance filing a justification of its policy regarding the aggregation or lack thereof of offer data and of cost data, discussing the manner in which it believes its policy avoids participant harm and the possibility of collusion, while fostering market transparency.

b. Tailored Requests for Information

i. Commission Proposal

425. In the NOPR, the Commission carried forward the ANOPR proposal allowing state commissions to make tailored requests for information from MMUs regarding general market trends and performance, not to include information designed to aid state enforcement actions against individual companies. The Commission also proposed that a state commission could, on a case-by-case basis, request the Commission to authorize the release of otherwise proscribed data, if the state commission demonstrated a compelling need for the information and could insure adequate protections for commercially sensitive material. The Commission proposed that before an MMU be allowed to release information pertaining to a particular market participant, that the participant be given the opportunity to object and to correct any inaccurate information proposed to be released, and that the availability of this protection be included in the RTO or ISO tariff. The Commission also proposed that RTOs and ISOs develop, and include in theirtariffs, confidentiality provisions that would protect commercially sensitive material, but which would not be so restrictive as to permit the release of little if any information.

ii. Comments

426. Several commenters generally support the Commission's proposal regarding tailored requests for information.[524] APPA comments that the Commission should not bar MMUs from providing such assistance to the states if MMUs believe they can do so without harming their own mission.[525] ISO New England states it has an information policy that already allows it to release confidential market information to state commissions under certain circumstances and subject to non-disclosure protections.[526] Duke Energy is concerned with giving the MMUs too much discretion and potentially imposing an unreasonable burden on them, but states that the guiding parameters set out by the Commission make the proposal more acceptable.[527] FirstEnergy states the MMU should share analyses and information with state commissions only when directly necessary to support state regulatory obligations, and agrees that tailored requests from state commissions should not detract from the MMU's core duties and must be made in light of budget and time limitations.[528]

427. The California PUC agrees that requests by state commissions should not overly burden the MMUs but comments that this need not be the case, noting that in California, CAISO and the California PUC have been able to work out the wording, scope and timing of the California PUC information requests in a reasonable and cooperative manner, including the protection of sensitive commercial information with a nondisclosure agreement. The California PUC and PG&E also comment that the MMU's core function of reviewing and reporting on the performance of wholesale markets should be understood to include reporting to state commissions, and assert that data used in making MMU assessments of market efficiency or competitiveness, reports to CAISO management or boards, or reports to the Commission should be available to state commissions as well.[529]

428. EEI and Reliant support allowing the MMUs to be receptive to requests for information, as long as the information pertains to market trends and is developed in the ordinary course of business. EEI and Reliant comment that it is not reasonable for the MMUs to provide new studies or analysis beyond their annual and quarterly reports, and assert that state commissions may not treat MMUs as private consultants to perform studies. These commenters also assert that states have their own enforcement programs and should not rely on the MMU. Reliant suggests that, if a state commission requesting MMU information cannot agree with the RTO's or ISO's confidentiality provisions, the Commission should clarify that the MMU should not be required to disclose information to the state commission.[530]

429. The Kansas CC agrees with the Commission's proposal not to require MMUs to provide information to aid in state enforcement efforts or actions against individual utilities. However, it suggests that sensitive market information could be provided to state commissions in a manner that would uphold the confidential nature of the information and protect the market. The Kansas CC requests that the Commission consider alternative solutions that will preserve confidentiality, while providing state commissions with

[524] *See, e.g.*, PJM Power Providers; SoCalEdison-SDG&E.

[525] APPA at 92–93.

[526] ISO New England at 26.

[527] Duke Energy at 11.

[528] FirstEnergy at 16.

[529] *See, e.g.*, California PUC; PG&E.

[530] *See, e.g.*, EEI; Reliant.

information necessary to fulfill their statutory and regulatory charges.[531]

430. The Ohio PUC, noting the interconnectedness of retail rates to wholesale markets, proposes a test to determine the type of information that should be disseminated to state commissions. In its view, if a state commission asks for it, and the MMU has it or can get it without undue burden, it should be provided subject to confidentiality provisions.[532]

431. Several commenters do not support various aspects of the Commission's proposal on tailored requests from state commissions. The California PUC contends that the restrictions would cripple state market monitoring, and asks the Commission how it would distinguish between information designed to aid state enforcement actions from information designed to allow states to monitor the market.[533]

432. NARUC states that imposing the proposed limitations on state access to information is inefficient and unnecessary, observing that states operate in the public interest. NARUC argues that requiring unnecessary proceedings over specific requests, at taxpayer or ratepayer expense, is not good policy, and asserts that state commissions have demonstrated their ability to maintain the integrity of commercially sensitive materials.[534]

433. The New York PSC states that limiting its ability to obtain such information is unnecessary and unsupported by the record in this proceeding, contending that the Commission has not demonstrated that providing information to state commissions for state enforcement purposes violates any provision of law or policy, and noting that the purpose of the information may not be apparent in any event. It suggests that in the event the MMU is concerned about budgetary and time limitations, it could simply provide the state commission with the raw data and allow the state commission to employ its resources to derive the information or analysis sought. It proposes that if a state commission is able to maintain the information on a confidential basis, the MMU should be allowed to determine whether to provide the requested information.[535]

434. OMS disagrees with the Commission that its proposed restrictions on information access by state commissions are reasonable. It asserts that the NOPR proposal limiting state commission requests to the MMU to ''general market trends and performance'' represents a significant reduction in the information its members already receive in accordance with the Midwest ISO's tariff. OMS states that the Commission should respect the arrangement currently in place for the Midwest ISO, and permit that arrangement to be expanded, as necessary, to meet the need of OMS and its state commission members. OMS also asserts that state commissions should not be put in a position of merely having to trust the findings of the MMU, but rather, should be provided with the data and information necessary to evaluate and verify the MMU's findings. It also states that the Commission's proposal to prohibit state commissions from seeking information from the MMU that would aid state enforcement is unreasonable, as many state commissions do not have access to the data and information necessary to initiate investigative actions that might eventually lead to enforcement actions.[536]

435. Other commenters provided suggestions and points of clarification. The FTC encourages the Commission to devise ways that would allow MMUs to provide services to state and federal agencies even when the MMU does not have the extra resources. For example, it suggests that the Commission could authorize fees to be paid by state and federal agencies for services that primarily assemble and organize existing MMU data, which is similar to how other agencies deal with FOIA requests.[537] The California PUC comments it is unclear if ''information regarding general market trends and performance'' would be limited to aggregated data or if the state commissions would also have access to raw data. It also states that this proposal would restrict existing access to data, and would require states to obtain Commission authorization and make a showing of a ''compelling need'' for that information.[538] CAISO states that the Commission should clarify whether its proposal applies only to requests or also to subpoenas and court orders.[539] TAPS opposes giving state commission staffs preferential treatment in the ability to make requests for information from the MMU.[540]

436. Several of the commenters support the provision regarding the development of confidentiality provisions, with limitations. The California PUC asserts that the language is too vague, and suggests it be revised to read ''The RTO should develop confidentiality provisions in their tariffs that will protect commercially sensitive material, but will be no more restrictive than necessary to protect that information.'' The California PUC also notes that the California PUC and CAISO have an established practice for sharing market information that preserves confidentiality of data, and argues that the proposed limitations are unnecessary and would disrupt already existing state access to market data.[541]

437. The Maine PUC stresses the need for a greater level of information sharing by ISO New England with state commissions. It proposes that where there are protections in place to ensure that confidential information remains confidential when disclosed to a state commission, the Commission should direct ISO New England to share confidential information with the state commissions in the same or similar manner to its information sharing with the Commission.[542]

438. The Ohio PUC and PJM request clear rules and definitions relating to confidential information. The Ohio PUC states that the Commission should require RTOs or ISOs to revisit the definitions of ''Confidential Information'' in their tariffs, asserting that in the cases of PJM and the Midwest ISO, confidential information is whatever a market participant declares it to be. PJM is concerned about the treatment of confidential information, such as cost data, particularly in the area of aggregated data that may be ''reverse engineered.'' PJM states that the release of these data, in conjunction with other industry information not necessarily known or even available to PJM, could inflict commercial harm on a market participant and adversely impact the competitiveness of the market. PJM requests clear, bright-line rules regarding the treatment of confidential information, noting it must deal with large volumes of such information that frequently are the subject of requests from numerous public and private entities.[543]

439. Reliant and SPP are concerned about the treatment of confidential materials once in the hands of the state commissions. Reliant is of the view that

[531] Kansas CC at 2.

[532] Ohio PUC at 27, 29.

[533] California PUC at 48–49.

[534] NARUC at 15.

[535] New York PSC at 10–12.

[536] OMS at 13–14.

[537] FTC at 31.

[538] California PUC at 47–48.

[539] CAISO at 16–17.

[540] TAPS at 57.

[541] California PUC at 46, 49.

[542] Maine PUC at 8–9.

[543] *See, e.g.* , Ohio PUC; PJM.

state commissions should be required to identify the person who will have access to the information, the person who will be the official custodian for the information, and the purpose for the request. It states that a state official should be required to sign a non-disclosure agreement as a pre-condition of receiving data and, in situations where the state cannot guarantee data confidentiality, such as in the case where a state's public records regulations might require disclosure, such data should not be shared. SPP is concerned that unless the state commission can provide proof that information can and will be kept confidential, that SPP should not be required to provide that information to the state commission, and asks that the Commission address the issue of relieving the RTO or ISO from any liability.[544]

440. PJM Power Providers states that given the serious potential consequences associated with an improper release of sensitive market data, the Commission should go to great lengths to ensure the confidentiality of this information.[545]

441. Commenters generally agree with the proposal to permit market participants the opportunity to contest any data specific to them that the MMU proposes to release. Duke Energy supports allowing market participants an opportunity to contest information, but comments that market participants should also have an opportunity to respond to data and not just contest them, as they may want to provide context to data even if they do not wish to dispute them.[546] FirstEnergy agrees that affected utilities should be given notice and have the opportunity to comment.[547]

442. Several commenters support the Commission's proposal to allow state commissions to request release of data from the Commission, with limitations or additions. EEI supports the Commission releasing data if the state demonstrates a compelling need and cannot obtain the data from any other source, and if the Commission can adequately protect commercially sensitive data.[548] APPA believes that state entities (including commissions, state attorney generals, legislators, governors, and relevant electric retail regulatory authorities for public power systems) and third parties should be allowed to request information on a case-by-case basis directly from an MMU; if the MMU believes it can provide the needed information it should not have to go through the Commission, and only in the event the requestor is refused the information by the MMU, would it be necessary to petition the Commission.[549] Duke Energy comments that affected market participants should have recourse to appeal an MMU decision to the Commission, just as a requester can petition the Commission.[550]

443. Other commenters strongly oppose the Commission's proposal regarding submitting a request for the release of otherwise proscribed information. NARUC believes the proposal is likely to hamper proper state oversight, and argues that the Commission should not impose a gatekeeper function to evaluate state commission information needs or the legitimacy of their requests. NARUC argues this can only waste both state and federal resources and ratepayer funds on unnecessary proceedings.[551]

444. The Ohio PUC questions how enforcement can occur without access to market information, which it argues the Commission currently controls. It asserts that the Commission must reevaluate its position on this matter to ensure that state commissions have timely access to market information and possess all the necessary tools to make certain that customers' interests are protected against market abuses and manipulation. It also suggests that it could take entity-specific information subject to a confidentiality agreement, and then use that information to pursue its own discovery under state law, in order to pursue an enforcement action.[552] OMS states that state commissions should not be required to petition the Commission for access to data and information that it feels should be theirs in the first place. OMS strongly urges the Commission to reconsider its position in this regard.[553]

445. OPSI does not agree with the Commission's proposal and recommends that any rules adopted in this proceeding reflect the data availability practices established in the PJM/MMU Settlement Agreement.

iii. Commission Determination

446. The enhanced information sharing provisions we adopt in this Final Rule significantly expand the materials that state commissions may receive. However, we are cognizant that state commissions might from time to time desire additional information pertinent to their particular needs. Therefore, we adopt the NOPR proposal that state commissions may make tailored requests for information from the MMUs, so long as the request is limited to information regarding general market trends and the performance of the wholesale market. This limitation is needed in light of the limited resources of the MMUs, whose first order of business is evaluating market design, monitoring the markets, and referring suspected wrongdoing to the Commission. If this limitation were not imposed, the MMU could rapidly become an unpaid consultant for the states, and would be unable to perform its core functions.

447. We are cognizant of the observations by EEI and Reliant that state commission requests for information, which would necessarily be in addition to the information already produced in the MMUs' annual and quarterly reports, may place an unreasonable burden on the MMUs. We therefore direct that the MMUs, in the first instance, determine whether a request would be unduly burdensome. If so, it need not perform the requested study.

448. Many comments centered on the need for the confidentiality of the materials provided by the MMU, and the means by which confidentiality concerns could be addressed. Inasmuch as the material to be provided in response to tailored requests for information will consist of market trends and the performance of the wholesale market, such confidentiality concerns may not prove to be as great a stumbling block as some suggest. Where information to be provided raises confidentiality concerns, the information may nonetheless be provided, if appropriate non-disclosure agreements are executed. We direct the RTOs and ISOs to develop confidentiality provisions for their tariffs, and adopt the California PUC suggestion that such provisions be designed so as to protect commercially sensitive material, but be no more restrictive than necessary to protect that information. It will be up to each RTO or ISO, together with its stakeholders, to propose the confidentiality provisions they deem most appropriate, and to propose them to the Commission in a tariff filing.

449. We note that our directive regarding the ability of state commissions to make tailored requests for information is designed to increase the dissemination of information, not

[544] *See, e.g.*, Reliant; SPP.

[545] PJM Power Providers at 18.

[546] Duke at 11–12.

[547] FirstEnergy at 16.

[548] EEI at 28.

[549] APPA at 94.

[550] Duke at 12.

[551] NARUC at 15–16.

[552] Ohio PUC at 35.

[553] OMS at 14–15.

restrict it. As we have indicated elsewhere, the type of information to be provided by the MMU may vary from region to region, and is governed principally by the workload such requests impose on the MMU. Therefore, unless the information violates confidentiality restrictions regarding commercially sensitive material, is designed to aid state enforcement actions, or impinges on the confidentiality rules of the Commission with regard to referrals, it may be produced, so long as it does not interfere with the MMU's ability to carry out its core functions.

450. We decline to require MMUs to turn over raw data if they do not have the time to comply with a tailored request for information. If the MMU determines that raw data may be provided, appropriately redacted to meet confidentiality concerns, it may do so. However, it is quite possible that gathering, organizing, reviewing, and explaining such data might prove nearly as time consuming as responding in a narrative fashion to a request for information. The MMU is not a consultant for the states, and should not be placed in the position of having to respond to every request for information submitted to it.

451. We also decline to eliminate our restriction on the state commissions' ability to request information designed to aid state enforcement actions. Of course, if a state receives information regarding general market performance, and chooses to pursue a more focused study with its own resources, there is no prohibition to its doing so. The key considerations here are the burden placed on the MMU, the nature of the material to be provided, and the need for confidentiality. The MMU will be in the best position to determine if the material requested would be unduly burdensome to produce. And the RTO or ISO confidentiality provisions, as well as those of the Commission, will govern whether the state commission can receive information of a confidential nature.

452. A state commission need not turn an MMU into an arm of its investigatory processes in order to carry out its duties. If a state has information suggesting the need for an investigation, it can use the full panoply of its powers and resources to pursue the matter on its own. We know from long experience that investigations are very time and resource-intensive, and were states to enlist the MMU's assistance in this regard, it would leave the MMU with little ability to carry out its core functions.

453. We note, however, that from time to time Commission staff investigates matters of mutual interest to state commissions. It has been staff's practice to work cooperatively with the states in such cases, bearing in mind the confidentiality of materials obtained by Commission staff in the course of an investigation. We direct staff to continue its practice in this regard.

454. Whether requested information is designed to aid an enforcement action can generally be answered by the particularized nature of the request and the extent of the questions. As we have stated, the information to be provided in response to a tailored request for information should consist of market trends and the performance of the wholesale market. At least one comment reinforces the need for caution in this regard. The comment suggested that a state body could take entity-specific information subject to a confidentiality agreement and then use that information to pursue its own discovery. This end run around the confidentiality provisions might raise liability concerns on the part of both the MMU and the RTO or ISO, and possibly the Commission itself, and underscores the need to be sensitive to requests designed to support enforcement actions.

455. We adopt the NOPR proposal that market participants be given the opportunity to contest any data specific to them. We also adopt the proposed expansion of this provision to include the right to provide context to the data, so long as the process does not unduly delay release of the information.

456. CAISO asks that we clarify whether our proposal applies only to requests or also to subpoenas and court orders. We clarify that our proposal applies to requests. Whether subpoenas or court orders are to be honored or contested lies outside the scope of this Final Rule and is a matter to be addressed by the MMU and by the RTO or ISO, in consultation with their attorneys.

457. We decline to adopt the FTC's suggestion that state and federal agencies be given the ability to obtain data from the MMU through the payment of fees. Such a fee arrangement could raise conflict of interest concerns. More significantly, however, it would reduce the MMU to the position of a consultant for hire, a role which would necessarily distract it from its core functions.

458. We also adopt our NOPR proposal permitting state commissions to petition the Commission for the release of otherwise proscribed information. This provision is intended as a safety net to increase the ability of states to receive information, not as a further restriction. State commissions are free to direct their requests to the MMUs in the first instance, but such requests should comply with the restrictions we note above. If they do not, waiver of such restrictions is up to the Commission, not to the MMUs.

459. Therefore, we carry forward our proposal from the NOPR, modified as noted herein. MMUs are to entertain from state commissions tailored requests for information regarding general market trends and the performance of the wholesale market, but not for information designed to aid state enforcement actions. Granting or refusing such requests will be at the MMU's discretion, based on agreements worked out between the RTO or ISO and the states, or otherwise based on time and resource availability. Release of any confidential information is to be subject to the confidentiality provisions in the RTO's or ISO's tariff, and to the Commission's confidentiality restrictions. RTOs and ISOs are to develop confidentiality provisions that will protect commercially sensitive material, but which will be no more restrictive than necessary to protect that information. State commissions are also free to petition the Commission for the release of information that does not fall within the parameters noted. And market participants are free to contest the factual content of information to be released, or to provide context for it, so long as such material does not unduly delay release of the information.

c. Commission Referrals

i. Commission Proposal

460. In the NOPR, the Commission noted that its rules require that information regarding its investigations be kept nonpublic unless, in any given case, the Commission authorizes that it be publicly disclosed. We proposed that the existing provisions regarding the confidentiality of MMU referrals to the Commission, as well as the confidentiality of the progress and results of its own investigations, be retained. The Commission also noted that it intended to continue the practice of Commission staff providing the MMUs with generic feedback regarding enforcement issues.

ii. Comments

461. Several commenters support the Commission's proposal.[554] APPA also suggests that the Commission has the obligation to act as quickly as possible, so other government entities with a

[554] *See, e.g.*, APPA, EEI, Midwest ISO, Reliant, and SPP.

legitimate interest in the matter are kept informed.[555] ISO New England comments that the proposed referral provisions are generally consistent with, but more detailed than, ISO New England's existing rules concerning the obligation of its MMU to identify and report on market design flaws and to refer potential market manipulation to the Commission.[556]

462. Many commenters urge the Commission to reconsider its position that state commissions not be informed when an MMU refers a matter to the Commission.[557] Some commenters assert that several states maintain sufficient safeguards against public disclosure of information, and any assumptions regarding the potential mishandling of confidential information are misdirected and should be discounted.[558] The California PUC and NRECA comment that the Commission should provide information to the MMUs and state commissions about matters an MMU has referred to the Commission, because it would help increase confidence that the Commission investigates attempts to manipulate the market.[559] The Ohio PUC maintains that there must be a free exchange of market data among the RTO or ISO, the MMU, and state commissions to ensure markets are flourishing and to avoid manipulation.[560]

463. NARUC comments that the Commission should inform affected state commissions of MMU referrals because the commissions need information about specific market participants both to properly exercise their own regulatory authority and to avoid potentially inconsistent outcomes and duplicative efforts.[561] The New York PSC comments that it is vital that state commissions be able to demonstrate that the presence of a competitive market does not disable the state from protecting retail ratepayers, and that the state commission is capable of carrying out its statutory obligation in a competitive market.[562]

464. NRECA believes that an appropriate balance can be struck with respect to information and emphasized that it is not seeking the release of the names of individual entities or any competitively sensitive information but is merely requesting statistical information on, for example, numbers of entities referred, types of infractions, and the resolution of referrals.[563] OMS comments that state commissions could be effective allies with the Commission in the investigation and evaluation of the market participant behavior that led the MMU to make the referral, and the Commission's concern that informing state commissions of MMU referrals might discourage market participants from self-reporting objectionable behavior is not applicable to MMU referrals, as these referrals happen only because a market participant has failed to self-report.[564]

iii. Commission Determination

465. We adopt the NOPR proposal retaining the confidentiality of MMU referrals to the Commission, as well as the confidentiality of any investigations that result from such referrals. By Commission rule, all information and documents obtained during the course of an investigation are non-public. They may not be released except to the extent the Commission directs or authorizes in a given instance, unless the material is already made public during an adjudicatory proceeding or disclosure is required by the Freedom of Information Act.[565] There are sound policy reasons for this rule. As we noted in the NOPR, release of such confidential information would impede the willingness of market participants to cooperate in the investigation and to self-report in the future. It could also injure innocent persons who might be erroneously implicated or adversely affected by simply being associated with an investigation.

466. The Commission can only answer for its own abilities to keep material confidential, and cannot put itself in the position of having to interpret the extent of protections afforded by all the relevant state rules, statutes, and case law that govern disclosure. Nor can it expose itself to the potential liability it might incur by turning over confidential materials, should such materials be misused by agencies or individual state employees over whom the Commission has no control.

467. We also are not persuaded that release of information about MMU referrals would avoid potentially inconsistent outcomes and duplicative efforts. For that to be true, one would have to assume that the scope of jurisdiction and the governing laws of the states in question are identical to those of the Commission, which is clearly not the case.

468. We are sympathetic to NRECA's request for statistical information, and agree that, to the extent we can make our enforcement actions more transparent, it is desirable to do so. To that end, we recently announced that the staff of the Office of Enforcement will prepare and publicly release annual reports summarizing its enforcement activities for the preceding year, to be released at the close of our fiscal year, September 30.[566] The first such report was released on November 14, 2007.[567] In addition, it is the practice of Commission staff to provide the MMU with generic feedback regarding enforcement issues, and we will ensure that staff continues to do so.

469. We therefore decline to alter our rule and policy regarding the confidential nature of MMU referrals to the Commission.

4. Pro Forma Tariff

a. Commission Proposal

470. In the NOPR, the Commission declined to propose a *pro forma* tariff for the MMU sections of an RTO or ISO OATT, instead proposing that RTOs and ISOs conform their tariffs to the requirements set forth in this Final Rule. The Commission also proposed that each RTO or ISO include protocols for the referral of tariff, rule, and market manipulation violations to the Office of Enforcement, and for the referral of perceived market design flaws and recommended tariff changes to the Office of Energy Market Regulation.

b. Comments

471. A limited number of entities filed comments on the Commission's proposal. The Midwest ISO agrees that requiring each RTO or ISO to conform its tariff to the requirements of the Final Rule is preferable to a *pro forma* tariff.[568] EEI agrees that the Commission has appropriately permitted RTOs and ISOs flexibility to tailor their market monitoring provisions to their own regional variations.[569] APPA suggests that the Commission use, as a possible template for the relevant tariff provisions, the revised Attachment M to the PJM tariff approved in the PJM MMU Settlement Order.[570] SPP believes that it already complies with the majority of the proposals the

[555] APPA at 94.

[556] ISO New England at 27.

[557] *See, e.g.*, California PUC, NARUC, New York PSC, NRECA, Ohio PUC, and OMS.

[558] *See, e.g.*, New York PSC, Ohio PUC, and OMS.

[559] California PUC at 52–53.

[560] Ohio PUC at 32.

[561] NARUC at 16.

[562] New York PSC at 13–15.

[563] NRECA at 56.

[564] OMS at 11.

[565] 18 CFR 1b.9.

[566] *Revised Policy Statement on Enforcement,* 123 FERC ¶ 61,156, at P 12 (2008).

[567] Report on Enforcement, Docket No. AD07–13–000 (2007).

[568] Midwest ISO at 27.

[569] EEI at 24.

[570] *PJM MMU Settlement Order,* 122 FERC ¶ 61,257.

Commission has set forth in this proceeding, but will comply with any revisions that may be required by the Final Rule.[571]

472. The California PUC, on the other hand, states that it does not support a *pro forma* tariff because of its objections to several of the MMU proposals in the NOPR, particularly the issues surrounding state access to data.[572]

c. Commission Determination

473. Given the degree of discretion this Final Rule allows RTOs and ISOs to structure their relationship with their MMUs in the manner they deem most suitable, a *pro forma* MMU tariff section would be impractical. Therefore, we will not impose one.

474. We also decline to adopt PJM's MMU tariff section, Attachment M, as a template for a centralized MMU tariff section. That document is particularized to the needs of that RTO, and we therefore will not require other RTOs and ISOs to follow it. We agree, however, that some uniformity is desirable, particularly for market participants who operate in multiple regions, and for regulators who often have occasion to compare and contrast tariff provisions amongst the various RTOs and ISOs.

475. We therefore suggest, but do not require, that RTOs and ISOs consider structuring their MMU tariff sections to include the following general categories, preferably in this general order: Introduction and Purpose; Definitions; Independence and Oversight; Structure; Duties of Market Monitor; Duties of RTO or ISO; Data Access, Collection, and Retention; Information Sharing; Ethics; RTO- or ISO-Specific Provisions; Protocol on Referrals of Investigations to the Office of Enforcement; Protocol on Referrals of Perceived Market Design Flaws and Recommended Tariff Changes to the Office of Energy Market Regulation.

476. We note that in our Policy Statement on Market Monitoring Units,[573] we prescribed the form and contents of an MMU referral to the Office of Enforcement. We likewise include in this Final Rule updated protocols for such referrals, as well as protocols for referrals to the Office of Energy Market Regulation of perceived market design flaws and recommended tariff changes.

[571] SPP at 10.

[572] California PUC at 53.

[573] Policy Statement, 111 FERC ¶ 61,267 at Appendix A.

D. Responsiveness of RTOs and ISOs to Customers and Other Stakeholders

477. In this section of the Final Rule, the Commission requires RTOs and ISOs to establish a means for customers and other stakeholders to have a form of direct access to the board of directors, and thereby to increase the boards of directors' responsiveness to these entities. (By responsiveness, we mean an RTO or ISO board's willingness, as evidenced in its practices and procedures, to directly receive concerns and recommendations from customers and other stakeholders, and to fully consider and take actions in response to the issues that are raised.) The Commission requires each RTO or ISO to submit a compliance filing demonstrating that it has in place, or will adopt, practices and procedures to ensure that its board of directors is responsive to customers and other stakeholders. The Commission will assess each RTO's or ISO's filing using four criteria: (1) Inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.

478. The Commission also directs each RTO and ISO to post on its Web site its mission statement or organizational charter. The Commission encourages each RTO and ISO to set forth in these documents the organization's purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services.

1. Background

479. Neither Order No. 888[574] nor Order No. 2000[575] mandated specific RTO board governance requirements. In Order No. 2000, the Commission stated that, given the early stage of RTO formation, it would be counterproductive to impose a one-size-fits-all approach to governance when RTOs may have varying structures based on their regional needs.[576] Therefore, the Commission indicated that it would review governance proposals on a case-by-case basis.[577] The Commission also emphasized the importance of stakeholder input regarding both the creation of RTOs and ongoing operations.[578] The Commission added that, in the case of a non-stakeholder board, it is important that the board not become isolated.[579]

480. In the ANOPR, the Commission noted stakeholders' concerns that RTOs and ISOs are not sufficiently responsive to customers and other stakeholders, and that those parties should have some form of effective direct access to the RTO or ISO board of directors.[580] The Commission inquired whether RTOs and ISOs should be required to create and institute practices and procedures to ensure that customers and other stakeholders have such access.[581] The Commission also made a preliminary proposal that the goal of enhancing customer and other stakeholder access to the board could be achieved by either a board advisory committee or a hybrid board.[582]

2. Commission Proposal

Responsiveness Obligation and Proposed Criteria

481. In the NOPR, the Commission proposed to require that customers and other stakeholders have some form of effective direct access to the RTO or ISO board of directors. The Commission indicated that while it viewed the board advisory committee as particularly suitable for enhancing responsiveness, it anticipated that each RTO or ISO and its stakeholders would develop practices and procedures that best suit their needs.[583] The Commission reiterated its position that a one-size-fits-all approach may not be beneficial given the varying structure and needs of each regional entity. It therefore proposed to establish a set of four criteria for RTOs and ISOs designed to ensure that RTO and ISO

[574] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (DC Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

[575] *Regional Transmission Organizations,* Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g,* Order No. 2000–A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington* v. *FERC,* 272 F.3d 607 (DC Cir. 2001).

[576] The Commission noted that existing ISOs have varying forms of governance. Some used a two-tier form of governance with a non-stakeholder board and advisory committees of stakeholders while one, CAISO, employed a decision making board consisting of both stakeholders and non-stakeholders. Order No. 2000–A, FERC Stats. & Regs. at 31,073.

[577] *Id.* at 31,073–74.

[578] *Id.*

[579] *Id.*

[580] ANOPR, FERC Stats. & Regs. ¶ 32,617 at P 148.

[581] *Id.* P 149.

[582] *Id.* P 151, 153. The Commission explained that a hybrid board would be composed of both independent members and stakeholder members, with each member holding a seat on the board and participating fully in board decisions with an equal vote. *Id.* P 152.

[583] *Id.* P 277.

boards are responsive to their customers and other stakeholders.[584]

482. In order to demonstrate that RTOs and ISOs meet the responsiveness obligation, the Commission proposed to require each one to submit a compliance filing showing that it has in place or will adopt practices and procedures to ensure responsiveness. The Commission proposed to assess the filed practices and procedures of each RTO and ISO using four criteria:

• Inclusiveness—The business practices and procedures must ensure that any customer or other stakeholder affected by the operation of the RTO or ISO, or its representative, is permitted to communicate its views to the RTO's or ISO's board of directors.

• Fairness in Balancing Diverse Interests—The business practices and procedures must ensure that the interests of customers or other stakeholders are equitably considered and that deliberation and consideration of RTO and ISO issues are not dominated by any single stakeholder category.

• Representation of Minority Positions—The business practices and procedures must ensure that, in instances where stakeholders are not in total agreement on a particular issue, minority positions are communicated to the RTO's or ISO's board of directors at the same time as majority positions.

• Ongoing Responsiveness—The business practices and procedures must provide for stakeholder input into the RTO's or ISO's decisions as well as mechanisms to provide feedback to stakeholders to ensure that information exchange and communication continue over time.

483. The Commission proposed that each RTO or ISO compliance filing would be required to be submitted within six months of the date the Final Rule is published in the **Federal Register**, and stated that it would assess whether each filing satisfies the proposed requirement and issue additional orders as necessary.[585]

3. Comments

484. Most of the commenters support the Commission's proposal and the four responsiveness criteria that the Commission proposed in the NOPR.[586] Many also express support for the Commission not proposing a one-size-fits-all solution, but instead allowing regions flexibility in meeting the criteria.[587] The comments fall loosely into three categories: (1) Whether to establish an obligation for responsiveness; (2) whether the four responsiveness criteria are appropriate or need greater specificity; and (3) whether additional criteria should be required.

485. Among the RTOs and ISOs, CAISO, Midwest ISO, NYISO, PJM and SPP argue that they already have responsiveness policies that they believe satisfy the Commission's proposed criteria. Some stakeholders concur that their RTO's or ISO's policies meet the proposed criteria.[588] APPA is skeptical that the proposals would have any effect, arguing that the RTOs and ISOs would likely say that their practices are already sufficiently responsive.[589]

486. Many commenters present examples of RTO or ISO practices that are not fully effective. For example, IID notes that during consideration of CAISO's proposal to subsidize the financing of certain interconnection facilities, CAISO did not adopt any of the specific tariff language IID recommended or sufficiently explain why it was rejecting so many of IID's suggestions.[590] TANC opines that time frames for stakeholder review of CAISO initiatives are too short and therefore appear to diminish the value of stakeholder input. As a result, TANC submits that the Commission should require RTOs and ISOs to employ methods of interacting with stakeholders that are intended to achieve consensus on issues and that incorporate stakeholders early in the decision-making process.[591]

487. Connecticut and Massachusetts Municipals encourage the Commission to not solely rely on an inclusive stakeholder process to ensure that organized wholesale electric markets and market administrators are providing, or facilitating the provision of, reliable electric service at the lowest reasonable cost. They do not agree that developing a stakeholder process that meets the four criteria will alleviate the need for the Commission to conduct its own investigation into the justness and reasonableness of proposed rates, charges, market rules, and design changes.[592]

488. Several commenters make recommendations about the four criteria proposed by the Commission. For instance, Ameren urges the Commission to make sure that the third criterion, representation of minority positions, is not allowed to outweigh the second criterion, fairness in balancing diverse interests. One way to do this, Ameren argues, would be to ensure that entities that will ultimately incur a major portion of the costs related to the changes to RTO or ISO market rules have a proportionate say in the development of these rules and any related modifications, through bicameral voting.[593]

489. TAPS asserts that the balancing criterion invites greater deference to well-represented classes to the detriment of other customers that the FPA requires the Commission to protect. CAISO requests that the Commission consider clarifying one of the four proposed criteria, fairness in balancing diverse interests, regarding how an RTO or ISO would be expected to establish generically that the consideration given to diverse interests is equitable.[594]

490. Constellation asks the Commission to clarify its definition of the term ''customer'' in its statement that ''access by customers and other stakeholders to the board based on these criteria will provide them with the opportunity to ensure that their concerns are considered.'' It states that the term customer could be applied to non-jurisdictional entities such as retail customers, and the Commission has already ensured that state agencies that regulate the retail market have access to RTO and ISO boards.[595]

491. Other commenters recommend more detail regarding the application of the proposed criteria. For example, APPA suggests new mandates for RTO and ISO stakeholder processes to help meet the proposed criteria: [596] Mandated direct stakeholder access to RTO and ISO boards at frequent intervals; presentation of minority positions on RTO and ISO proposals directly to the board by minority stakeholders; consideration of the use of both stakeholder advisory committees and hybrid boards; open RTO and ISO board meetings, with agendas made public in advance and opportunity for stakeholder comment on agenda items;

[584] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 275.

[585] *Id.* P 92.

[586] *See, e.g.,* Ameren; Comverge; Constellation; EEI; Exelon; Indianapolis P&L; Midwest ISO; New York PSC; NYISO; PJM; and PG&E.

[587] *See, e.g.,* Ameren; ATC; Constellation; Midwest ISO; NYISO; PJM; and SoCal Edison-SDG&E.

[588] *See* Ameren and ATC discussing Midwest ISO; California PUC discussing CAISO; New York PSC discussing NYISO; and NEPGA, NEPOOL and NU discussing ISO New England.

[589] APPA at 9, 97.

[590] IID at 5.

[591] TANC at 12.

[592] Connecticut and Massachusetts Municipals at 9–10.

[593] Ameren at 15–16, 37–40.

[594] CAISO at 10.

[595] Constellation at 19.

[596] APPA at 10, 102.

elimination of ''self-perpetuating'' RTO and ISO boards; directors elected by stakeholder vote, with multiple candidates for each seat and stakeholder input into the slate selection; and administration of customer satisfaction surveys by outside entities. ATC wants a formalized mechanism within an RTO's or ISO's main stakeholder committee for communicating minority views of stakeholder sectors to an RTO's or ISO's board of directors.

492. SMUD states that RTOs and ISOs should be required to demonstrate that: (1) There is evenly divided industry sector representation, (2) no one sector (or entity) can dominate the process, (3) votes are taken to measure stakeholder sentiment, (4) there is a formal process for the RTO or ISO to consider adoption of stakeholder initiatives and (5) before the RTO or ISO can reject a stakeholder position supported by a supermajority of stakeholders, it must articulate its reasons in writing, including in any filing it makes with the Commission.[597]

493. Others suggest new criteria for improving responsiveness, such as providing opportunities for customer and other stakeholder feedback on budgets and costs. The Maine PUC argues that ISO New England has insufficient cost incentives, and that the Commission should consider requiring RTOs and ISOs to place a stronger emphasis on cost-containment in administration and development of wholesale electric markets.[598] North Carolina Electric Membership and NRECA suggest an additional criterion: Reliable service at just and reasonable rates. According to NRECA, the Commission's goals in creating RTOs and ISOs require that these entities ensure accountability to stakeholders for keeping costs down while maintaining a high level of service quality. NRECA also states that the Commission should require RTOs and ISOs to present annual budget information to customers and stakeholders, along with adequate detail, transparent assumptions and calculations of estimates, and cost support. It further recommends that the Commission require RTOs or ISOs with formula rates to develop their budget presentations for stakeholders and customers using the format required for a filing with the Commission to change previously approved rates. NRECA states that the RTO's or ISO's budgeting process should ensure that customers and other stakeholders have a timely opportunity for review of the budget proposals offered and that each RTO or ISO should submit to the Commission, as an informational filing, all of the budget materials provided to stakeholders for review.[599]

494. Ameren suggests that RTOs and ISOs should be required to post longer-term budgets, such as five-year budgets, so that market participants can better monitor the costs and benefits of participating in RTO and ISO Day 2 markets.[600] NRECA states that the NOPR is silent with respect to the matter of transparency in RTO and ISO budgets. Old Dominion also requests that the Commission reinstate the proposals contained in the ANOPR that would have improved transparency in the budget process.[601]

495. Some commenters ask for a formal cost-benefit review of any significant action. Connecticut and Massachusetts Municipals request that the Commission require RTOs and ISOs to perform cost-benefit studies in support of proposed rates, charges, and related rules. FirstEnergy also recommends that significant new RTO or ISO proposals should require a formal cost-benefit analysis before being submitted to the stakeholder process. If these proposals are implemented, they argue, post-implementation cost-benefit analyses should be employed to see if actual benefits have materialized. RTO or ISO initiatives that fail to produce stakeholder benefits or achieve their stated objectives should be modified, or if necessary, rescinded.[602] LPPC also suggests that the Commission should require cost-benefit analyses to be filed in conjunction with any significant capital expenditures or tariff changes. These cost-benefit analyses would be submitted with the annual budgets for approval by the Commission in the case of capital expenditures, or with section 205 filings for tariff changes.[603]

496. Other commenters want improvements regarding notice of meetings and time to review new proposals. TANC asserts that the Commission should set minimal standards as to what constitutes sufficient notice for convening stakeholder meetings and conference calls, for the submission of stakeholder comments, and for subsequent consideration of those comments prior to the RTO or ISO taking action.[604] ATC calls for a minimum amount of time afforded to stakeholders to review and provide suggestions and feedback on final versions of RTO or ISO filings before they are submitted to the Commission. California Munis suggests that unless there is a physical threat to system reliability or an exigent market condition, no stakeholder meeting should be held without two weeks, and preferably four weeks, minimum notice. It also argues that major market design and policy meetings should not be held the same day, and preferably not on back-to-back days. It further suggests that policy white papers should be available no less than two weeks before the relevant stakeholder meeting.

497. Other commenters want feedback from the RTO or ISO on how their views were taken into account in the decision-making process. ATC calls for establishment of a formal ''feedback loop'' that would provide greater transparency in how stakeholder views are received, reviewed, and considered in an RTO's or ISO's decision-making process. TANC argues that the Commission should require RTOs and ISOs to explain how they considered comments during their decision-making processes.[605] TANC also asks the Commission to require the RTO or ISO to answer specific questions that would describe the stakeholder process employed for developing tariff revisions, and how customer and other stakeholder concerns were rectified.

498. Other commenters call for periodic reviews of the effectiveness of stakeholder processes. LPPC suggests having a periodic survey of customer satisfaction. ATC recommends that RTOs and ISOs be required to submit annual reports to the Commission detailing their adherence to the proposed responsiveness criteria. These reports would provide the Commission with an ongoing mechanism for assessing whether an RTO or ISO is following its approved practices for adhering to the Commission's responsiveness criteria, whether those practices maintain their effectiveness in meeting stakeholders' needs, and whether these practices should be changed.[606] California Munis believes that RTOs and ISOs should be required to make a regular showing to the Commission reviewing their stakeholder processes. NSTAR also encourages the Commission to require RTOs and ISOs to undergo a periodic, independent review of its stakeholder processes including sector membership qualifications, voting weights, and other measures. It contends that the Commission should oversee the review rather than leave it to the stakeholders. This review and recommendation

[597] SMUD at 9.

[598] Maine PUC at 8.

[599] NRECA at 59.

[600] Ameren at 15–16, 37–40.

[601] Old Dominion at 5.

[602] FirstEnergy at 17.

[603] LPPC at 19.

[604] TANC at 13.

[605] *Id.* at 20.

[606] ATC at 10.

should then be used to make constructive changes to the stakeholder processes to ensure that all parties are properly represented.[607]

499. Other commenters want RTOs and ISOs to adopt one another's best practices. For example, NRECA states that the Commission should add a criterion for RTOs and ISOs to follow best practices. NRECA describes the PJM liaison committee meeting process, which allows for direct board access by requiring board member attendance at such meetings, and criteria for vote reporting. NRECA further states that requiring board member participation in substantive committee meetings would provide opportunity for improved communications between stakeholders and the board.[608]

500. Other commenters have further suggestions for improving responsiveness to the needs of customers and other stakeholders. Joint Commenters urge the Commission to adopt three additional requirements for RTOs and ISOs to include in their compliance filings: (1) Improved dissemination of information, (2) well-designed independent operational audits of RTOs and ISOs with stakeholder input, and (3) clarification of the need to adhere to manuals and market rules except under clearly predefined circumstances.[609] LPPC suggests requiring the annual publication of a strategic plan.

4. Commission Determination

501. Based on the various aspects of the proposed responsiveness criteria that the comments address, we discuss three topics in order: Whether to establish an obligation for responsiveness and whether the four responsiveness criteria are appropriate; whether the criteria need greater specificity; and whether additional criteria should be required.

a. Responsiveness Obligation and Appropriateness of the Four Responsiveness Criteria

502. The Commission adopts its proposal from the NOPR and establishes by rule an obligation for each RTO and ISO to make reforms, as necessary, to increase its responsiveness to the needs of customers and other stakeholders. As further detailed below, each RTO and ISO must explain in a filing to the Commission how it is fulfilling, or will fulfill, this obligation. The Commission will assess each RTO's or ISO's filing using the responsiveness criteria discussed below.

503. Although some commenters argue that this requirement is not needed or that RTOs and ISOs are already sufficiently responsive, we find this requirement necessary. For those RTOs and ISOs that may already be satisfying customer needs adequately, this formal requirement will help to focus the attention of RTO and ISO boards and senior management on improvements in this area of great concern to their customers and other stakeholders. As RTOs and ISOs developed, the Commission emphasized that their decision-making processes must be independent of control of any market participant or class of participants. RTO and ISO independence remains fundamental, and we will preserve it; however, we find that RTOs and ISOs must provide an avenue for customers and other stakeholders to present their views on RTO and ISO decision-making, and to have those views considered. Establishing practices and procedures that would allow RTO and ISO boards to be responsive to the concerns of customers and other stakeholders is important to providing these entities with confidence in RTOs' and ISOs' independent governance processes.

504. We will adopt the four responsiveness criteria as proposed in the NOPR. Based on the comments received, we conclude that each of the four criteria has a role in helping us to assess each separate dimension of responsiveness. We also require each RTO and ISO to submit a compliance filing demonstrating how it is responsive to customers and other stakeholders, and we will assess each demonstration based on the four criteria adopted herein.

505. In adopting the four criteria, we have carefully sought to balance customers' and other stakeholders' need for effective access to the boards of RTOs and ISOs, with the need for the independent management of each RTO and ISO. Upon consideration of the comments, the Commission finds that the four criteria are appropriate, balanced, and suitably tailored to improve the responsiveness of RTOs and ISOs to customers and stakeholders.

506. The first criterion, inclusiveness, is intended to ensure that existing or newly-developed practices and procedures, are adequate to bring the views of all customers or other stakeholders before the board. Meeting this criterion will demonstrate that the RTO or ISO actively provides for presenting customer and other stakeholder issues, concerns, or proposals to its boards.

507. The second criterion, fairness in balancing diverse interests, requires that each RTO and ISO ensures that its practices and procedures for decision making consider and balance the interests of their customers and stakeholders, and ensures that no single stakeholder group can dominate. This is necessary to ensure that the RTO or ISO may make well-informed decisions that reflect the full range of competing interests that may be affected.

508. The third criterion, representation of minority interests to the RTO and ISO boards, is also critical to ensure that customers and other stakeholders have confidence in the decisions that come out of RTO and ISO processes. This criterion will ensure that the minority views of customers and stakeholders are forwarded, at the same time as the majority views, to the boards during the deliberation process. The Commission has often been notified that RTO and ISO decisions have been made based only on the single view of the majority vote. While the Commission will not intrude on the governance and decision-making process of RTO and ISO boards and management, it will require that those processes provide for appropriate consideration of minority interests.

509. Finally, through the fourth criterion, ongoing responsiveness, the Commission will require that RTOs and ISOs continue over time to consider customer and other stakeholder needs as the architecture or market environment of the RTO or ISO changes. This criterion is necessary to ensure that responsiveness continues into the future. As with the overall operations of each RTO and ISO, responsiveness to customers and other stakeholders should continually be evaluated for improvement.

510. In response to comments, we clarify that compliance with each criterion must not diminish or limit the requirements for compliance with the remaining criteria. For example, in response to Ameren, we note that the third criterion does not mandate that minority interests overrule majority decisions, rather it requires that the board be made aware of the minority position where necessary. Taken together, the criteria require that RTO and ISO boards be fully aware of the positions of customers and other stakeholders to ensure that issues are fully and fairly vetted.

[607] NSTAR at 11.

[608] NRECA at 60.

[609] Joint Commenters at 3.

b. Specificity of the Responsiveness Criteria

511. While some commenters state that the four responsiveness criteria should be more specific,[610] others support the criteria as proposed, and we conclude that the Commission struck the appropriate balance in the NOPR. The Commission's approach in addressing the responsiveness of RTO and ISO boards is to create a regulatory obligation for RTOs and ISOs to provide greater access in order to better serve the needs of customers and other stakeholders, and to leave the detailed implementation of this obligation for the RTOs and ISOs to work out with their own customers and other stakeholders.

512. As was discussed in the NOPR, and the ANOPR prior to that, during the evolution of RTOs and ISOs, the Commission has allowed each RTO and ISO to develop the necessary operational practices that best suit the needs of its customers and other stakeholders. Differing market designs, governance structures, and existing stakeholder processes should be balanced with the need for independent decision making to provide the greatest benefits to customers and other stakeholders. To create a more expansive set of one-size-fits-all rules would undo that long-held determination.

513. As a result, we do not agree with those commenters who contend that the criteria should be made more specific or set out in more detail. To the contrary, the requirements in this Final Rule will achieve the Commission's goal: RTOs and ISOs will be obligated to demonstrate that they are responsive to the needs of customers and other stakeholders through a direct collaboration among the RTOs and ISOs and their constituencies. Therefore, to specify how an RTO or ISO would be expected to demonstrate compliance with the criteria, as requested by some commenters, would not be consistent with our stated objective in this section of the Final Rule. Upon each RTO's or ISO's submittal of its compliance filing, parties will be free to raise responsiveness issues specific to each RTO or ISO that they believe have not been resolved satisfactorily. With regard to Constellation's request, we clarify that we define ''customer'' as is defined in the RTO's or ISO's tariff.

514. Each RTO or ISO should consider in a collaborative process prior to the submittal of compliance filings the issues or methods that customers and other stakeholders want to raise that they believe will be helpful in satisfying the responsiveness criteria. As suggested in comments filed on the NOPR, such issues and/or methods may include, but need not be limited to, changes of stakeholder processes, board selection methodologies, and monitoring and reporting on the effectiveness of the RTO or ISO in meeting the responsiveness criteria.

c. Additional Criteria

515. We do not agree that additional criteria for responsiveness are necessary at this time. Many of the criteria commenters propose would require specific mandates from the Commission on items that could be resolved by RTOs and ISOs through their own stakeholder procedures. For example, establishing cost-containment requirements or requiring the application of cost/benefit analyses for each RTO or ISO decision in and of themselves are not measures of responsiveness, but rather are practices and procedures that are best developed through the collaborative efforts of each RTO or ISO and their respective customers and other stakeholders. Our objective in requiring RTOs and ISOs to demonstrate their responsiveness to customers and other stakeholders is to ensure that the RTOs and ISOs, in collaboration with their customers and other stakeholders, work toward developing regional solutions suited to the region's needs.

5. Board Advisory Committee and Hybrid Board

516. In the NOPR, the Commission emphasized that various approaches may satisfy the responsiveness criteria and encouraged each RTO or ISO to develop an approach that best suits its own governance structure and stakeholder needs. The Commission asked for comments on two proposed approaches for achieving board responsiveness—a board advisory committee composed of stakeholders and a hybrid board that includes both independent and stakeholder members. The Commission indicated that a board advisory committee would be a particularly strong approach to improving RTO and ISO responsiveness.[611]

a. Comments

517. Commenters generally express support for the board advisory committee as a method of ensuring board responsiveness.[612] They argue that the advisory committee is the better method of balancing the interests of stakeholders without sacrificing the independence of RTO or ISO boards. Others argue, however, that advisory boards do not always allow for meaningful input from stakeholders because they do not have decisional authority.

518. National Grid urges the Commission to resist the inclination to micromanage RTO and ISO governance structure. It states that stakeholders who voluntarily participate in an RTO or ISO should be able to develop their own governance.[613] National Grid states that the governance structures already in place among RTOs and ISOs are products of stakeholder agreements and the Commission should not overturn these compromises.[614]

519. Several RTOs and ISOs note their support for the advisory board concept by pointing to their own existing advisory boards. For example, the Midwest ISO's Advisory Committee consists of 23 representatives from nine stakeholder groups. The Advisory Committee is required to consider separately any measure that is the product of a close vote in committee.[615] PJM states that it successfully worked with its stakeholders to develop and implement a Liaison Committee in 2007. PJM describes the Liaison Committee structure as an attempt to respect the Board's independence in decision making while ensuring accountability and clear communication with the membership.[616]

520. Commenters provide several suggestions to the Commission on how best to structure an advisory board. NARUC suggests that the Commission require that these advisory committees have open positions for state commissions and state consumer advocates.[617] PJM Power Providers recommends that the Commission encourage RTOs or ISOs that select an advisory board approach to recognize diversity as an essential attribute for compliance with the Commission's criteria.

521. PJM Power Providers also suggests that representation on the advisory board should be subject to term limits to ensure diversity over time.[618] PJM Power Providers urges that the Commission encourage representation on the advisory board to be limited to

[610] *See, e.g.*, APPA; ATC; California Munis; NRECA; and SMUD.

[611] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 277.

[612] *See, e.g.*, DRAM at 27; Duke Energy at 2–3; Exelon at 16–17; FirstEnergy at 17; ITC at 12–13; Midwest ISO at 38; NARUC at 19; Old Dominion at 5; OMS at 17–18; Pennsylvania PUC at 20; PJM Power Providers at 12 (board liaison committee); and Steel Producers at 14.

[613] National Grid at 9.

[614] *Id.* at 10.

[615] Midwest ISO at 38.

[616] PJM at 8.

[617] NARUC at 19.

[618] PJM Power Providers at 11.

a defined period with rotating membership. PJM Power Providers recommends that no entity or its affiliates be permitted to have more than one representative on the board advisory committee simultaneously. The Midwest ISO TOs suggest that the advisory committee structure be changed so that transmission owners have a percentage of votes commensurate with the costs they would bear on major expenditures. DRAM agrees with the use of a representative board advisory committee and supports equal representation for demand resources.[619] IID recommends the establishment of an advisory committee to the CAISO Board comprising voluntary representatives from neighboring balancing authority areas bordering or internal to the CAISO.[620]

522. ATC suggests that the Commission should require stakeholder sector representatives to explain the degree to which a vote they cast was supported by their sector's members, and why any minority within a sector disagreed with the majority position. ATC also recommends that RTOs and ISOs and their stakeholders should be allowed to propose exactly how sectors' minority views on main stakeholder committee votes should be conveyed to RTO and ISO boards.[621]

523. Others comment on board selection and composition. The Pennsylvania Commission suggests that the Commission may wish to increase board responsiveness to stakeholders through modifications to the board nominating and selection process. It says that one approach might be to require that all board nominees be selected from an outside consultant's list by a nominating committee that is largely or entirely composed of stakeholder representatives, and/or representatives of the states that the RTO or ISO serves. The Pennsylvania Commission further offers that the Commission should consider prohibiting RTO or ISO management from being part of, or participating in the deliberations of, the board member nominating committee; this will avoid obligating board members to management for their nomination or retention.[622]

524. NSTAR states that while there are requirements for business and technical expertise to serve on the ISO New England board, there is no requirement that any of the members have any experience serving the customers who ultimately pay for the entire market. As a result, NSTAR requests that the Commission consider providing guidance on the composition of boards to include more consumer representatives.[623] The Ohio Commission recommends that the Commission require each RTO and ISO to include on its board at least one individual with extensive state regulatory experience.[624] Moreover, it states that the Commission should compel the RTO's or ISO's board to work with the relevant regional state advisory committee.

525. Regarding hybrid boards, commenters are split on whether a hybrid board represents a valid approach to ensuring board responsiveness. Some commenters argue that a hybrid board is a good alternative to a board advisory committee, and would provide a good way for stakeholders to have input on RTO and ISO decision making. Many more commenters, however, argue that the Commission should not allow hybrid boards. They point to the potential to endanger the independence of the RTO or ISO board and to create conflict of interest for stakeholder board members.

526. TAPS supports the hybrid board approach and says that, with adequate protections, appropriately structured hybrid boards are a better means of achieving a responsive, accountable RTO or ISO than another board advisory committee of stakeholders.[625] TAPS also notes that, by making stakeholders vested partners in board decision making, hybrid boards can change the dynamic of the RTO or ISO, which, it claims, often pits stakeholders against the RTO or ISO. Industrial Consumers also support the hybrid board approach, and suggest that stakeholder members be split equally between representatives of supplier and consumer interests.[626]

527. Other commenters object to the idea of hybrid boards. Industrial Coalitions state that hybrid boards would be unlikely to provide adequate representation for end-use customers, and would further diminish customers' already limited voice in RTO and ISO governance. Industrial Coalitions argue that the proposed criteria for hybrid boards are not sufficient to prevent conflicts of interest on the part of board members.[627] Also, NARUC argues that a hybrid board conflicts with the goal of RTO and ISO independence, and would be unwieldy and ineffective.[628]

528. Duke Energy argues that hybrid boards could create the appearance of, and provide the opportunity for, undue preference in favor of stakeholder board members.[629] ITC argues that mandating or allowing hybrid boards would be a mistake, as this would sacrifice RTO and ISO independence. ITC states that as long as the Commission allows hybrid boards, there will be tremendous pressure on RTOs and ISOs to form a hybrid board, or else be seen as being ''unresponsive'' by stakeholder groups. ITC argues that hybrid boards would violate the principles outlined in Order No. 890, and would allow stakeholders with no interest in new development to block transmission projects. ITC also states that hybrid boards will make it more difficult to develop appropriate transmission pricing systems; for example, stakeholder board members may seek to serve their own interests through allocation of new project costs to others.

529. The Pennsylvania PUC also notes concern regarding stakeholder board members when the board may be required to review competitively sensitive information in making decisions. It states that it is unclear how, or whether, non-independent members would be prevented from reviewing such material.[630]

530. FirstEnergy opposes giving particular stakeholder constituencies preferential rights or privileges under the name of responsiveness, and states that attempts by state commissions to elevate their stakeholder status to advice and approval over RTO or ISO initiatives represent a serious threat to RTO and ISO independence.[631]

531. OMS argues that allowing market participants to hold seats on an RTO or ISO board would jeopardize independence. OMS explains that stakeholder board members can be expected to act in the interests of the companies with which they are affiliated.[632] OMS is also concerned that the members of a hybrid board would create directors unable to fully and fairly exercise their business judgment

[619] DRAM at 27.

[620] IID at 8–9.

[621] ATC at 9. IID also suggests that the Commission's oversight would be aided by requiring RTOs and ISOs to report both majority and minority stakeholder positions to the Commission when they file proposed changes to their rates and tariffs.

[622] Pennsylvania PUC at 19.

[623] NSTAR at 10.

[624] Ohio PUC at 38.

[625] TAPS at 64.

[626] Industrial Consumers at 24.

[627] Industrial Coalitions at 24–32.

[628] NARUC at 18–19.

[629] Duke Energy at 2–3.

[630] Pennsylvania PUC at 18.

[631] FirstEnergy at 17.

[632] OMS at 15.

consistent with general corporate governance law.[633]

532. PJM concurs that hybrid boards are a poor solution given the legal and practical pitfalls associated with these structures.[634] PJM concludes that the NOPR does not demonstrate how the inherent conflicts in fiduciary duties (as well as issues of access to confidential data) would be resolved through a hybrid board structure.[635]

533. The California PUC is sympathetic to the Commission's objectives to improve customer access to RTO and ISO boards of directors and believes that the Commission's proposal of flexibility on this issue is appropriate. However, it states that the requirement that RTOs and ISOs establish a board advisory committee is preferred over the hybrid board approach and the CAISO already has such a mechanism in place and could easily demonstrate to the Commission that it already satisfies the objectives of the NOPR on this issue.[636] The California PUC also states that it is questionable whether the Commission has the legal authority to take the type of actions to reform RTO and ISO boards of directors that are being considered in the NOPR and urges the Commission to proceed only by means of an RTO- or ISO-specific adjudicative process under section 206 of the Federal Power Act. It states that the creation of a hybrid board of directors would violate Order Nos. 888 and 2000, and that the Commission lacks legal authority to impose any reform pertaining to the makeup of the board of directors of a state-created ISO.[637]

b. Commission Determination

534. The Commission will not require RTOs or ISOs to adopt a specific form of board structure—whether board advisory committee, hybrid board, or other—in this rule or when evaluating their compliance filings to determine whether their existing or proposed structures and procedures are appropriately responsive to customers and other stakeholders. The Commission agrees with commenters that a one-size-fits-all approach is not appropriate, given the different needs of each region. As the Commission noted in the NOPR, it views the board advisory committee as a particularly strong mechanism for enhancing responsiveness, and expects each RTO and ISO to work with its stakeholders to develop the mechanism that best suits its needs.

535. The Commission will not require, as proposed by the Ohio Commission, that at least one member of RTO or ISO boards have state regulatory experience. Similarly, the Commission will not require, as proposed by NARUC, that board advisory committees have open positions for state commissions and state consumer advocates. However, these suggestions may be considered by RTOs and ISOs during their own deliberations on compliance with this Final Rule.

536. In response to the comments of California PUC, the Commission notes that the approach adopted in this Final Rule to require each RTO or ISO to submit a compliance filing demonstrating that it has in place or will adopt practices and procedures to ensure that its board of directors is responsive to customers and other stakeholders is within its jurisdictional authority.[638] The Commission is not mandating a specific approach such as a hybrid board of directors in this rulemaking, but is instead establishing a responsiveness objective that each RTO or ISO may meet in its own way.

537. Several commenters argue that the Commission should not allow hybrid boards for legal or practical reasons, including concerns over the independence of RTO and ISO boards. The Commission denied similar requests to disallow hybrid boards in Order No. 2000, noting that RTOs take many different forms to reflect the various needs of each region.[639] The Commission found that a case-by-case review of each RTO board structure was best, with the general guidance that any board including market participants should ensure that no one class would be allowed to veto a decision reached by the rest of the board and that no two classes could force through a decision that is opposed by the rest of the board.[640] We choose to follow our decision on hybrid boards in Order No. 2000 here. As the Commission has found in other circumstances, a hybrid governance structure may be constructed in a way that allows for the expertise of various groups to inform the decision-making process, while still remaining independent such that no individual market participant is given undue influence over the decisions of the board.[641] Our ruling here is not meant to imply that all hybrid board structures are acceptable. RTOs or ISOs wishing to adopt a hybrid board will have to show in their compliance filings that their proposals are consistent with the principles of Order No. 2000 and other relevant precedent. Commenters are free to raise any specific objections to a hybrid board proposal in response to the RTO's or ISO's compliance filing, and the Commission will be able to determine the validity of those objections against a concrete proposal from the RTO or ISO, if any such proposal is made.

6. Supermajority Requirement

538. In the NOPR, the Commission requested comment on whether RTOs and ISOs should be encouraged (or required) to base their process for selecting non-independent members of a board advisory committee, or the board itself, on a supermajority vote of eligible stakeholders.

a. Comments

539. The few commenters that address the issue are split on whether the Commission should require members of advisory boards or hybrid boards to be chosen by a supermajority of stakeholders. Some commenters are skeptical of using a supermajority. Others, such as Steel Producers, believe that it could be beneficial for ensuring that minority perspectives are heard, as those elected to the board by a supermajority would be more likely to be responsive to viewpoints beyond those of their own company or stakeholder segment. Steel Producers argue that a supermajority voting requirement would provide ''minority'' stakeholders a meaningful voice and prevent one group of stakeholders from selecting a disproportionate number of board members.[642]

540. A few commenters suggest that supermajority requirements may be more useful for choosing representatives for specific market sectors; members of each market sector would be allowed to choose their own representatives by a supermajority rather than having voting among the RTO or ISO as a whole.[643] Other commenters argue that the Commission should leave the decision on whether to require a supermajority to regional preference.

541. On the other hand, Comverge is concerned that the use of a supermajority vote to choose board

[633] *Id.* at 15–16.

[634] PJM at 9.

[635] *Id.* at 10.

[636] *Id.* at 56.

[637] California PUC at 54.

[638] *See* Order No. 2000, FERC Stats & Regs ¶ 31,089 at 31,039.

[639] *Id.* at 31,073–74.

[640] *Id.*

[641] *See Western Systems Coordinating Council,* 96 FERC ¶ 61,348, at 62,296 (2001) (approving a hybrid board for WECC). While the WECC is not an RTO, the Commission applied a similar standard to the formation of the WECC board as it applied to RTOs in Order No. 2000.)

[642] Steel Producers at 14.

[643] *See* APPA; California Munis.

representatives would make it difficult to reconcile minority positions with demand response interests and suggests that the Commission consider support for separate board advisory committees that are intended primarily to represent demand response and demand-side resources.[644]

542. Xcel believes that the Commission should narrowly define ''stakeholder'' to ensure that a stakeholder is not simply any person in the room. For example, in some organized markets, *e.g.*, the Midwest ISO, the advisory structure permits each stakeholder sector to ballot only within its own sector, which reduces the risk of one sector dominating the overall ballots.[645]

543. SMUD indicates that its comments on the ANOPR urged adoption of requirements that: (1) The RTO or ISO give stakeholders a formal voting process to express their views, and (2) the RTO or ISO explain when it ignores supermajority sentiments.[646] SMUD claims that the NOPR's more vague requirements are insufficient; thus specific directives should be set forth in any final action.

544. PJM suggests that a supermajority requirement is not a necessary or sufficient one, and argues that the Commission should instead encourage RTOs or ISOs that choose to establish an advisory board to recognize diversity as an essential attribute for compliance with the Commission's guidelines.

545. Finally, ITC notes that a supermajority requirement, as suggested in the NOPR, may or may not be beneficial for hybrid boards and would further politicize the board selection process. Additionally, ITC argues that because advisory committees do not have decision making authority, a supermajority would not be necessary or appropriate for choosing advisory committee members.[647]

b. Commission Determination

546. The Commission will leave it to each RTO or ISO, in consultation with its customers and other stakeholders, whether to select by supermajority vote members of any board advisory committee or any non-independent board member. When determining whether to implement a supermajority requirement, RTOs and ISOs should consider the goals of achieving a voice for minority interests while also having a workable process.

7. Posting Mission Statement or Organizational Charter on Web Site

547. In the NOPR, the Commission proposed to require that each RTO and ISO post on its Web site a mission statement or charter for its organization. The Commission encouraged each RTO and ISO to set forth in either the mission statement or the organizational charter its purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services.

a. Comments

548. Most commenters who discuss the topic indicate that they support the Commission's proposed requirement for RTOs or ISOs to post a mission statement or organizational charter on their Web sites. Both CAISO and NYISO report that they already post mission statements on their Web site.[648]

549. Other commenters provide additional thoughts on RTO and ISO mission statements on a more general level. Constellation also supports having a requirement that each RTO and ISO publish a mission statement setting forth the organization's purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders. It advocates that the mission statement should reflect and include the minimum characteristics and functions that the Commission has required for each RTO and ISO in Order No. 2000.[649]

550. North Carolina Electric Membership requests that the Commission require RTOs and ISOs revisit their mission statements to ensure that the statements are consistent with the Order No. 2000 core objectives. It asserts that paramount among the core objectives should be the twin goals of facilitating open access to the transmission grid and providing reliable electric service at an affordable cost to consumers. North Carolina Electric Membership adds that the mission statements should also set forth defined roles for the RTO and ISO boards and management, as well as defined roles for stakeholders in accomplishing the objectives set forth in those statements. Old Dominion also sees value in defining within the mission statement the roles of the board, RTO and ISO management and stakeholders to provide the clarity necessary to be sure that the organization is aligned with the RTO's and ISO's mission.[650]

551. NRECA and Old Dominion argue that RTOs and ISOs should be required to include their mission statements in their tariffs and that the mission statements should include a focus on lowering costs for transmission and wholesale power customers. NRECA notes that absent from the mission statements currently posted on many RTO and ISO Web sites is a focus on ensuring that overall costs to consumers are consistent with the objective of ensuring just and reasonable rates for consumers.[651]

552. Steel Producers note that an RTO's or ISO's mission statement and/or charter should not be utilized by the RTO and ISO, its stakeholders, or market participants to limit the range or scope of potential issues that the RTO or ISO and/or its respective stakeholder group(s) may need to address. They conclude that mission statements and charters should provide guidance, but should not foreclose discussion and action on pertinent matters of interest.[652]

553. TAPS asserts that ''the Final Rule should require each RTO to file a mission statement that makes it accountable to consumers for meeting the purposes of the Federal Power Act.'' [653] TAPS argues that the Federal Power Act's purpose is to ensure that electricity consumers pay the lowest prices possible for reliable service. TAPS concludes that by establishing consumer value as a core goal for RTOs and ISOs, the Commission would align the goals of these regional organizations with the objectives of state regulators, federal policy makers, and consumers.

554. SMUD states that the NOPR failed to further discuss the issue of whether RTOs and ISOs should be required to publish a strategic plan, as was raised in the ANOPR. SMUD avers, however, that such a requirement is implicit in the NOPR discussion where RTOs and ISOs would be required to show that they have satisfied the criteria, including responsiveness to stakeholders. SMUD requests that the Commission clarify that its intent was to require RTOs and ISOs to publish strategic plans.

555. FirstEnergy opposes an RTO or ISO mission statement that deviates from the contractual and tariff obligations under which the RTO or ISO currently operates, and states that any effort to adopt such a statement would be problematic, and a source of

[644] Comverge at 24.
[645] Xcel at 14.
[646] *Id.* at 12.
[647] ITC at 12–13.
[648] CAISO at 12; NYISO at 18.
[649] Constellation at 19.
[650] Old Dominion at 5.
[651] NRECA at 62.
[652] Steel Producers at 14–15.
[653] TAPS at 60.

additional and unneeded controversy among RTO and ISO stakeholders.[654]

b. Commission Determination

556. The Commission will require each RTO and ISO to post on its Web site a mission statement or organizational charter. The Commission encourages each RTO and ISO to include in its mission statement, among other things, the organization's purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services. The mission statement or organizational charter may include additional information, such as elements from the RTO or ISO governing documents. The Commission does not expect that any explicit statement of the responsiveness objective would conflict with existing elements of the RTO's or ISO's mission.

557. We find that this requirement will improve communication between RTOs and ISOs and their stakeholders and the community at large, as well as provide a statement of goals by which the RTO's and ISO's progress may be judged. If any RTO or ISO believes that there is a conflict between this requirement and the existing mission statement, contracts or tariff, the RTO or ISO may address this conflict in its compliance filing. In response to SMUD, we clarify that publication of a strategic plan is not implicit in the responsiveness obligation.

8. Executive Compensation

558. In the NOPR, the Commission encouraged, but did not propose to require, each RTO and ISO to ensure that its management programs, including, but not limited to, incentive compensation plans for executive managers, give appropriate weight to stakeholder responsiveness.

a. Comments

559. Commenters generally agree that RTOs and ISOs should link compensation plans for executive managers to customer service measures of performance, as indicated by customer satisfaction surveys and complying with the responsiveness criteria.

560. LPPC asks for establishment of objective criteria for performance and executive compensation.[655] Additionally, North Carolina Electric Membership argues that the Final Rule should require RTOs and ISOs to demonstrate that their executive management incentive programs are tied to their mission statements, including a focus on improving customer service, properly managing their markets, being responsive and accountable to stakeholders and consumers, and providing consumers with reliable service at an affordable cost.[656]

b. Commission Determination

561. The Commission continues to encourage, but not require, each RTO and ISO to ensure that its management programs, including executive compensation, give appropriate weight to responsiveness to customers and other stakeholders. If the RTO or ISO board is well-informed about the needs of customers and various stakeholders, it will set criteria for performance, appropriate goals and targets for the organization and its management and institute measures for achieving those targets. By focusing our requirements on having a well-informed board, we decline to intrude further into board prerogatives regarding management compensation.

9. Compliance Filing Requirement

562. In the NOPR, the Commission determined that each RTO or ISO must comply with this proposed requirement by submitting a filing that proposes changes to its board responsiveness practices and procedures to comply with the proposed criteria or that demonstrates its practices and procedures already satisfy the criteria for board responsiveness.[657] This filing would be submitted within six months of the date the Final Rule is published in the **Federal Register**. The Commission also stated that it will assess whether each filing satisfies the proposed requirement and issue additional orders as necessary.

a. Comments

563. Most commenters support a compliance filing requirement. However, some commenters expressed concern that RTOs and ISOs will merely submit documentation asserting that their existing processes already satisfy the responsiveness criteria, without working seriously with stakeholders to ensure that stakeholder input is sought on compliance. The California PUC states that it believes that CAISO already meets the requirements of the NOPR and asks the Commission to refrain from taking any further action regarding the responsiveness of RTOs and ISOs to stakeholders and customers needs.[658]

564. Industrial Coalitions state that the Final Rule should not delegate to the RTO or ISO stakeholder processes the task of working out the details of the Commission's proposals. Industrial Coalitions are concerned that the Commission's approach will delay resolution of these important matters, to the detriment of customers. Accordingly, Industrial Coalitions urge the Commission to provide clear and consistent directives regarding the subject matter and timing of the RTO and ISO compliance filings.[659]

b. Commission Determination

565. The Commission requires each RTO or ISO to make a compliance filing that proposes changes to its responsiveness practices and procedures to comply with the responsiveness requirement or that demonstrates that its practices and procedures already satisfy the requirement for responsiveness. The compliance filing also must propose posting, or report the posting, of the RTO's or ISO's mission statement or organizational charter on its respective Web site. This filing shall be submitted within six months of the date this Final Rule is published in the **Federal Register**.

566. We recognize that many of the existing RTOs and ISOs have a form of committee (whether advisory board or stakeholder committee) that functions within the RTO or ISO governance structure to provide stakeholder feedback. Given the number of comments from interested parties seeking improvement to their interactions with RTO and ISO boards and the effectiveness of these committees, it is important that the compliance filings required herein follow from consultation with customers and other stakeholders regarding satisfaction with existing processes and the appropriateness of improved processes. In the end, however, the filing is the RTO's or ISO's to make; we urge them to seek consensus but realize that complete agreement is not always achievable. This consultation process is worth additional time and effort, and should not cause an excessive delay, given the six-month time allowed for filing.

567. Each RTO or ISO should explain in its compliance filing how it plans to satisfy, or currently satisfies, each responsiveness criterion. Furthermore, each RTO and ISO should include in its

[654] FirstEnergy at 17.

[655] LPPC at 18.

[656] North Carolina Electric Membership at 25–26.

[657] NOPR, FERC Stats. & Regs. ¶ 32,628 at P 276.

[658] California PUC at 56.

[659] Industrial Coalitions at 4.

compliance filing, for each criterion, an explanation of the process (*e.g.*, stakeholder meetings, technical conferences, board discussions) that the RTO and ISO used to develop its compliance filing demonstration and describe major dissenting views. In the event RTOs or ISOs, working with their customers and other stakeholders, complete the responsiveness compliance requirements in less than six months, they may file them ahead of the specified due date. The Commission will assess whether each filing satisfies the proposed requirement and issue additional orders as necessary.

E. Other Comments

1. Comments

568. A few commenters address topics other than the specific proposals in the NOPR. For example, some suggest we require, or promote as part of the Final Rule, the review of RTO and ISO seams and rate levels, performance benchmarking, moratoriums on new RTO or ISO products and services, cost-benefit analyses,[660] time-sensitive rates for transmission and other non-market services with marginal costs caused by on-peak usage,[661] interconnection requirements,[662] tariff filings, and reviews related to the design and scope of independent operational audits of RTOs and ISOs.[663] CAISO and the Cities filed reply comments in opposition to implementing time-sensitive rates.[664]

569. First Energy is opposed to RTOs and ISOs recovering from market participants penalties for NERC reliability violations caused by RTOs.[665]

570. Another commenter asked that the Commission avoid, to the extent possible, requiring compliance filings at times when RTOs and ISOs are focused on start up of new markets.[666]

571. In its comments, Sorgo expresses concern that the April 2007 Report to Congress on Competition in Wholesale and Retail Markets failed to address anticompetitive policies that may favor old power plants.[667]

572. Allied Public Interest Groups states that the Commission should direct RTOs and ISOs to give comparable consideration to demand response resources in regional planning, and that regional planning should include scenario analyses evaluating the amounts of potentially available demand response resources.[668]

2. Commission Determination

573. The Commission appreciates the efforts involved in developing these comments and proposals submitted in this rulemaking. We note that these topics have already been addressed by the Commission in Order No. 890[669] and Order No. 693.[670] Accordingly, the Commission declines to expand the scope of this proceeding to encompass topics not presented in the NOPR. RTOs and ISOs and their stakeholders may address these topics, if they so choose, through their own processes for evolving RTO and ISO services and markets.

IV. Applicability of the Final Rule and Compliance Procedures

A. NOPR Proposal

574. In the NOPR, the Commission proposed to apply the Final Rule to all RTOs and ISOs, and to require them to demonstrate compliance with the requirements in each of the four sections of the Final Rule.[671] The Commission proposed to require each RTO and ISO to file a report to the Commission within six months of the Final Rule's effective date, or six months following its certification as an RTO or commencement of operations as an ISO. The Commission proposed that the compliance filing should describe whether the RTO or ISO already complies with the requirements of the Final Rule, or describe the entity's plans to attain compliance, including a timeline with intermediate deadlines and appropriate proposed tariff and market rule revisions. The Commission noted that it would assess whether each filing satisfies the proposed requirements and issue further orders for each RTO and ISO, as necessary.

B. Comments

575. The Commission received few comments on the applicability and compliance proposals. Ameren notes that the six-month period for compliance may coincide with the implementation period for the Midwest ISO's Ancillary Services Market. Accordingly, Ameren argues that the Commission should avoid, to the extent possible, requiring compliance filings at times when RTOs and ISOs are focused on the start of new markets.[672]

576. CAISO requests clarification from the Commission as to whether the six-month compliance deadline is intended to apply to those market enhancements that CAISO already has planned under its Market Redesign and Technology Upgrade. CAISO notes that many of these upgrades, including allowing demand response to supply ancillary services and implementing enhanced shortage pricing, are on a separate timeline approved by the Commission.[673]

577. NYISO states that it supports the compliance deadlines in the NOPR, and calls on the Commission to reject any proposal calling for shorter compliance periods. NYISO notes that given the number of changes to RTO or ISO market software, billing practices and organizational functions that would be required by the Final Rule, along with the time required to consult with stakeholders, the proposed deadlines are the minimum necessary time for preparation of compliance filings.[674]

C. Commission Determination

578. As we proposed in the NOPR, we will require RTOs and ISOs to make a compliance filing within six months of the date that this Final Rule is published in the **Federal Register**. RTOs and ISOs should work with stakeholders and interested parties, where applicable, to comply with this rule and to develop their compliance filings.

579. The six-month period appropriately recognizes that it is important for RTOs and ISOs to work with stakeholders and other interested parties to develop a compliance filing, and that (as NYISO contends) such processes take time. In response to Ameren and CAISO, we clarify that the compliance requirement is not meant to displace the timelines of any market improvements that RTOs or ISOs are currently undertaking. Each RTO and ISO should include in its compliance filing an update on the status of any relevant market design changes that are

[660] AMPA at 2–6; APPA at 10, 19, 102–03; Indianapolis P&L at 5;Industrial Coalitions at 23–24.

[661] California DWR at 3, 21–36, and 38–39.

[662] American Forest at 2.

[663] Joint Commenters at 6–10.

[664] CAISO and the Cities at 3.

[665] FirstEnergy at 19.

[666] Ameren at 16.

[667] Sorgo at 1. The April 2007 Report to Congress on Competition in Wholesale and Retail Markets was developed by the Electric Energy Market Competition Task Force as directed by Section 1815 of the Energy Policy Act of 2005.

[668] Allied Public Interest Groups at 13–14.

[669] Order No. 890 requires any public utility with an OATT to allow qualified demand response resources to participate in its regional transmission planning process on a comparable basis to generation resources and to allow qualified demand response to provide certain ancillary services. Order No. 890, ¶ FERC Stats. & Regs. ¶ 31,241 at P 479, 494, and 888.

[670] Order No. 693 requires the Electricity Reliability Organization to revise its reliability standards so that all technically feasible resource options, including demand response and generating resources, may be employed in the management of grid operations and emergencies. Order No. 693, FERC Stats. & Regs. ¶ 31,242.

[671] NOPR, 122 FERC ¶ 61,167 at P 283.

[672] Ameren at 16.

[673] CAISO at 2.

[674] NYISO at 22.

in the process of being implemented and address any remaining issues not addressed by the ongoing changes. It need not change the schedule for implementing these other market design changes as a result of this Final Rule.

580. The compliance filing should explain the action the RTO or ISO has taken, or plans to take, to comply with the requirements in each of the four sections of this Final Rule. It should also describe, where applicable, the process used to develop the compliance filing and describe any major dissenting views. The Commission will evaluate each compliance filing to determine whether it satisfies the requirements in this rule, and issue additional orders as necessary.

581. As described above, RTOs and ISOs, in cooperation with their customers and stakeholders, also are required to perform an assessment, through pilot projects or other mechanisms, of the technical feasibility and value to the market of smaller demand response resources providing ancillary services, including whether (and how) smaller resources can reliably and economically provide operating reserves and report their findings to the Commission. This assessment is due to the Commission within one year of the date that this Final Rule is published in the **Federal Register**.

582. Finally, as described above, each RTO's and ISO's market monitoring unit is required to comment on the adequacy of market mitigation measures in its respective RTO's or ISO's shortage pricing proposal. This requirement will aid the Commission in evaluating the proposals once they are filed.

583. In response to commenters who argue that the six-month requirement for submission of a compliance filing is either too long or too short, we find that the six-month period is an adequate amount of time for an RTO or ISO to work with stakeholders and other interested parties to develop a compliance filing. We note that RTOs and ISOs may make their compliance filing at any time prior to the end of the six-month period.

V. Information Collection Statement

584. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[675] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. This Final Rule amends the Commission's regulations to improve the operation of organized wholesale electric power markets. The objective of this Final Rule is to improve market design and competition in organized markets. Through this rule the Commission hopes to provide remedies by: (1) Ensuring that new criteria are established so that RTOs and ISOs are responsive to their customers and stakeholders; (2) improving market monitoring within RTOs and ISOs by requiring them to provide their Market Monitoring Units with access to market data and sufficient resources to perform their duties; (3) providing transparency in the marketplace by requiring RTOs and ISOs to dedicate portions of their Web sites so market participants can avail themselves of information concerning offers to buy or sell power on a long-term basis; and (4) requiring RTOs and ISOs to institute certain reforms in the demand response programs to remove several disincentives and barriers to demand response so as to provide for more efficient operation of markets and encourage new technologies. Filings by RTOs and ISOs would be made under Part 35 of the Commission's regulations. The information provided for under Part 35 is identified as FERC–516.

585. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act.[676] The Commission solicited comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. The Commission did not receive comments specifically addressing the burden estimates in the NOPR. Therefore we will use the same estimates here as in the NOPR.

Burden Estimate: The Public Reporting burden for the requirements contained in the Final Rule is as follows:

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC–516 Task:				
Allow demand response to provide certain ancillary services	6	1	433	2,598
Remove certain deviation charges	5	1	288	1,440
Permit aggregation of Retail Customers	6	1	102.5	615
Allow pricing to ration demand during a shortage	6	1	649	3,894
Long-term contract postings	6	1	30	180
MMUs	6	1	129	774
Require RTO board responsiveness to customers	6	1	180	1,080
Require RTO self-assessment	6	1	650	3,900
Totals				14,481

Total Annual Hours for Collection: (Reporting + recordkeeping, (if appropriate)) = Total hours for performing tasks 1 through 8 as identified above = 14,481 hours.

Information Collection Costs: The average annualized cost[677] is expected to be:

Legal expertise = $473,526 (2,368 hours @$200 an hour)

Technical Expertise = $712,038 (4,747 hours @$150 an hour) (RTO/ISO Senior Staff, Stakeholder participants)

Administrative Support = $108,701 (2,718 hours @$40 an hour)

[675] 5 CFR 1320.11.

[676] 44 U.S.C. 3507(d).

[677] Differences in RTO/ISO staff hourly rates are to differentiate between administrative support staff and senior staff.

IT Support = $236,448 (2,489 hours @ $95 an hour)
Participatory Expenditures = $2,160,000 (96 participants @$1,000 per day on average 4.5 days per activity for five of the eight activities identified above).
Total = $3,690,713.

Title: FERC–516 ''Electric Rate Schedule Filings.''

Action: Proposed Collections.

OMB Control No: 1902–0096.

Respondents: Business or other for profit, and/or not for profit institutions.

Frequency of Responses: An initial filing to comply with the rule, and then on occasion as needed to revise or modify.

Necessity of the Information: This Final Rule furthers the improvement of competitive wholesale electric markets and the provision of transmission services in the RTO and ISO regions. The Commission recognizes that significant differences exist among the regions, industry structures, and sources of electric generation, population demographics and even weather patterns. In fulfilling its responsibilities under sections 205 and 206 of the Federal Power Act, the Commission is required to address, and has the authority to remedy, undue discrimination and anticompetitive effects.

586. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502–8415, fax: (202) 273–0873, e-mail: *michael.miller@ferc.gov.* Comments on the requirements of the proposed rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, fax (202) 395–7285, e-mail: *oira_submission@omb.eop.gov*.

VI. Environmental Analysis

587. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[678] The Commission concludes that neither an Environmental Assessment nor an Environmental Impact statement is required for this Final Rule under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale subject to the Commission's jurisdiction, plus the classification, practices, contracts, and regulations that affect rates, charges, classifications, and services.[679]

VII. Regulatory Flexibility Act Certification

588. The Regulatory Flexibility Act of 1980 (RFA)[680] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The RFA does not mandate any particular outcome in a rulemaking. It only requires consideration of alternatives that are less burdensome to small entities and an agency explanation of why alternatives were rejected.

589. In drafting a rule an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analyses available for public comment.[681] In its NOPR, the agency must either include an initial regulatory flexibility analysis (initial RFA)[682] or certify that the proposed rule will not have a ''significant impact on a substantial number of small entities.''[683]

590. If in preparing the NOPR an agency determines that the proposal could have a significant impact on a substantial number of small entities, the agency shall ensure that small entities will have an opportunity to participate in the rulemaking procedure.[684]

591. In its Final Rule, the agency must either prepare a Final Regulatory Flexibility Analysis (Final RFA) or make the requisite certification. Based on the comments the agency receives on the NOPR, it can alter its original position as expressed in the NOPR, but it is not required to make any substantive changes to the proposed regulation.

592. The statute provides for judicial review of an agency's final certification or Final RFA.[685] An agency must file a Final RFA demonstrating a ''reasonable, good-faith effort'' to carry out the RFA mandate.[686] However, the RFA is a procedural, not a substantive, mandate. An agency is only required to demonstrate a reasonable, good-faith effort to review the impact the proposed rule would place on small entities, any alternatives that would address the agency's and small entities concerns and their impact, provide small entities the opportunity to comment on the proposals, and review and address comments. An agency is not required to adopt the least burdensome rule. Further, the RFA does not require the RFA to assess the impact of a rule on all small entities that may be affected by a rule, only on those entities that the agency directly regulates and that will be directly impacted by the rule.[687]

A. NOPR Proposal

593. In the NOPR, the Commission stated that most, if not all, of the transmission organizations to which this rule would apply do not fall within the definition of small entities.[688] The Commission identified the characteristics of each of those organizations and all exceeded the standard size definition established in NAICS.[689] It should be noted that due to typographical error in the NOPR, footnote 292 omitted the word ''million'' when identifying the size standard applicable to utilities.

594. One of those requirements proposed in the NOPR was that ''RTO and ISOs must amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.''[690] The Commission reasoned that such action would reduce obstacles for small retail loads to be able to participate in organized markets by

[678] *Regulations Implementing the National Environmental Policy Act,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[679] 18 CFR 380.4(a)(15).

[680] 5 U.S.C. 601–12.

[681] 5 U.S.C. 601–604.

[682] 5 U.S.C. 603(a).

[683] 5 U.S.C. 605(b).

[684] 5 U.S.C. 609(a).

[685] 5 U.S.C. 611.

[686] *United Cellular Corp. v. FCC,* 254 F.3d 78, 88 (DC Cir. 2001); *Alenco Communications, Inc. v. FCC,* 201 F.3d 608, 625 (5th Cir. 2000).

[687] *Mid-Tex Electric Coop., Inc. v. FERC,* 773 F.2d 327 (DC Cir. 1985) (Mid-Tex).

[688] NOPR, FERC Stats. & Regs. ¶32,628 at P 291.

[689] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 5 U.S.C. 601(3), citing to Section 3 of the Small Business Act, U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small utility as one that, including its affiliates is primarily engaged in the generation, transmission, or distribution of electric energy for sale, and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.202 (Sector 22, Utilities, North American Industry Classification System (NAICS)) (2004).

[690] NOPR, FERC Stats. & Regs. ¶32,628 at P 86.

allowing ARCs to assemble small demand responses that individually are too small to qualify for bidding into an RTO or ISO organized market and having ARCs assume many of the administrative tasks that retail customers may lack the resources or cannot afford. Simultaneously, as the Commission pointed out from comments received in response to its ANOPR, ARCs can reduce the RTO's and ISO's administrative burden of managing individual customers' demand response participation.[691]

595. Thus, in the NOPR, based on comments to the ANOPR, the Commission sought to ameliorate administrative burdens on small entities, specifically small retail customers to be able to participate in organized market and access demand response programs.

1. Comments

596. APPA and TAPS argue that the inclusion of ARCs, while assisting small retail customers, disproportionately shifts the burden to relevant electric retail regulatory authorities. APPA does not support the Commission's proposal that RTOs presume that aggregation is allowed unless the relevant electric retail regulatory authority informs the RTO that it does not permit aggregation.[692] APPA provides data on the number of power systems providing retail service in RTO regions and states that the vast majority of these are small utilities within the meaning of the RFA.[693]

597. TAPS, while recognizing the Commission's efforts, also has concerns about the Commission's proposal. TAPS believes the ''proposal would place undue burdens on many individual nonregulated electric utilities to take affirmative regulatory actions to maintain their authority * * *.'' [694] TAPS believes that if relevant electric retail regulatory authorities must assume the responsibility to notify RTOs then this places undue burden on municipal entities to become involved in lengthy legislative processes to make determinations that may have already been made on whether ARCs may aggregate the demand response of the municipals' loads.[695]

598. APPA believes the Commission is giving the RTOs and ISOs authority to trump state and local laws and regulations when it allows RTOs and ISOs to accept bids from an ARC whether or not the laws and regulations of the relevant electric retail regulatory authority explicitly permits it.[696] APPA believes that the retail regulatory authority will be placed in the position of having to make an administrative finding of whether aggregation by ARCs of retail end users is to be permitted. By APPA's count, only a small proportion of the 1,315 public power systems that provide retail electric service in states served by RTOs and ISOs have such laws or regulations. For the majority, this would result in a huge learning curve to become familiar with the process and consequently result in a ''very substantial undertaking.'' [697] APPA estimates that approximately 1,307 of the power distribution systems located in states served by RTOs and ISOs are ''small utilities'' as the term is defined in the RFA. To require relevant electric retail regulatory authorities to consider an affirmative pronouncement on this issue is ''cumulatively a very substantial FERC-imposed burden on them.'' [698]

599. APPA believes that unless a system's relevant electric retail regulatory authority affirmatively informs an RTO or ISO that it permits such aggregation by third-party ARCs, the RTO or ISO should be required to assume that such aggregation is not permitted. Should the Commission not accept APPA's proposal, as an alternative APPA suggest that for relevant electric retail regulatory authorities governing public power systems located in RTO and ISO regions that exceed the RFA size requirement, they would have to consider the issue of third-party ARCs and aggregation of their retail customers. In the case of public power systems that do not meet the RFA size requirement, then the RTO or ISO would be responsible for making the assumption that aggregation by ARCs is not permitted.[699]

600. TAPS takes a similar position. It believes the NOPR can be interpreted to require municipal systems to take legislative or regulatory action specific to the third-party ARC issue and notify the RTO or ISO. For these municipal systems to respond particularly when they do not allow retail access will impose significant burdens on them. As an indication of the potential impact, TAPS identified the number of municipal systems served by their members including AMP-Ohio with 122 municipal electric systems in both Midwest ISO and PJM; Indiana Municipal Power Agency, which serves 51 municipal electric systems in Midwest ISO; and Wisconsin Public Power Inc. which serves 50 municipal electric systems in Midwest ISO.[700] TAPS reminds the Commission that Congress, through passage of the RFA, requires agencies to assess the impact on entities whose total electric output does not exceed 4 million MWh. TAPS notes that the Commission's certification in the NOPR recognized this responsibility, but failed to account for ''the hundreds of small entities that it proposes to effectively put through this legislative or regulatory process.'' [701]

601. TAPS believes the Commission can achieve its objective by rewording its requirement to have relevant electric retail regulatory authorities notify the RTO or ISO when they permit third-party ARCs. Unless there is a notification, the RTO or ISO is to assume that third-party aggregation is not permitted. By shifting the emphasis as to when the notification is to take place, hundreds of municipals would not be burdened by having to go through the legislative process. In addition, only systems with a total electric output exceeding 4 million MWh would have to go through the process. TAPS also proposes an additional alternative, namely that municipals with retail sales of more than 500 million kWh as specified in PURPA would have to go through the process.[702]

2. Commission Determination

602. The Final Rule is applicable to all RTOs and ISOs. The Commission is requiring each RTO and ISO to make certain filings that reflect amendments to their tariffs to demonstrate they have either incorporated, or already have in place, processes that implement the requirements of this Final Rule. None of these entities, as identified in the NOPR, meets the RFA definition of a small entity—in particular, the last criterion of the definition ''and which is not dominant in its field of operation.'' [703]

603. In *Mid-Tex*, the court accepted the Commission's conclusion that, since virtually all of the public utilities that it regulates do not fall within the meaning of the term ''small entities'' as defined in the RFA, the Commission did not need to prepare a regulatory flexibility analysis in connection with its proposed rule governing the allocation of costs for construction work

[691] *Id.* P 83.

[692] APPA at 3.

[693] *Id.* at 3.

[694] TAPS at 13

[695] *Id.* at 17.

[696] APPA at 43.

[697] *Id.* at 44.

[698] *Id.* at 45.

[699] *Id.* at 47.

[700] TAPS at 19.

[701] *Id.* at 20.

[702] *Id.*

[703] 5 U.S.C. 601(3) and 601(6) and 15 U.S.C. 632(a)(1) (defining ''small business concern'').

in progress (CWIP).[704] The CWIP rules applied to *all* public utilities. This Final Rule applies only to RTOs and ISOs, which are a subset of ''all public utilities'' for which the regulatory flexibility analysis was not required.

604. In a subsequent court decision, *American Trucking Associations, Inc. v. EPA*,[705] the U.S. Court of Appeals for the District of Columbia applied the decision in *Mid-Tex* to its determination. The Environmental Protection Agency (EPA) established a primary national ambient air quality standard for ozone and particulate matter. The basis of EPA's certification was that the standard regulated small entities indirectly through state implementation plans. The court found that because the states, not EPA, had the direct authority to impose the burden on small entities, EPA's regulation did not have a direct impact on small entities.

605. Here APPA and TAPS contend that hundreds of small municipal systems would have to undertake legislative or regulatory actions in order to respond to the RTO. We disagree with their contention. No relevant electric retail regulatory authority is required to take any action under this rule. For these reasons, the Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

VIII. Document Availability

606. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

607. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

608. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov*.

IX. Effective Date and Congressional Notification

609. These regulations are effective December 29, 2008. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission will submit the Final Rule to both houses of Congress and the Government Accountability Office.

By the Commission. Commissioner Kelly concurring in part and dissenting in part with a separate statement attached.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, of the *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ In § 35.28 add new paragraphs (b)(4) through (b)(8) and (g) to read as follows:

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(b) *Definitions* * * *

(4) *Demand response* means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.

(5) *Demand response resource* means a resource capable of providing demand response.

(6) *An operating reserve shortage* means a period when the amount of available supply falls short of demand plus the operating reserve requirement.

(7) *Market Monitoring Unit* means the person or entity responsible for carrying out the market monitoring functions that the Commission has ordered Commission-approved independent system operators and regional transmission organizations to perform.

(8) *Market Violation* means a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

* * * * *

(g) *Tariffs and operations of Commission-approved independent system operators and regional transmission organizations.*

(1) *Demand response and pricing.*

(i) *Ancillary services provided by demand response resources.*

(A) Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning reserves, supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's bidding rules at or below the market-clearing price, unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.

(B) Each Commission-approved independent system operator or regional transmission organization must allow providers of a demand response resource to specify the following in their bids:

(*1*) A maximum duration in hours that the demand response resource may be dispatched;

(*2*) A maximum number of times that the demand response resource may be dispatched during a day; and

(*3*) A maximum amount of electric energy reduction that the demand response resource may be required to provide either daily or weekly.

(ii) *Removal of deviation charges.* A Commission-approved independent system operator or regional transmission organization with a tariff that contains a day-ahead and a real-time market may not assess a charge to a purchaser of electric energy in its day-ahead market for purchasing less power in the real-time market during a real-time market period for which the Commission-approved independent system operator or regional transmission organization declares an operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage.

[704] *Mid-Tex*, 773 F.2d 327 at 342.

[705] *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1044 (DC Cir. 1999), *aff'd in part and rev'd in part sub nom., Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

(iii) *Aggregation of retail customers.* Each Commission-approved independent system operator and regional transmission organization must permit a qualified aggregator of retail customers to bid demand response on behalf of retail customers directly into the Commission-approved independent system operator's or regional transmission organization's organized markets, unless the laws and regulations of the relevant electric retail regulatory authority expressly do not permit a retail customer to participate.

(iv) *Price formation during periods of operating reserve shortage.*

(A) Each Commission-approved independent system operator or regional transmission organization must modify its market rules to allow the market-clearing price during periods of operating reserve shortage to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.

(B) A Commission-approved independent system operator or regional transmission organization may phase in this modification of its market rules.

(2) *Long-term power contracting in organized markets.* Each Commission-approved independent system operator or regional transmission organization must provide a portion of its Web site for market participants to post offers to buy or sell power on a long-term basis.

(3) *Market monitoring policies.*

(i) Each Commission-approved independent system operator or regional transmission organization must modify its tariff provisions governing its Market Monitoring Unit to reflect the directives provided in Order No. 719, including the following:

(A) Each Commission-approved independent system operator or regional transmission organization must include in its tariff a provision to provide its Market Monitoring Unit access to Commission-approved independent system operator and regional transmission organization market data, resources and personnel to enable the Market Monitoring Unit to carry out its functions.

(B) The tariff provision must provide the Market Monitoring Unit complete access to the Commission-approved independent system operator's and regional transmission organization's databases of market information.

(C) The tariff provision must provide that any data created by the Market Monitoring Unit, including, but not limited to, reconfiguring of the Commission-approved independent system operator's and regional transmission organization's data, will be kept within the exclusive control of the Market Monitoring Unit.

(D) The Market Monitoring Unit must report to the Commission-approved independent system operator's or regional transmission organization's board of directors, with its management members removed, or to an independent committee of the Commission-approved independent system operator's or regional transmission organization's board of directors. A Commission-approved independent system operator or regional transmission organization that has both an internal Market Monitoring Unit and an external Market Monitoring Unit may permit the internal Market Monitoring Unit to report to management and the external Market Monitoring Unit to report to the Commission-approved independent system operator's or regional transmission organization's board of directors with its management members removed, or to an independent committee of the Commission-approved independent system operator or regional transmission organization board of directors. If the internal market monitor is responsible for carrying out any or all of the core Market Monitoring Unit functions identified in paragraph (g)(3)(ii) of this section, the internal market monitor must report to the independent system operator's or regional transmission organization's board of directors.

(E) A Commission-approved independent system operator or regional transmission organization may not alter the reports generated by the Market Monitoring Unit, or dictate the conclusions reached by the Market Monitoring Unit.

(F) Each Commission-approved independent system operator or regional transmission organization must consolidate the core Market Monitoring Unit provisions into one section of its tariff. Each independent system operator or regional transmission organization must include a mission statement in the introduction to the Market Monitoring Unit provisions that identifies the Market Monitoring Unit's goals, including the protection of consumers and market participants by the identification and reporting of market design flaws and market power abuses.

(ii) *Core Functions of Market Monitoring Unit.* The Market Monitoring Unit must perform the following core functions:

(A) Evaluate existing and proposed market rules, tariff provisions and market design elements and recommend proposed rule and tariff changes to the Commission-approved independent system operator or regional transmission organization, to the Commission's Office of Energy Market Regulation staff and to other interested entities such as state commissions and market participants, provided that:

(*1*) The Market Monitoring Unit is not to effectuate its proposed market design itself, and

(*2*) The Market Monitoring Unit must limit distribution of its identifications and recommendations to the independent system operator or regional transmission organization and to Commission staff in the event it believes broader dissemination could lead to exploitation, with an explanation of why further dissemination should be avoided at that time.

(B) Review and report on the performance of the wholesale markets to the Commission-approved independent system operator or regional transmission organization, the Commission, and other interested entities such as state commissions and market participants, on at least a quarterly basis and submit a more comprehensive annual state of the market report. The Market Monitoring Unit may issue additional reports as necessary.

(C) Identify and notify the Commission's Office of Enforcement staff of instances in which a market participant's or the Commission-approved independent system operator's or regional transmission organization's behavior may require investigation, including, but not limited to, suspected Market Violations.

(iii) *Tariff administration and mitigation*

(A) A Commission-approved independent system operator or regional transmission organization may not permit its Market Monitoring Unit, whether internal or external, to participate in the administration of the Commission-approved independent system operator's or regional transmission organization's tariff or, except as provided in paragraph (g)(3)(iii)(D) of this section, to conduct prospective mitigation.

(B) A Commission-approved independent system operator or regional transmission organization may permit its Market Monitoring Unit to provide the inputs required for the Commission-approved independent system operator or regional transmission organization to conduct prospective mitigation, including, but not limited to, reference levels, identification of system constraints, and cost calculations.

(C) A Commission-approved independent system operator or regional transmission organization may allow its Market Monitoring Unit to conduct retrospective mitigation.

(D) A Commission-approved independent system operator or regional transmission organization with a hybrid Market Monitoring Unit structure may permit its internal market monitor to conduct prospective and/or retrospective mitigation, in which case it must assign to its external market monitor the responsibility and the tools to monitor the quality and appropriateness of the mitigation.

(E) Each Commission-approved independent system operator or regional transmission organization must identify in its tariff the functions the Market Monitoring Unit will perform and the functions the Commission-approved independent system operator or regional transmission organization will perform.

(iv) *Protocols on Market Monitoring Unit referrals to the Commission of suspected violations.*

(A) A Market Monitoring Unit is to make a non-public referral to the Commission in all instances where the Market Monitoring Unit has reason to believe that a Market Violation has occurred. While the Market Monitoring Unit need not be able to prove that a Market Violation has occurred, the Market Monitoring Unit is to provide sufficient credible information to warrant further investigation by the Commission. Once the Market Monitoring Unit has obtained sufficient credible information to warrant referral to the Commission, the Market Monitoring Unit is to immediately refer the matter to the Commission and desist from independent action related to the alleged Market Violation. This does not preclude the Market Monitoring Unit from continuing to monitor for any repeated instances of the activity by the same or other entities, which would constitute new Market Violations. The Market Monitoring Unit is to respond to requests from the Commission for any additional information in connection with the alleged Market Violation it has referred.

(B) All referrals to the Commission of alleged Market Violations are to be in writing, whether transmitted electronically, by fax, mail, or courier. The Market Monitoring Unit may alert the Commission orally in advance of the written referral.

(C) The referral is to be addressed to the Commission's Director of the Office of Enforcement, with a copy also directed to both the Director of the Office of Energy Market Regulation and the General Counsel.

(D) The referral is to include, but need not be limited to, the following information.

(*1*) The name[s] of and, if possible, the contact information for, the entity[ies] that allegedly took the action[s] that constituted the alleged Market Violation[s];

(*2*) The date[s] or time period during which the alleged Market Violation[s] occurred and whether the alleged wrongful conduct is ongoing;

(*3*) The specific rule or regulation, and/or tariff provision, that was allegedly violated, or the nature of any inappropriate dispatch that may have occurred;

(*4*) The specific act[s] or conduct that allegedly constituted the Market Violation;

(*5*) The consequences to the market resulting from the acts or conduct, including, if known, an estimate of economic impact on the market;

(*6*) If the Market Monitoring Unit believes that the act[s] or conduct constituted a violation of the anti-manipulation rule of Part 1c, a description of the alleged manipulative effect on market prices, market conditions, or market rules;

(*7*) Any other information the Market Monitoring Unit believes is relevant and may be helpful to the Commission.

(E) Following a referral to the Commission, the Market Monitoring Unit is to continue to notify and inform the Commission of any information that the Market Monitoring Unit learns of that may be related to the referral, but the Market Monitoring Unit is not to undertake any investigative steps regarding the referral except at the express direction of the Commission or Commission Staff.

(v) *Protocols on Market Monitoring Unit Referrals to the Commission of Perceived Market Design Flaws and Recommended Tariff Changes.*

(A) A Market Monitoring Unit is to make a referral to the Commission in all instances where the Market Monitoring Unit has reason to believe market design flaws exist that it believes could effectively be remedied by rule or tariff changes. The Market Monitoring Unit must limit distribution of its identifications and recommendations to the independent system operator or regional transmission organization and to the Commission in the event it believes broader dissemination could lead to exploitation, with an explanation of why further dissemination should be avoided at that time.

(B) All referrals to the Commission relating to perceived market design flaws and recommended tariff changes are to be in writing, whether transmitted electronically, by fax, mail, or courier. The Market Monitoring Unit may alert the Commission orally in advance of the written referral.

(C) The referral should be addressed to the Commission's Director of the Office of Energy Market Regulation, with copies directed to both the Director of the Office of Enforcement and the General Counsel.

(D) The referral is to include, but need not be limited to, the following information.

(*1*) A detailed narrative describing the perceived market design flaw[s];

(*2*) The consequences of the perceived market design flaw[s], including, if known, an estimate of economic impact on the market;

(*3*) The rule or tariff change(s) that the Market Monitoring Unit believes could remedy the perceived market design flaw;

(*4*) Any other information the Market Monitoring Unit believes is relevant and may be helpful to the Commission.

(E) Following a referral to the Commission, the Market Monitoring Unit is to continue to notify and inform the Commission of any additional information regarding the perceived market design flaw, its effects on the market, any additional or modified observations concerning the rule or tariff changes that could remedy the perceived design flaw, any recommendations made by the Market Monitoring Unit to the regional transmission organization or independent system operator, stakeholders, market participants or state commissions regarding the perceived design flaw, and any actions taken by the regional transmission organization or independent system operator regarding the perceived design flaw.

(vi) *Market Monitoring Unit ethics standards.* Each Commission-approved independent system operator or regional transmission organization must include in its tariff ethical standards for its Market Monitoring Unit and the employees of its Market Monitoring Unit. At a minimum, the ethics standards must include the following requirements:

(A) The Market Monitoring Unit and its employees must have no material affiliation with any market participant or affiliate.

(B) The Market Monitoring Unit and its employees must not serve as an officer, employee, or partner of a market participant.

(C) The Market Monitoring Unit and its employees must have no material financial interest in any market participant or affiliate with potential exceptions for mutual funds and non-directed investments.

(D) The Market Monitoring Unit and its employees must not engage in any

market transactions other than the performance of their duties under the tariff.

(E) The Market Monitoring Unit and its employees must not be compensated, other than by the Commission-approved independent system operator or regional transmission organization that retains or employs it, for any expert witness testimony or other commercial services, either to the Commission-approved independent system operator or regional transmission organization or to any other party, in connection with any legal or regulatory proceeding or commercial transaction relating to the Commission-approved independent system operator or regional transmission organization or to the Commission-approved independent system operator's or regional transmission organization's markets.

(F) The Market Monitoring Unit and its employees may not accept anything of value from a market participant in excess of a *de minimis* amount.

(G) The Market Monitoring Unit and its employees must advise a supervisor in the event they seek employment with a market participant, and must disqualify themselves from participating in any matter that would have an effect on the financial interest of the market participant.

(4) *Offer and bid data.* (i) Unless a Commission-approved independent system operator or regional transmission organization obtains Commission approval for a different period, each Commission-approved independent system operator and regional transmission organization must release its offer and bid data within three months.

(ii) A Commission-approved independent system operator or regional transmission organization must mask the identity of market participants when releasing offer and bid data. The Commission-approved independent system operators and regional transmission organization may propose a time period for eventual unmasking.

(5) *Responsiveness of Commission-approved independent system operators and regional transmission organizations.* Each Commission-approved independent system operator or regional transmission organization must adopt business practices and procedures that achieve Commission-approved independent system operator and regional transmission organization board of directors' responsiveness to customers and other stakeholders and satisfy the following criteria:

(i) *Inclusiveness.* The business practices and procedures must ensure that any customer or other stakeholder affected by the operation of the Commission-approved independent system operator or regional transmission organization, or its representative, is permitted to communicate the customer's or other stakeholder's views to the independent system operator's or regional transmission organization's board of directors;

(ii) *Fairness in balancing diverse interests.* The business practices and procedures must ensure that the interests of customers or other stakeholders are equitably considered, and that deliberation and consideration of Commission-approved independent system operator's and regional transmission organization's issues are not dominated by any single stakeholder category;

(iii) *Representation of minority positions.* The business practices and procedures must ensure that, in instances where stakeholders are not in total agreement on a particular issue, minority positions are communicated to the Commission-approved independent system operator's and regional transmission organization's board of directors at the same time as majority positions; and

(iv) *Ongoing responsiveness.* The business practices and procedures must provide for stakeholder input into the Commission-approved independent system operator's or regional transmission organization's decisions as well as mechanisms to provide feedback to stakeholders to ensure that information exchange and communication continue over time.

(6) *Compliance filings.* All Commission-approved independent system operators and regional transmission organizations must make a compliance filing with the Commission as described in Order No. 719 under the following schedule:

(i) The compliance filing addressing the accepting of bids from demand response resources in markets for ancillary services on a basis comparable to other resources, removal of deviation charges, aggregation of retail customers, shortage pricing during periods of operating reserve shortage, long-term power contracting in organized markets, Market Monitoring Units, Commission-approved independent system operators' and regional transmission organizations' board of directors' responsiveness, and reporting on the study of the need for further reforms to remove barriers to comparable treatment of demand response resources must be submitted on or before April 28, 2009.

(ii) A public utility that is approved as a regional transmission organization under § 35.34, or that is not approved but begins to operate regional markets for electric energy or ancillary services after December 29, 2008, must comply with Order No. 719 and the provisions of paragraphs (g)(1) through (g)(5) of this section before beginning operations.

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

Appendix—Abbreviated Names of Commenters

Alcoa—Alcoa, Inc.
Ameren—Ameren Services Company
American Forest—American Forest & Paper Association
AMPA—Arkansas Municipal Power Association
APPA—American Public Power Association
ATC—American Transmission Company, LLC
Beacon Power—Beacon Power Corporation
Blue Ridge—Blue Ridge Power Agency
BlueStar Energy—BlueStar Energy Services, Inc.
Mr. Borlick—Robert L. Borlick, Borlick & Associates
BP Energy—BP Energy Company
CAISO—California Independent System Operator Corporation
California DWR—California Department of Water Resources State Water Project
California Munis—California Municipal Utilities Association
California PUC—Public Utilities Commission of the State of California
Cogeneration Parties—Energy Producers and Users Coalition (EPUC) and the Cogeneration Association of California (CAC). EPUC is an *ad hoc* group representing the end-use and customer generation interests of the following: Aera Energy LLC; BP America, Inc. (including Atlantic Richfield Company); Chevron U.S.A., Inc.; ConocoPhillips Company; ExxonMobil Power and Gas Services, Inc.; Shell Oil Products US; THUMS Long Beach Company; Occidental Elks Hills, Inc.; and Valero Refining Company-California. CAC is an *ad hoc* association representing the power generation, power marketing and cogeneration operation interests of the following: Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company.
Comverge—Comverge, Inc.
Connecticut and Massachusetts Municipals—Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company
Constellation—Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., and Constellation Power Source Generation, Inc.
DC Energy—DC Energy, LLC
Detroit Edison—Detroit Edison Company
Dominion Resources—Dominion Resources Services

DRAM—Demand Response and Advanced Metering Coalition
Duke Energy—Duke Energy Corporation
EEI—Edison Electric Institute
EnergyConnect—EnergyConnect, Inc.
Energy Curtailment—Energy Curtailment Specialists, Inc.
EnerNOC—EnerNOC, Inc.
E.ON U.S.—E.ON U.S. LLC
EPSA—Electric Power Supply Association
Exelon—Exelon Corporation
FTC—Federal Trade Commission
FirstEnergy—FirstEnergy Service Company, on behalf of FirstEnergy Solutions Corp. and the transmission- and distribution-owning utility subsidiaries of FirstEnergy Corp.: American Transmission Systems, Incorporated; The Cleveland Electric Illuminating Company; Jersey Central Power and Light Company; Metropolitan Edison Company; Ohio Edison Company; Pennsylvania Electric Company; Pennsylvania Power Company; and The Toledo Edison Company
IID—Imperial Irrigation District
IMEA—Illinois Municipal Electric Agency
Indianapolis P&L—Indianapolis Power and Light Company
Industrial Coalitions—The Coalition of Midwest Transmission Customers, Connecticut Industrial Energy Consumers, Industrial Energy Consumers of Pennsylvania, NEPOOL Industrial Customer Coalition, Industrial Energy Users-Ohio, West Virginia Energy Users Group, PJM Industrial Customer Coalition, American Iron and Steel Institute, and Portland Cement Association
Industrial Consumers—Electricity Consumers Resource Council, American Chemistry Council, American Iron and Steel Institute, Association of Businesses Advocating Tariff Equity, Council of Industrial Boiler Owners, and Wisconsin Industrial Energy Group
Integrys Energy—Integrys Energy Services, Inc.
ISO New England—ISO New England Inc.
ISO/RTO Council—ISO/RTO Council, which is comprised of the Alberta Electric System Operator; California Independent System Operator, Inc.; New Brunswick System Operator; Electric Reliability Council of Texas; Independent Electricity System Operator of Ontario; ISO New England Inc.; Midwest Independent Transmission System Operator, Inc.; New York Independent System Operator, Inc.; PJM Interconnection, LLC; and Southwest Power Pool, Inc.
ITC—International Transmission Company; Michigan Electric Transmission Company, LLC; and ITC Midwest LLC
Joint Commenters—Citadel Energy Products LLC, Citadel Energy Strategies LLC, Citadel Energy Investments Ltd.; and DC Energy LLC
Kansas CC—Kansas Corporation Commission
LPPC—Large Public Power Council
MADRI States—the State members of the Mid-Atlantic Distributed Resources Initiative
Maine PUC—Maine Public Utilities Commission
Midwest Energy—Midwest Energy, Inc.
Midwest ISO—Midwest Independent Transmission System Operator, Inc.
Midwest ISO TOs—Midwest ISO Transmission Owners: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; City of Columbia Water and Light Department (Columbia, Missouri); City Water, Light & Power (Springfield, Illinois); Duke Energy Shared Services for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Manitoba Hydro; Michigan Public Power Agency; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.
NARUC—National Association of Regulatory Commissioners
National Grid—National Grid USA and its affiliates
NCPA—Northern California Power Agency
NEPGA—New England Power Generators Association, Inc.
NEPOOL Participants—New England Power Pool Participants Committee
New England Power Generators—New England Power Generators Association, Inc.
New York PSC—New York State Public Service Commission
NIPSCO—Northern Indiana Public Service Company
New Jersey BPU—New Jersey Board of Public Utilities
North Carolina Electric Membership—North Carolina Electric Membership Corporation
Northeast Utilities—Northeast Utilities
NRECA—National Rural Electric Cooperative Association
NSTAR—NSTAR Electric Company
NYISO—New York Independent System Operator, Inc.
NY TOs—Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation
Ohio PUC—Public Utilities Commission of Ohio
Old Dominion—Old Dominion Electric Cooperative
OMS—Organization of MISO States, whose participating members are: Illinois Commerce Commission, Indiana Utility Regulatory Commission, Iowa Utilities Board, Kentucky Public Service Commission, Michigan Public Service Commission, Minnesota Public Utilities Commission, Montana Public Service Commission, Nebraska Power Review Board, Public Utilities Commission of Ohio, South Dakota Public Utilities Commission, Wisconsin Public Service Commission. Participating associate members are: Indiana Office of Utility Consumer Counselor, Iowa Office of Consumer Advocate and the Minnesota Office of Energy Security
OPSI—Organization of PJM States, Inc., whose state commission members include: Delaware Public Service Commission, District of Columbia Public Service Commission, Illinois Commerce Commission, Indiana Utility Regulatory Commission, Kentucky Public Service Commission, Maryland Public Service Commission, Michigan Public Service Commission, New Jersey Board of Public Utilities, North Carolina Utilities Commission, Public Utilities Commission of Ohio, Pennsylvania Public Utility Commission, Tennessee Regulatory Authority, Virginia State Corporation Commission, and Public Service Commission of West Virginia
Orion Energy—Orion Energy Systems, Inc.
Pennsylvania PUC—Pennsylvania Public Utility Commission
PG&E—Pacific Gas and Electric Company
PJM—PJM Interconnection, LLC
PJM Power Providers—PJM Power Providers Group
Potomac Economics—Potomac Economics, Ltd.
PPL Parties—PPL Brunner Island, LLC; PPL Edgewood Energy, LLC; PPL Electric Utilities Corporation; PPL EnergyPlus, LLC; PPL Great Works, LLC; PPL Holtwood, LLC; PPL Maine, LLC; PPL Martins Creek, LLC; PPL Montana, LLC; PPL Montour, LLC; PPL Shoreham Energy, LLC; PPL Susquehanna, LLC; PPL University Park, LLC; PPL Wallingford Energy LLC; and Lower Mount Bethel Energy, LLC
Public Interest Organizations—Citizen Power; Conservation Law Foundation; Environment Northeast; Environmental Law & Policy Center; Fresh Energy; Izaak Walton League; Natural Resources Defense Council; Northwest Energy Coalition; Office of the Ohio Consumers' Counsel; Pace Energy Project; PennFuture; Project for Sustainable FERC Energy Policy; Southern Alliance for Clean Energy; The Stella Group, Ltd.; Union of Concerned Scientists; and Western Grid Group
Reliant—Reliant Energy, Inc.
Retail Energy—Retail Energy Supply Association
SMUD—Sacramento Municipal Utility District
SoCal Edison-SDG&E—Southern California Edison Company and San Diego Gas & Electric Company
Sorgo—Sorgo Fuels, Inc.
SPP—Southwest Power Pool, Inc.
Steel Manufacturers—Steel Manufacturers Association
Steel Producers—Nucor and Steel Dynamics
TANC—Transmission Agency of Northern California

TAPS—Transmission Access Policy Study Group

Wal-Mart—Wal-Mart Stores, Inc.

Xcel—Xcel Energy Services, Inc., on behalf of Northern States Power Company, a Minnesota corporation; Northern States Power Company, a Wisconsin corporation; Southwestern Public Service Company; and Public Service Company of Colorado

Abbreviated Names of Reply Commenters

Allied Public Interest Groups—Clean Energy First, Conservation Law Foundation, Environment Northeast, Environmental Law & Policy Center, Fresh Energy, Natural Resources Defense Council, Northwest Energy Coalition, Office of the Ohio Consumers' Counsel, Pace Energy and Climate Center, Penn Future, Project for Sustainable FERC Energy Policy, Renewable Northwest Project, and Union of Concerned Scientists.

CAISO and the Cities—CAISO and the cities of Anaheim, Azusa, Banning, Colton, and Riverside, California

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Wholesale Competition in Regions with Organized Electric Markets

Docket Nos. RM07–19–000 and AD07–7–000

(Issued October 17, 2008)

KELLY, Commissioner, *concurring in part and dissenting in part:*

I write separately for two reasons. First, I want to emphasize the importance of competition to the operation of organized wholesale electric markets and the fact that many of the findings here will help foster that competition. Second, I write to express my misgivings about the potential impacts of several of the directives included in the Final Rule.

I believe that many of the Final Rule's findings will promote competition, thereby helping the Commission to fulfill our statutory mandate to ensure adequate and reliable service at just and reasonable rates. In particular, I support the Final Rule's requirements that regional transmission organizations (RTOs) and independent system operators (ISOs): (1) Accept bids for certain ancillary services from demand response resources that meet technical requirements and submit a bid at or below the market-clearing price; (2) permit qualified aggregators of retail customers to bid demand response on behalf of retail customers; and (3) eliminate deviation charges during system emergencies to a purchaser of electric energy for taking less energy in the real-time market than it purchased in the day-ahead market. I also agree with requiring RTOs/ISOs to include a tariff provision that commits to providing market monitoring units (or MMUs) with the data, resources, and personnel necessary to carry out the MMUs' functions.

I continue to be troubled by the Final Rule's directive to each RTO or ISO with an organized energy market to make a compliance filing to propose any necessary reforms to allow for scarcity pricing in times of emergency by modifying market power mitigation rules. The Final Rule states that existing RTO/ISO rules ''may not produce prices that accurately reflect the value of energy and, by failing to do so, may harm reliability, inhibit demand response, deter entry of demand response and generation resources, and thwart innovation.'' I recognize that the majority has good intentions in requiring RTOs/ISOs to make this filing. However, I believe that, prior to allowing energy supply offer caps and demand bid caps to rise or be eliminated, the necessary generation and demand response infrastructure must be in place to give consumers the ability to respond to higher prices. As Commission staff noted in the *2006 FERC Staff Demand Response Assessment*, advanced metering currently has low market penetration of less than six percent in the United States.[1] Without providing consumers with the ability to respond to rising prices, I view the decision to allow energy supply offer caps and demand bid caps to rise or be eliminated as irresponsible.

Additionally, I disagree with the Final Rule's decision to promote responsiveness of RTOs/ISOs by allowing them to adopt hybrid boards with stakeholder members. Having an independent board is the cornerstone of RTO/ISO policy. Providing for stakeholder representatives on an RTO/ISO board jeopardizes such an independent governing structure. I agree with Duke Energy's statement that ''hybrid boards are contrary to the premise of independent RTO governance, and that the board advisory committee is a much more effective means of helping RTO boards to understand member issues and concerns.'' [2] I also fear that a board with independent and non-independent members will suffer from a divisive atmosphere with suspicion as to whether non-independent board members are acting in the best interests of the RTO/ISO and its customers or in the best interest of the particular market participant represented by that non-independent board member. I also share Pennsylvania PUC's concern that it will be difficult to protect competitively sensitive information with non-independent members serving on the RTO/ISO's board.[3] I believe that a board advisory committee is a better way to address RTO/ISO responsiveness to stakeholders while maintaining the independence of RTO/ISO boards.

Finally, as I noted previously in my separate statement regarding the notice of proposed rulemaking (NOPR),[4] I am concerned about the issue of MMUs being removed from tariff administration and mitigation. I note that a large number and variety of commenters were also concerned about the NOPR proposal, including American Forest, California PUC, Indianapolis P&L, ISO New England, Industrial Coalitions, Maine PUC, NARUC, NEPOOL Participants, New York PSC, North Carolina Electric Membership, Ohio PUC, Old Dominion, OMS, Potomac Economics, and Xcel. ISO New England stated that it ''disagrees with the proposition that an MMU's performance of mitigation functions compromises the MMU's independence or distracts an MMU from its core functions,'' [5] referring to the arguments against MMUs' involvement in mitigation as ''unconvincing.'' [6] Maine PUC stated that ''[t]he Commission has not demonstrated that there is a lack of independence or a conflict of interest in having those who are experts in the areas of market mitigation performing day-to-day mitigation.'' [7] Industrial Coalitions called the Commission's proposal, ''objectionable because it would place responsibility for mitigation in the hands of the RTO/ISO staff that designed, and have a vested interest in the success of, market rules.'' [8]

I do not mean to imply that the Final Rule totally ignores these concerns. Indeed, the Final Rule does make changes to the NOPR proposal by drawing a distinction between RTOs/ISOs that have a single MMU and those that have hybrid MMUs, with both an ''external'' and ''internal'' market monitor. Under these changes, a RTO/ISO may allow its MMU—whether it is a single MMU or a hybrid MMU—to perform retrospective mitigation. However, only a RTO/ISO with both an internal and external MMU may allow its internal MMU to continue to perform prospective mitigation.[9] In those instances, the internal MMU may perform the prospective mitigation, but only if the RTO/ISO moves the responsibility and the tools to monitor the quality and appropriateness of the mitigation conducted by the internal MMU to its external MMU. Finally, both single MMUs and hybrid MMUs may provide the RTO/ISO with the inputs needed for the RTO/ISO to conduct prospective mitigation, including ''reference levels, identification of system constraints, and cost calculations.''

After this long, drawn-out process, I question what problem we are actually trying to solve with this proposal. MMUs are professionals who have been performing mitigation in a competent, professional, and efficient manner for many years. I disagree with the misgivings expressed in the Final Rule that ''unfettered conduct of mitigation by MMUs makes them subordinate to the RTOs and ISOs and raises conflict of interest concerns.'' I do not think the record supports

[1] Assessment of Demand Response and Advanced Metering: Staff Report, Docket No. AD06–2–000, at 26 (2006) (*2006 FERC Staff Demand Response Assessment*).

[2] Duke Energy Corporation Apr. 21, 2008 Comments, Docket No. RM07–19, at 2;–3.

[3] *See* Pennsylvania PUC Apr. 21, 2008 Comments, Docket No. RM07–19, at 18.

[4] *Wholesale Competition in Regions with Organized Electric Markets*, Notice of Proposed Rulemaking, 73 FR 12,576 (Mar. 7, 2008), FERC Stats. & Regs. ¶ 32,628 (2008) (Comm'r Kelly concurring in part and dissenting in part).

[5] ISO New England Apr. 21, 2008 Comments, Docket No. RM07–19, at 19.

[6] *Id.*

[7] Maine PUC Apr. 21, 2008 Comments, Docket No. RM07–19, at 7.

[8] Industrial Coalitions Apr. 21, 2008 Comments, Docket No. RM07–19, at 22.

[9] The Final Rule considers prospective mitigation to include mitigation that can affect market outcomes on a forward-going basis, such as altering the prices of offers or altering the physical parameters of offers at or before the time they are considered in a market solution.

that assertion. I am also concerned that the dictates of the Final Rule may put some RTOs/ISOs to unnecessary expense. While the Final Rule has evolved in a positive way on this issue, I believe it continues to be an answer in search of a problem.

Accordingly, for the reasons stated above, I concur in part and dissent in part on this Final Rule.

Suedeen G. Kelly

[FR Doc. E8–25246 Filed 10–27–08; 8:45 am]

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Federal Register

Tuesday,
October 28, 2008

Part V

The President

Proclamation 8310—United Nations Day, 2008

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 8310

United Nations Day, 2008

By the President of the United States of America

A Proclamation

On October 24, 1945, in the wake of the devastation left by World War II, the United Nations was formally established. Today, we recognize the many contributions of the United Nations and renew our commitment to its founding principles.

Sixty-three years ago, representatives from around the world completed the founding charter of the United Nations and pledged to reaffirm faith in fundamental human rights and to unite their strength to maintain international peace and security. It is vital that this noble pledge continue to guide the United Nations throughout the 21st century. By taking an unequivocal stand against terrorists, those who traffic in persons, and all who exploit the poor, the needy, and the marginalized, the United Nations can live up to the noble ideals of the Universal Declaration of Human Rights.

The United Nations is an organization with extraordinary potential for good works. On United Nation's Day, we recommit ourselves to reforming the U.N., ensuring the highest standards are upheld throughout the organization, and renewing the principals of its charter for the 21st century.

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 October 24, 2008, as United Nations Day. I urge the Governors of the 50 States, the Governor of the Commonwealth of Puerto Rico, and the officials of other areas under the flag of the United States to observe United Nations Day with appropriate ceremonies and activities.

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

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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Endangered and Threatened Species:

Final Rule to Remove the Caribbean Monk Seal from the Federal List of Endangered and Threatened Wildlife; published 10-28-08

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National Emission Standards for Hazardous Air Pollutants:

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Irish Potatoes Grown in Washington; Modification of Late Payment and Interest Charge Regulation; comments due by 11-4-08; published 10-20-08 [FR E8-24918]

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Brucellosis in Cattle; State and Area Classifications; Montana; comments due by 11-3-08; published 9-3-08 [FR E8-20374]

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Designation of Critical Habitat for Threatened Southern Distinct Population Segment of North American Green Sturgeon; comments due by 11-7-08; published 9-8-08 [FR E8-20632]

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Atka Mackerel in the Bering Sea and Aleutian Islands Management Area; comments due by 11-4-08; published 10-23-08 [FR E8-25327]

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Groundfish of the Gulf of Alaska; comments due by 11-3-08; published 10-3-08 [FR E8-23456]

Fisheries Off West Coast States:

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ENERGY DEPARTMENT

Coordination of Federal Authorizations for Electric Transmission Facilities; comments due by 11-3-08; published 9-19-08 [FR E8-21867]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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.

H.R. 6197/P.L. 110–448

To designate the facility of the United States Postal Service located at 7095 Highway 57 in Counce, Tennessee, as the ''Pickwick Post Office Building''. (Oct. 22, 2008; 122 Stat. 5013)

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